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New Challenges and New States: What Role for International Law

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10th Conference of the
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New Challenges and New States: What Role for International Law

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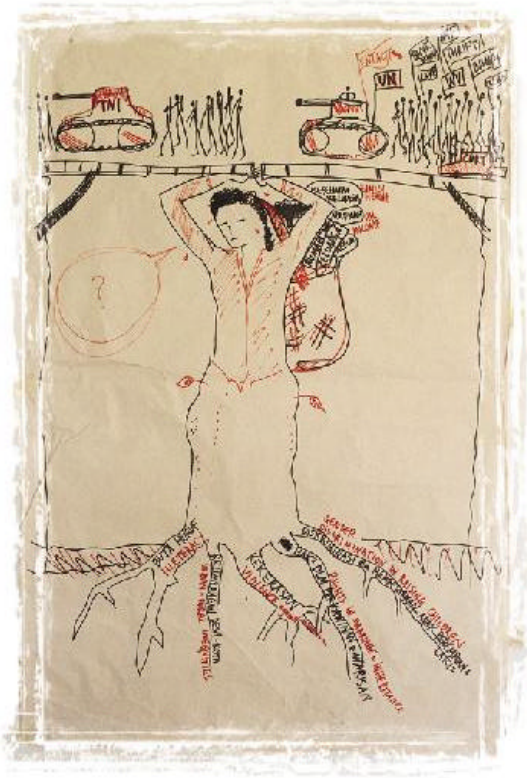
Untold numbers: East Timorese Women and Transitional Justice

Susan Gail Harris*

Women have played a critical role in East Timor's struggle for national independence. Both inside the country and in the diaspora, they courageously challenged the Indonesian invasion and occupation, as well as the international support that made these possible. East Timorese women have survived Indonesian military campaigns of violence, including forced sterilisation, rape and sexual slavery. They have shown themselves as leaders, though they are often pushed aside in political discussions. And women have continued to struggle for equality throughout the United Nation's administration of East Timor.

Unfortunately, women's liberation is not a natural outcome of national liberation.

"Editorial: Women and the Reconstruction of East Timor." *The La'o Hamutuk Bulletin*, Vol. 2, No. 5: August 2001



Picture from Fokupers, an East Timorese women's NGO.

* Human Rights Policy Officer, Australian Council for Overseas Aid. BA(Hons)/LLB(Hons) UQ, SJD Candidate ANU.

Introduction

In 2001, it seemed that East Timor had a unique dilemma. International criminal law had evolved to a state where impunity for war crimes was finally under pressure from a series of successful prosecutions and convictions by ad hoc tribunals, and the advent of the International Criminal Court. International practice had developed to the point where the newly elected East Timorese government should have been in a position to make some choices about how to achieve justice and reconciliation, even if bounded choices. However, despite these ground-breaking developments in the area of international criminal law, and the prosecution of gender-based crimes within that jurisprudence, justice for East Timorese women seems to move further out of reach.

My contention is that the few substantive options that existed for dealing with transitional justice in Timor are fast vanishing and that one of the major casualties of this will be justice for women.

This paper will focus on the case of *The Prosecutor v Leonardus Kasa* (11/CG/2000), decided by the Special Panel for Serious Crimes in May 2001. I argue that the case has extremely significant implications in itself, and for the way rape and sexual violence prosecutions may be treated in the Lolotoe crimes against humanity cases currently before the Special Panel (4/CG/2000).

The performance of the Serious Crimes Court is also considered a crucial issue for transitional justice in East Timor because it is the only "internationalised" body at present dealing with the violence in East Timor, if within a very limited time-frame,[1] and because the Court has adopted substantial provisions of the International Criminal Court Statute and can therefore be considered the first state application of the new global provisions.

This paper postulates that there are four key interrelated threats to the transitional justice outcomes that are demanded by Timorese women. First, the relationship between proposed amnesty laws may hamper the mandate and effectiveness of the Commission for Reception, Truth and Reconciliation. Second, the Security Council continues to reject an international criminal tribunal for East Timor. Third, the Indonesian ad hoc Human Rights Court has so far failed to meet even basic objectives as enumerated by the recent International Crisis Group report (ICG 2002). Finally, the rejection of jurisdiction in the *Leonardus Kasa* case by the Serious Crimes Court, the subject of this paper, may be considered a serious impediment to obtaining most of the perpetrators from West Timor for trial.

The *Kasa* case has been chosen because it throws into relief the interrelatedness of all these threats. It also illuminates three key points. First, the case illustrates that no knowledge of the international advances in the prosecution of gender-based crimes was discussed or applied in the judgement. Second that the trial proceeded without any reference to the context of systematic gender-based violence in West Timor; and third, that the outcome for the alleged victim has been actually worsened rather than improved by the outcome of the case.

The methodology of the paper applies the feminist thesis of Hilary Charlesworth and Christine Chinkin's text *The Boundaries of International Law* (Charlesworth & Chinkin, 2000) to the current Timor situation to test whether international criminal law has been "transformed" to meet the female experience of armed conflict, or is still limited and fundamentally flawed. The authors analysed recent developments in international criminal law and concluded that although precedents in prosecuting gender-based crime might mean that "the silence about the suffering of women in all forms of conflict has been broken" (Charlesworth & Chinkin, 2000: 330), there were still serious shortcomings.

These limitations include the fact that crimes are still required to be wide-spread and systematic, and as the authors point out "although the rapes and sexual violence in the former Yugoslavia have been perceived in such terms, this may not always be the case. There is a tendency to regard the sexual abuse in the former Yugoslavia as exceptional and not as a regularly occurring part of armed conflict" (Charlesworth & Chinkin, 2000: 333).[2]

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1 Suzannah Linton notes that ad hoc international criminal tribunal will not necessarily deliver justice more effectively that the Serious Crimes Court due to the same issues with resources and lack of Indonesian cooperation (Linton 2001c, 458).

2 A good recent example of this is the adverse reaction of the US State Department to a report called *License to Rape* by a Burmese women's group reported by ABC radio. ABC reporter Barbara Heggen notes "Rape is an increasingly

They also point to an inadequacy of international legal remedies that provide long-term, financial and practical assistance (Charlesworth & Chinkin, 2000: 333), and that international law emphasises only women's sexual and reproductive identities and only harms inflicted by opposing forces (Charlesworth & Chinkin, 2000: 334).

This seminal "reframing" of international law in feminist terms is consistent with a wider rethinking of women's rights as human rights over recent decades, pressuring for a shift from traditional definitions of human rights as state-sponsored terrorism, torture and imprisonment to a broader view, which includes gender-specific acts such as domestic violence, female genital mutilation or trafficking (Aptheker, 2002: 17).

Advances in the prosecution of gender-based international crimes

It may appear that the long eon of impunity for war crimes is coming to a close by dint of international cooperation. The jurisprudence of the Nuremberg and Tokyo Tribunals after World War II has been strengthened by the practice and judgments of the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). The Statute of Rome, which created an International Criminal Court (ICC) to try genocide, war crimes and crimes against humanity, is a reality at last. There are also several credible models of Truth and Reconciliation Tribunals, such as South Africa and Chile. There are new hybrid "internationalised" criminal tribunals such as Sierra Leone. Many states have implemented domestic legislation to cover war crimes such as genocide and are exercising universal jurisdiction, as in the case of Belgium.

In relation to prosecutions for gender-related crimes in international criminal law, the precedents have been even more revolutionary. Both the ICTY and ICTR have successfully indicted, prosecuted and convicted defendants for gender-based crimes for the first time in history, including rape as a crime against humanity and an element of genocide in the *Akayesu* case before the ICTR,[3] and the *Celebici*, *Furundzija* and *Kunerac* cases relating to rape as torture, sexual slavery and sexual acts as inhumane treatment.[4] Article 5(g) of the new International Criminal Court Statute explicitly enumerates rape as a crime against humanity. A unanimous Security Council Resolution 1325 (2000) was passed on the topic of "Women, Peace and Security" urging the Secretary-General to carry out a study on the impact of armed conflict on women and girls, and the role of women in peace-building. There have been significant decisions by regional human rights courts, such as *Mejia Egocheaga v Peru* in the Inter-American Commission of Human Rights.[5] It is these developments to which Charlesworth and Chinkin refer when they state "the silence about the suffering of women in all forms of conflict has been broken" (Charlesworth & Chinkin, 2000: 330).

The East Timorese context

Gender-based international crimes in East Timor have been widespread since 1975 and was rife in the 1999 violence, according to evidence collected by the United Nations,[6] human rights NGOs such as Amnesty International (2001), the Indonesian Human Rights Commission KPP Ham, (2000) Australian journalists, (McDonald et al, 2002) and most importantly, according to data and stories from East Timorese NGOs themselves (Godinho, 2001).

Of the 1999 violence, Bishop Belo has written: "Up to 3,000 died in 1999, untold numbers of women were raped and 500,000 persons displaced – 100,000 are yet to return" (Belo, 2001).

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common weapon of war, as witnessed in the conflict in the former Yugoslavia. Now, according to a new report from a human rights group in Burma, it's being used by the military in that country on a regular basis" (Heggen, 2002).

3 *Prosecutor v Jean-Paul Akayesu*, 2 September 1999, ICTR-96-4-T.

4 P*rosecutor v Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic*, Judgement, Case No. IT-96-23/1-T, 22 February 2001, *Prosecutor v Anto Furundzija*, 10 December 1998, ICTY-95-17/1-T.

5 (1996) 1 Butterworths Human Rights Cases 229. See Charlesworth & Chinkin, 2000 p.330-2.

6 See especially the Report of the International Commission of Inquiry on East Timor To The Secretary-General. UN Document A/54/726. 31 January, 2000. Report of the Security Council Mission to Jakarta and Dili, S/1999/976, 14 September 1999. Report of UN Special Rapporteurs: Situation of human rights in East Timor. Based on visit between 4-10 November 1999. UN Document A/54/660, 10 December 1999.

The phrase "untold numbers of women" is poignant, and literal – the story of women's experience before, during and after the 1999 violence remains largely untold despite the extraordinary efforts of Timorese women advocates. Leading women's NGO Fokupers has documented 46 cases of rape during the 1999 violence: nine by Indonesian soldiers, 28 by pro-Jakarta militias, and nine by joint attacks by militias and soldiers. Eighteen were categorised as mass rapes (AFP, 2001). "Many of these crimes were carried out with planning, organisation and coordination," a Fokupers report states. "Soldiers and militias kidnapped women together and shared their victims" (AFP, 2001).

David Senior, sexual violence investigator at the Special Crimes Unit noted that in all but one of the cases examined by him, the victims were the wives, daughters or sisters of pro-independence guerrillas and activists. "I believe that it's hand in hand," he told AFP in late 2001 (AFP, 2001). He also noted in a *New York Times* interview that "numbers alone do not tell the story". "How do you put a number on 5 women being raped by 12 guys?" he said. "How do you put a number on a woman being raped daily for six months? How do you put a number on one girl being raped by three guys for five nights? For me, numbers don't describe the impact that rape has had on the women of East Timor" (Mydans, 2001).

The obvious question arises – why has the issue of rape and sexual violence experienced by East Timorese women been such a non-issue for the international community in comparison to Bosnia, and even Afghanistan? What will this lack of attention and recognition mean for Timorese women?.

This question is especially critical due to the strong claim from women's groups in East Timor that it was women who have suffered the most since the 1975 occupation to the present day. According to the East Timorese Women's Network. "Of all the victims of Indonesian military violence the greatest suffering was borne by women, who, up to this time, have not met with the justice they hoped for" (*La'o Hamutuk Bulletin*, 2001b).

Angelina Saramento, an activist from the Timorese NGO KSI states:

> From 1975 up to now, women are the ones who suffer more than the men. For example their husbands stay in the jungle, the women stay alone. Then the military came and asked them, where is your husband and they take control of other person's wife, so this is a kind of violation against women. This kind of thing happened all over East Timor so I think women are the ones who really suffered. In order to see how the women can get justice is hard – because in our culture the women sometimes keep quiet, doesn't talk too much, so it is hard for women to give their aspirations or talk in public – to the abat, the court, Truth Commission (Harris, 2002).

She contends that this should directly impact on decisions about transitional justice:

> There are many contradictory ideas – for example, on the leaders' side, Xanana a few months ago mentioned an amnesty – was he talking on the side of the victims or on the side of the political leaders, their perspective? For those who still really suffer, is not the leaders, but the main victims were the civilian people, so in order to make a decision as to how to bring the perpetrators to the court or whether to give an amnesty, the leaders have no right to decide it because they are not the ones who really suffered through the troubles (Harris, 2002).

An article called "Raping the Future" concurred that:

> Since their homeland was invaded in 1975, the women of East Timor have felt the brunt of some of the Indonesian military's most egregious human-rights violations: They have been raped in the presence of family members, forced to marry Indonesian soldiers, subjected to torture by electric shock, sexually abused, and forcibly sterilized. East Timorese women have been forced to bear much of the load of what many believe is an Indonesian government plan to eliminate the East Timorese culture (Eaton, 1999).

This article was based on a report published by Miranda Sissons of the East Timor Human Rights Centre in Australia, which alleged that the Indonesian government targeted indigenous Timorese in particular for "reproductive oppression" and that these practices might constitute a breach of the international Convention on

the Prevention and Punishment of the Crime of Genocide, which prohibits intentional limitation of births within a specific national, ethnic, religious, or racial group (Eaton, 1999).[7]

Sexual violence in the home remains a key priority for East Timor with frightening levels of domestic violence reported in every District, although there have been some recent high-profile court cases (Peirera, 2001).[8] A Jordanian UN peacekeeper was indicted of rape of an Oecussi woman on 21 August 2001 in a Dili court (*La'o Hamutuk Bulletin*, 2001a) There is also a serious campaign by activists including the new First Lady of East Timor, Australian Kirsty Sword Guasmo, to obtain the release of several young women in the refugee camps of West Timor who are thought to be being held against their will as "war trophies" by militia leaders[9] (Farsetta, 2001). Many older Timorese women recently expressed distress at the arrival of the Japanese "Self-Defence" forces because they had been forced to be "comfort women" during World War II when the Japanese had occupied East Timor (Joliffe, 2001). In brief, gender-based crime is a substantive and pressing issue in East Timor.

Two insights flow from this analysis. The first is that transitional justice solutions in East Timor will have to look beyond the 1999 violence to cover the whole of the Indonesian occupation. Hilary Charlesworth has noted that international law can be considered a "discipline of crisis" and notes: "One major silence is the position of women in the representation of crises. The players in international law crises are almost exclusively male… The lives of women are considered part of a crisis only when they are harmed in a way that is seen to demean the whole of their social group" (Charlesworth, 2002: 389). The Commission for Reception, Truth and Reconciliation has in fact adopted the 1975 time frame, but not the Serious Crimes Court or the Indonesian ad hoc Human Rights Court.

Secondly, if you accept the proposition that the greatest suffering during the violence may have been borne by women, then according to principles of equality and non-discrimination, women should have a substantial input in what type of justice they require and it should be designed to fit, not exclude the female experience. This should also extend to broader social policy.[10] How does the *Leonardus Kasa* case, the first trial to deal with gender-based crime in East Timor, measure up to these basic requirements?

The *Leonardus Kasa* case[11]

The facts of the case are straightforward. Leonardus Kasa was an alleged member of Laksaur militia from Cova Lima district. He was arrested and detained by CivPol, pursuant to the Indonesian Criminal Procedure Code. The Public Prosecutor, Raimund Sauter indicted him in December 2000 with one charge of rape of a woman in Betun village, West Timor in September 1999. At the preliminary hearing in February 2001 the defence claimed the Special Panel lacked jurisdiction to hear the case as the alleged rape occurred outside the territory of East Timor, and that as the sex was consensual, it should be classified as adultery, which is not a serious crime.

On 9 May 2001 the Special Panel declared that it had no jurisdiction in the case. The defendant had already been released from detention in February 2001 but had been prevented from approaching the victim's home. Immediately after the judgment was given, the Special Panel announced that such restrictions on the defendant no longer applied.

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7 The report states "The first phase began from the time of the Indonesian invasion and extended through the mid-1980s. The report alleges that Indonesian soldiers raped and impregnated East Timorese women and girls, mutilated pregnant women, and covertly sterilised them. The second phase, which extended to the late 1990s, saw further covert sterilisation and coerced contraception of East Timorese women through the World Bank-funded population control program, Programa Keluarga Berencana (commonly known as the KB program)" (Sissons, 1997). See also Jardine, 1995, at 62, and for a contrary view, see Saul, 2001 at 477-522.

8 Note the case of Dr Sergio Lobo in particular.

9 Note the case of 15-year-old Juliana dos Santos in particular.

10 For example, Timorese women will need to rebuild their faith in health workers for example, and Timorese women also demand that the practice of the "bride-price" might need to be re-examined by the society due to the way it seen to have promoted domestic violence (Eaton, 1999).

11 The General Prosecutor of the United Nations Transitional Administration in *East Timor v Leonardus Kasa*. Dili District Court Special Panel for Serious Crimes Case no. 11/CG/2000, 9 May 2001.

The judges of the Special Panel were Luca I. Ferrero (Presiding Judge, Italy), Maria Natercia Gusmao Pereira (Judge Rapporteur, East Timor) and Sylver Ntukamazina (Burundi). They stated that the same charges might be raised before courts in Indonesia, or in East Timorese courts if the current regulations are later to be amended. The Special Panel also emphasised that it made no finding as to the defendant's innocence or guilt on the charge of rape.

The background to this set of facts is well-known. A popular consultation was held on 30 August 1999 where over 80 percent of East Timorese voted for independence from Indonesia. Militias, organised and supported by the Indonesian military, forcibly removed up to 250,000 Timorese into camps in West Timor and wreaked widespread and systematic violence on those perceived to be pro-independence supporters and their property. The alleged victim in this case, Maria da Costa and her two children were displaced on 5 September 1999 from East Timor and brought to a refugee camp located in the warehouse of Betun in West Timor.

The indictment does not refer to this context. The defendant claimed not to be aware of the chaos around him. The *New York Times* reported in early 2001: "In an interview at the Dili courthouse, Mr. Casa put forward a defense that … he knew his victim. She belonged to him. The sex was consensual. Beyond that, Mr. Casa said, he knew less than just about anybody else in East Timor about the violence occurring around him. 'I never saw any massacre or any destruction,' he said. 'I never even left my house'" (Mydans, 2001).

Applicable law

The Prosecutor charged Kasa with the crime of rape in violation of Section 9 of UNTAET Regulation 2000/15 and Article 285 of the Penal Code of Indonesia. Section 9 "Sexual offences" merely states that the provision of the applicable Penal Code in East Timor shall, as appropriate, apply.

The Special Panels were established, within the District Court in Dili, pursuant to Section 10 of UNTAET Regulation No. 2000/11, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of UNTAET Regulation 2000/15. The panels are explicitly stated to have universal jurisdiction for genocide, war crimes, crimes against humanity and torture, but not murder or sexual offences, which follow the Indonesian Penal Code.[12] The sexual offences in the Penal Code are contained in the section "Crimes Against Decency". Adultery is a criminal offence under Article 284(1), and the definition of rape is "any person who … forces a woman to have sexual intercourse with him out of marriage" (Article 285).[13]

The definition of international crimes, however, is taken almost verbatim from the subject matter jurisdiction of the *Rome Statute of the International Criminal Court* (ICC).

The Special Panel for Serious Crimes is directed to apply three sources of law. The first is UNTAET Regulations and directives. The second is applicable treaties and recognised principles and norms of international law, including the established principles of international law of armed conflict. The third source is the law applied in East Timor prior to 25 October 1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with either the internationally recognised human rights standards; the fulfilment of the mandate given to UNTAET under the Security Council Resolution 1272 (1999); or UNTAET Regulations or directives.

Key elements of the decision

The Special Panel cited the arguments from the Prosecutor regarding jurisdiction who was aware of potential problems from the indictment stage. His motion read:

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12 Establishment of panels with exclusive jurisdiction over serious criminal offences. UNTAET/REG/2000/15, 6 June 2000.

13 Note Suzannah Linton "Experiments in International Justice" *Criminal Law Forum* 12:2001, pp.210-211. The ICTR defined rape in the *Akayesu* case as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive" at paras 6.4 and 7.7.

> Since the crime (of rape) was committed outside East Timor and since it does not belong to the crimes listed under Sect. 10.1 (a), (b), (c) and (f) of U.R. 2000/11 as specified in Sect. 4 to 7 of U.R. 2000/15 for which the Special Panel of the District Court of Dili shall have 'universal jurisdiction' the jurisdiction of the Special Panel might be questionable (*Kasa* Judgement, 2001: 3).

The Prosecutor instead based his case on the extraterritorial provisions in the Indonesian Criminal Code which he argued should be applied *mutates mutandi*s to this situation.

It was undisputed that the crime occurred outside the East Timorese territory. The Special Panel worked through the criteria used to determine the applicability of national criminal law to crimes that occurred out of the country: (a) universality (or total extraterritoriality), (b) territoriality, (c) active personality (or nationality, or personal status) of the perpetrator and (d) defence. They noted: "Modern states usually don't adopt a single principle. They rather choose a combination between territoriality and other principles. It can be said that the kind of combination depends on the international relations of the state" (Judgment, 2001: 4).

The Special Panel decided that the United Nation transitional administration had chosen to adopt the principle of territoriality with very few exceptions:

> This choice could be said mandatory for a transitional administration empowered by the United Nations Security Council, which has also the mandate of administration of justice. How could such a temporary and 'neutral' administration have jurisdiction for crimes committed out of the territory administrated? (Judgment, 2001: 4).

The judges relied on Section 5 of UNTAET Regulation 2000/11, which provides that:

> in exercising jurisdiction, the courts in East Timor shall apply the law of East Timor as promulgated by Section 3.1 of UNTAET Regulation 1999/1. Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with Sect. 3.1 of UNTAET Regulation 1999/1 or any other UNTAET regulations.

The alleged rape occurred in September 1999.

The Panel decided that the only exception to that principle is contained in Section 2.2 of UNTAET Regulation 2000/15, which grants the Panel universal jurisdiction for the crimes of genocide, war crimes, crimes against humanity and torture.

The Special Panel noted that these crimes "deserve universal jurisdiction due international customary laws and (more recently) international laws. That means that the aforementioned Indonesian rules are no longer applicable because they are not consistent with UNTAET Regulation and the principles of the UN mandate" (Judgment, 2001: 5). The Special Panel did not accept the Prosecutor's use of *mutates mutandis.*

Therefore, the Special Panel deemed that the applicable criminal law to case is Section 9 and Article 285, but only Indonesia has the jurisdiction on the case. The East Timorese courts and the Special Panel of Dili District Court itself did not have jurisdiction upon a crime of rape committed in West Timor before 25 October 1999.

The Special Panel pronounced: "It means that no East Timorese Court, according to the laws in force at the present time, could try this case" (Judgment, 2001: 6).

Analysis of the judgment

The Judicial System Monitoring Programme (JSMP) in East Timor provided the following succinct analysis, which highlighted the increased pressure the decision put on Indonesia to prosecute:

> According to the Special Panel, the universal jurisdiction they have over the international crimes of genocide, war crimes, crimes against humanity and torture, does not extend to individual cases of murder and sexual offences, including rape.

Although rape and murder committed between 1 January and 25 October 1999 are considered "serious crimes" by UNTAET, yesterday's decision means that no suspected perpetrators of such crimes, if committed in West Timor, can be tried by the Special Panel of the East Timorese courts unless the crimes can be categorised as any of the international crimes over which the court enjoys universal jurisdiction (JSMP, 2001).

With respect, the Special Panel erred in its consideration of the active personality (or nationality) of the perpetrator as a basis of jurisdiction. The "passive personality" principle which grants a state jurisdiction to try a crime where the victim is a national of the state should also have received more attention.

Universal jurisdiction is generally only relied upon where the crime is a gross human rights violation; and there is no link with the territory where the crime took place, the offender or the victim.[14] There was no impediment to assessing the other grounds of jurisdiction under customary international law, especially nationality, even if universal jurisdiction in this case was found not to exist, on the facts as well as on the judicial interpretation of the Regulation. The Special Panel is able to apply "recognised principles and norms of international law" and it is unarguable that the extra-territorial application of criminal jurisdiction in certain circumstances, for example, on the ground of the nationality principle is one of these norms (ICRC, 2002).[15]

The nationality principle (active personality principle) is well accepted as part of international customary law and is a counterpart of principle that states do not extradite their own nationals. In this case the defendant was an East Timorese citizen by birth and residence. This was a clear, strong ground for jurisdiction, even if the rape was charged only as a domestic crime.

The passive personality principle is less straightforward, as was seen by the Eichmann trial and in the recent Pinochet proceedings. It sometimes has a treaty basis, such as Article 5(1)(c) of the Torture Convention. The principle applies when the victim of the act was a national but the act occurs outside the state's territory, usually where the perpetrator is not a national of the state and the act is in the nature of terrorist or other organised attack.[16] The victim in this case was an East Timorese citizen, and the act may be seen as part of a systematic attack and forced relocation on the Timorese people after the ballot. Likewise, the defence (or security) principle is based on the state's right to self-protection and is closely connected to the territorial principle. Given the percentage of the population forcibly removed to West Timor, this ground may possibly have been invoked with corroborating evidence.

Both the Prosecutor and the Special Panel were incorrect in deciding that the principle of jurisdiction based on nationality would have to be applied *mutates mutandis* on the basis of the express provision Article 5(1)(2) of the Indonesian Code (in the case of the Prosecutor) or by construction of the UNTAET regulations (in the case of the Special Panel). The Panel could have considered extraterritorial jurisdiction over a domestic or international crime based on the customary international law principle of nationality. In either case, cooperation with Indonesia would have been a major stumbling block for the extradition of the accused, but in this case the accused was already under arrest within East Timor in the initial stages of the trial.

Had the Prosecutor charged the case as an international crime, the jurisdictional arguments would have fallen out quite differently and the whole issue could have been easily avoided. Both the Prosecutor and the Special Panel seemed to completely fail to entertain the idea that a single rape could have been characterised as a crime against humanity if part of a "widespread and systematic attack" as envisioned by Section 5.1(g); a war crime under Section 6.1(b)(xxii) in an international armed conflict or Section 6.1(e)(vi) in a non-international armed conflict; or an act of torture under Section 7.1.

The Special Panel is directed to apply treaties and recognised principles and norms of international law, including the established principles of international law of armed conflict, but fails to mention that the *Furundzija* case in the ICTY decided the proposition that the rape of a single victim is a crime serious enough to warrant prosecution by an international war crimes tribunal. The defendant in that case was charged and convicted with rape and torture as war crimes.[17] How can this oversight be explained? One can only speculate

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14 See further International Law Association Committee on Human Rights Law and Practice, "Final report on the exercise of universal jurisdiction in respect of gross human rights violations", in *Report of the Sixty-Ninth Conference*, London 2000, pp. 403-431.

15 Charlesworth and Chinkin ask "Why is extra-territorial jurisdiction traditionally involved against violations of monopoly and competition law but only rarely in cases of trafficking of women and children?" 2000: 19.

16 See further *United States v Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

17 *Prosecutor v Anto Furundzija*, ICTY-95-17/1-T, Judgment 10 December 1998. See further Charlesworth and Chinkin, 2000: 322-3.

that either the Panel or Prosecutor or both lacked sufficient knowledge of recent precedent in international criminal law,[18] or insufficient insight into the crime of rape.

Section 9 "Sexual offences" states that the provision of the applicable Penal Code in East Timor shall, *as appropriate*, apply. Given the context of armed conflict, forced displacement, violence and vulnerability in the refugee camps in West Timor, there is a strong case to say that the application of the Indonesian Penal Code was inappropriate in this case.

The lack of international criminal jurisprudence informing the Panel's decision identified here is not limited to the *Kasa* case. Suzannah Linton has argued cogently that the first two initial decisions handed down by the Special Panel in the cases of Joao and Julio Fernandes[19] should have been dealt with as international crimes rather then violations of domestic law (Linton, 2001c: 414-458).

In that case, the authors of the Maliana POLRES Massacre were charged and subsequently convicted not with crimes against humanity but with murder. In an unreported dissenting judgment, the only Timorese judge, Maria Natercia Gusmao Perreira J questioned how the practice of prosecuting as a domestic crime "could bring justice to a people who had suffered so much during the many years of occupation" (Linton, 2001c: 422).

The JSMP trial report of the first Serious Crimes Court convictions in the *Los Palos* case notes that "it is surprising that the Panel's arguments seem not to be based on international jurisprudence", noting that the Panel did not mention the *Tadic* case when assessing the elements of an armed conflict (JSMP, 2002b: 30).

Suzannah Linton has noted: "A state-of-the-art system for prosecuting international crimes has been grafted onto the fledgling criminal justice system of East Timor, drawing much from the regime designed for the proposed International Criminal Court" (Linton, 2001c: 418).[20] She notes elsewhere that one theory as to the poor resourcing and narrow decisions of the Court was that "the Serious Crimes venture exists simply to be used as political leverage in dealing with Indonesia" (Linton, 2001b: 217).[21]

As noted above, JSMP commented on the *Kasa* case that in the light of continued criminal acts against refugees in West Timor, this judgment would put more pressure on Indonesia to prosecute, and may also affect the operation of the Commission on Reception, Truth and Reconciliation (JSMP, 2001). In late June 2002, the Serious Crimes Investigations Unit charged two Indonesian officers and 14 militiamen with crimes against humanity for their alleged involvement in more than 70 killings and four rapes in East Timor's Bobonaro and Oecussi districts in 1999. "This is a breakthrough case because it shows clearly that the killing of UN workers was part of a widespread and systematic attack, not only carried out by militiamen but also by serving members of the Indonesian military," said prosecutor Brenda Sue Thornton (Jolly, 2002). However, only four East Timorese militiamen out of the 14 indicted Wednesday are in custody in East Timor. The rest, along with both Indonesian officers, are at large in Indonesia. These arrest warrants might also be designed to force Indonesia's hand.

It should also be noted that the Serious Crimes Court has faced significant administrative and substantive difficulties until now, with only two convictions and 117 indictments.[22] A former senior staff member who resigned last year was quoted recently as saying that "There is no doubt, in my mind, that we were not properly funded because they [the UN] did not want results" (Martinkus, 2002). The head of the Unit resigned last year and the new head, Norwegian prosecutor Siri Frigaard said during independence interviews that there will be no

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18 JSMP has raised concerns over the training and experience of both local and international public defenders in the *Los Palos* case (2002: 23-4).

19 *General Prosecutor v Joao Fernandes*, Case No. 001/00.CG.2000 (25 January 2000). *General Prosecutor v Julio Fernandes*, Case No. 002/00C.G.2000 (1 March 2000).

20 See also the media and NGO critiques of the Serious Crimes Court Linton details in note 13 on page 418.

21 This article is a seminal piece on transitional justice issues in East Timor.

22 For descriptions of the difficulties in building the judicial system in East Timor, see Hansjörg Strohmeyer "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor". Symposium: State Reconstruction After Civil Conflict *American Journal of International Law*, Vol 95, 2001, p 46-63, and Suzannah Linton "Rising from the ashes: the creation of a viable criminal justice system in East Timor" *Melbourne University Law Review* Vol 25, April 2001.

international criminal tribunal and most of those indicted [before the Special Panels] will not turn up (Martinkus 2002). This is evidence of an extremely defeatist attitude to transitional justice issues in Timor by UNTAET.

On a positive note, at least the initial indictments that were prosecuted and brought to trial by the Serious Crimes Unit included sexual violence offences, unlike the ICTY and ICTR. This may be due to cooperation with the Vulnerable Persons Unit in CivPol and the Gender Affairs Unit.

The *Lolotoe* trials

Previous cases such as the *Kasa* case will bear on the Lolotoe Crimes Against Humanity trials[23] currently before a Special Panel for Serious Crimes.

The three defendants in the *Lolotoe* case – KMP militia commanders José Cardoso Ferreira and João França da Silva and former Guda village chief Sabino Gouveia Leite – are accused of waging a campaign of deadly terror in the Lolotoe area of Bobonaro district during the months surrounding the 1999 Popular Consultation on the future of East Timor.

The two KMP commanders are accused of illegal imprisonment, murder, torture, rape, persecution and inhumane treatment of civilians in Lolotoe sub-district, near the border with West Timor, Indonesia. Gouveia Leite is accused of being an accomplice in the offences allegedly committed by the KMP and members of the Indonesian Armed Forces (TNI). An important aspect of the case is the maintenance by the accused of a "rape house" where three women suspected of being related to Falintil guerrillas were raped repeatedly from May to July 1999.

The *Lolotoe* case is the second of 10 priority cases to be tried by the Special Panels, and the first crimes against humanity case in East Timor to include charges of rape and charges against superiors based on the actions of their subordinates (UNTAET, 2002).

This is a prime opportunity for the Special Panel to apply the jurisprudence of the *Akayesu* case in the ICTR and the *Kunerac* case in the ICTY where rape was determined to be a crime against humanity. The *Kunerac* case is based on a rape hotel fact situation in the town of Foca comparable to the Lolotoe "rape house" and also examines the issue of enslavement.[24]

Conclusion: transformation or afterthought?

Hilary Charlesworth and Christine Chinkin conclude that precedents in prosecuting gender-based crime had broken the silence over these crimes but pointed to serious shortcomings still apparent in the system. A key limitation was the fact that international crimes are still required to be wide-spread and systematic, and that the sexual violence in the former Yugoslavia might be seen as "exceptional" (Charlesworth and Chinkin, 2000: 333) There has certainly been a failure to address the systematic nature of gender-based crime in West Timor in the *Kasa* case.

Charlesworth and Chinkin also point to an inadequacy of international legal remedies that provide long-term, financial and practical assistance (Charlesworth and Chinkin, 2000: 333). They note that international law currently only emphasises women's sexual and reproductive identities, and only harms inflicted by opposing forces (Charlesworth and Chinkin, 2000: 334). Maria da Costa's story is no doubt heavily influenced by her need to ensure her economic survival for herself and two children, not to mention a need for counselling and health services.

The hearing of the *Kasa* case can be argued to have made life even harder for both the alleged victim and women still in West Timor generally. Until this trial, there may have been at least some ambiguity over what accountability there might be for Indonesian military and East Timorese militia who commit crimes whilst in

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23 *The General Prosecutor of the United Nations Transitional Administration in East Timor v Joao Franca Da Silva alias Jhoni Franca, Jose Cardoso Fereira alias Mouzinho and Sabino Gouvia Leite*. Dili District Court Special Panel for Serious Crimes Case no. 4/CG/2000. (The Lolotoe Trial).

24 *Prosecutor v Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic*, Judgement, Case No. IT-96-23/1-T, 22 February 2001.

Indonesian territory against East Timorese. In the safe knowledge that Indonesia would probably not investigate let alone prosecute crimes in West Timor, this judgment sent a clear message of impunity for rape. After fatal attacks on UNHCR staff in West Timor in September 2000, most of the members of the international development community who may have been able to bear witness had left.

Meanwhile, media reports confirm that the "victims of militia rape and sex slavery continue to bear the scars of post-ballot violence in East Timor, facing ostracism on their return home" (AFP, 2001; Powell, 2001:1). Abuelda Alves of Fokupers said of the women who are able to return home, often with babies who are the product of rape: "They are viewed as rubbish. Their families are embarrassed. Women who were already married, their husbands reject them"(AFP, 2001).

Maria Dominggas Alves, also of Fokupers, captured a crucial feminist quandary of international criminal law: "Why is it that men who are tortured by the military forces are seen as heroes, whereas women who are tortured (including rape) are seen as traitors? Doesn't this show there is a double standard for women?" (Oxfam CAA, 1999).

It could get even worse for these women if broad amnesties are granted to militia in West Timor. A draft amnesty bill is currently before the new Parliament.[25] The new President Xanana Guasmo recently stated: "We must do our best to eradicate all sentiments of hatred, of revenge. If you still feel like this, then you are living with the ghosts of the past" (AP, 2002b: 15). Bishop Belo countered: "I hear the voices of widows, the complaints of raped women, of orphans. They don't like to live together and meet in the street their perpetrators" (AP, 2002b: 15). These "ghosts of the past" might come back from West Timor to fill women's lives with terror.

Taking a broad perspective of the four current transitional justice mechanisms in East Timor as outlined in my introduction, one can see a lurking danger that the view that the violence since 1975 should be viewed as a civil war rather than an international armed conflict will be confirmed. In other words, the Indonesian, and Australian government line has been that the conflict was a "civil war between equally-matched Timorese factions, with Indonesian security forces as bystanders" (Callick, 2002:18; AP, 2002).

The paper has focused on the Serious Crimes Court but the case analysis feeds into the wider transitional justice dilemmas facing Timor. My contention is that the international community has created an unwieldy, illogical and potentially self-defeating system of transitional justice mechanisms. The worst-case scenarios include the following outcomes: that a broad amnesty is passed, East Timorese militia in West Timor return and the Truth Commission and its "reception" function are severely compromised. The Truth Commission is unable to deal with serious crimes excluding those granted an amnesty, but can investigate the full time period since 1975. The Serious Crimes Court can only deal with the period of 1999, will not extend its jurisdiction to West Timor and will end its mandate in 2003. The Indonesian ad hoc Human Rights Court will only prosecute crimes committed in a very limited time frame and has so far failed to convict any Indonesian military at all. What picture, what legal record of the conflict in East Timor might be presented to the future if these predicted scenarios come to pass?

The Commission for Reception, Truth and Reconciliation (CRTR) will have an important psycho-social role to play as the main Timorese attempt to form a truthful record of the events and take Timorese perpetrators and victims though a healing process at both a local and national level. It may well be proved that the CRTR model of restorative rather than retributive justice is most fulfilling to the women of East Timor (Villa-Villencio, 2000:205). However, the mechanism of a truth commission is a traditional response for a society that has experienced a civil, rather than an international conflict. Did East Timor choose it, and international donors fund it, because no other options were left? Do the Truth Commission and the amnesty debate feed into, rather than oppose, Indonesia's civil conflict thesis?

At present, only the East Timorese militia still in East Timor (of lesser strategic importance to Indonesia by definition) have been both prosecuted and sentenced. The first sentence has already been served (JSMP, 2002a). Can the international community afford to leave to history this skewed legal record of the events of 1999, let alone post 1975? In fact, the consequences of the Indonesian military "getting away with it" may be even more

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25 Draft Amnesty legislation (unofficial-translation) and JSMP's comments on the draft legislation http://www.jsmp.minihub.org

severe in the immediate future for those in Indonesia, especially in West Papua and Aceh, and face the international community again. What faith can civil society in either East Timor or Indonesia (or globally) put into the rule of law if that interpretation is left to stand by the United Nations?[26] Why should the women of East Timor or Indonesia put their trust in the law in the future?

The vanishing options left open to the international community and East Timor present serious and difficult ethical choices. It is hard to foresee a development that would improve the chances for the women of East Timor to achieve the justice and compensation they have demanded so forcefully.

Unfortunately, I conclude that Charlesworth and Chinkin's general analysis, that international law is still unable to meet the needs of women, resonates strongly with the outcome of the *Leonardus Kasa* case for the survivor Maria da Costa and her two children, perhaps still three of the estimated 50,000 people in West Timor. The broad landscape of transitional justice for women in East Timor looks similarly bleak. The international community must not, however, give up the chance to finally tell the "untold story" of so many Timorese women.

A core priority must be a functional court and legal system within a range of broader social policy options, preferably an international tribunal. As Benjamin B. Ferencz, a former Nüremberg prosecutor has said on the advent of the ICC: "There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."[27]

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26 Note Bishop Belo's comments: "To date there is no definitive account of the crimes committed by the Indonesian army and the militias during 1999. The UN investigations have not even been resourced sufficiently to be able to report on a few of the most serious incidents. As long as this continues the perpetrators continue to go free and are able to pursue their military careers unhindered. Prosecuting the crimes of 1999 is essential for East Timor, but also for Indonesia. Democracy there is fragile and the military continue to intrude on both government and civil society." "To forge a future, Timor needs justice for the past". *The Sydney Morning Herald,* 28 August 2001 http://www.jsmp.minihub.org/Reports/Belo.htm

27 Benjamin B. Ferencz, a former Nüremberg prosecutor, quoted on www.icrc.org

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Prosecutor v Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic, , IT-96-23/1-T, Judgement 22 February 2001. (The Celebici camp cases)

Prosecutor v Anto Furundzija, ICTY-95-17/1-T, Judgment 10 December 1998

International Criminal Tribunal for Rwanda

Prosecutor v Jean-Paul Akayesu, ICTR-96-4-T, Judgment 2 September 1998

Inter-American Commission of Human Rights

Mejia Egocheaga v Peru (1996) 1 Butterworths Human Rights Cases 229

LEGISLATION

Note: All relevant East Timorese legislation can be downloaded from the Judicial System Monitoring Programme Resources web page – http://www.jsmp.minihub.org/Resources.htm

Security Council Resolution 1325 (2000) "Women, Peace and Security"

Rome Statute of the International Criminal Court

Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 808 (1993)

Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 (1994)

Princeton Principles on Universal Jurisdiction 2001.

Official Constitution of the Democratic Republic of East Timor, (English)

1999/1 Authority of the Transitional Administration (incl. applicable law)

1999/3 Establishment of the Transitional Judicial Services Commission

2000/11 Organisation of Courts in East Timor (Amended by Regulation 2001/25)

2000/14 Amendments to Regulation 2000/11

2000/15 Establishment of panels with exclusive jurisdiction over serious criminal offences. UNTAET/REG/2000/15 6 June 2000

2000/16 Organisation of the prosecution service

2000/30 Transitional rules of criminal procedure (Amended by Regulation 2001/25)

2001/10 Establishment of a commission for reception, truth and reconciliation in East Timor

2001/25Amending Regulations No. 2000/11 and 2000/30

2001/26 On the amendment of UNTAET Regulation No. 1999/3 on the establishment of a Transitional Judicial Service Commission and on the amendment of UNTAET Regulation No. 2000/16 on the organization of the Public Prosecution Service in East Timor

MOU between the Republic of Indonesia and UNTAET regarding cooperation in Legal, Judicial and Human Rights related matters

Draft Amnesty legislation – please note, this is a draft and the translation is unofficial – www.jsmp.minihub.org

Judicial System Monitoring Programme's comments to the draft legislation – English – www.jsmp.minihub.org

The Development of the Constitution of East Timor: A UN Perspective

Jonathan Morrow*

Thank you very much for the opportunity to speak today. I was asked to give a paper on the development of the East Timor Constitution from a UN perspective. I must start off with the usual proviso that the views I express today are not necessarily those of the United Nations, so I suppose the title of my paper is something of a misnomer. I was pleased to see that on the conference program I am described as being a legal adviser from the United Nations Transitional Administration in East Timor (UNTAET), an organisation which now, of course, no longer exists. Perhaps it is the prerogative of people who represent defunct organisations to speak a little more freely than they otherwise might, in the same way that at a funeral, the eulogist can speak frankly about the dear departed; and already, not even a month after East Timor's independence, it is possible even for UN staff members like myself to gain some critical distance on the UNTAET phenomenon and its role in the governance of East Timor. So if it is inevitable that I give a UN perspective, I will also try to give my own.

The topic which I wanted to address is not really the Constitution of East Timor, at least not the one which entered into force on 20 May this year. There are others here today, including of course Aderito Soares, one of the authors of the Constitution, who are much better equipped than me to discuss the Constitution and its contents. And of course Annemarie Devereux, who has also spoken today, followed the Constitution-drafting process very closely. My own involvement was limited to the creation of the conditions for the Constitution drafting process – the legal framework for the constituent process, if you like – having worked as an adviser to the Special Representative of the Secretary-General (SRSG) since December 1999, and having been part of a team which helped prepare the Electoral Law for the August 2001 Constituent Assembly election, the policy behind political party registration in East Timor, and laws on electoral offences and constitutional commissions.

A few weeks ago, when I received the invitation to speak today, I tried to work out what my argument, my main point, would be. If you are giving a conference paper you obviously need an argument. The last time I spoke about East Timor, at the American University Law School about a year ago at a conference on postcolonialism – back in the days when UNTAET still existed – I had a very clear argument; which was defend UNTAET against those critics who saw the UN in East Timor as yet another colonialist power, a delegate of an empire based not in Lisbon or Jakarta, but in New York, an empire whose weapons were not muskets or machine guns, but international legal norms to be imposed at will upon developing countries. Those of you who have been following East Timor closely will recall that one academic from a North American university who had been working with UNTAET in late 1999, Jarat Chopra, resigned his post in spectacular fashion, and soon after in a published article stated that the result of the UN exercising sovereign authority will be 'merely another form of authoritarianism unless the transitional administrators themselves submit … to genuine accountability to the local people whom they serve,' adding that 'comparisons with colonial administrations were unavoidable'.[1] Some East Timorese, some international journalists, and some Portuguese legal academics followed suit with similar comments. As an UNTAET masochist, my own favourite critical comment about UNTAET came, in fact, from a constitutional lawyer who said to a Portuguese newspaper: "the UN is divided between the exotic scenario of Spielberg's Indiana Jones series and the 'political correctness' of US academic thinking, and this combination gives rise to a somewhat neo-colonial approach".[2]

I was taken aback by this last criticism, since I had always aspired to being a politically correct Indiana Jones. Anyhow, my argument a year ago was that these criticisms were not accurate, bore no relation to the views of the majority of East Timorese, and moreover were dangerously close to the anti-UN invective of the fugitive East Timorese militia groups in West Timor, who have been prepared to assume the identity of anti-colonialists, ashamed no doubt of the fact that they were serving the interests of the *real* colonial threat to East Timor,

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1 Jarat Chopra 'The UN's Kingdom of East Timor' *Survival* 42, 3 Autumn 2000: 27-39, pp.27, 33.

2 Rui Baptista and Raposo Antunes 'The UN's neo-colonial vision of Timor' *Público* 26 December 2000, setting out the views of Portuguese constitutional lawyer Pedro Bacelar de Vasconcelos.

namely the Indonesian military, and their fairly transparent ambitions to resume control of East Timor. In particular, I wanted to say that whatever the difficulties and even failures of UNTAET might be – in the areas of capacity building, for instance – one area which was undoubtedly successful, both as a means and as an end, was the political transition. That is to say, in creating the conditions for East Timor to attain true self-determination – of which the preparation of the Constitution was the consummation, the ultimate symbol – UNTAET could hardly have been more accountable to the people of East Timor, and could hardly have done more to ensure that the constitutional drafting process was an East Timorese one. The electoral law, for instance, was ultimately the creation of the all-East Timorese National Council, who gave UN officials the drafting instructions to produce legislation which, ultimately was submitted to UN Headquarters as a mere formality. There were two major debates between the East Timorese leadership and the UN over the electoral law, both of which, it is fair to say, the East Timorese leadership won. The first revolved around the question as to whether political parties or candidates which supported reintegration with Indonesia might be able to register and participate in the August 2001 election. The position was clear from the Timorese National Resistance Council (CNRT) leadership and the National Council that they should not, and that the participation of such parties was offensive to the results of 1999 Popular Consultation; the position of the UN leadership in New York was, predictably enough, that in the interests of the freedom of association and freedom of expression there should be no restrictions on the political party program for the first free election ever held in East Timor. In the end, after the position of the East Timorese leadership was explained to New York by UNTAET, the Electoral Law was passed, complete with a condition of registration that parties commit themselves to the transition to independence, and that party leaders reside in East Timor. The second major debate concerned the question of whether seats in the Constituent Assembly should be set aside for women candidates. UN representatives had put the position that one third of the seats in the Assembly should be held by East Timorese women; but when the proposition was put to the vote in the National Council, it was roundly rejected – and rejected by many of the women members of the Council. Whatever one may think about the merits and utility of quota provisions in electoral laws, the point is that it was the Timorese leadership and representatives, not UNTAET, which was allowed to take the ultimate decision.

So that is the argument; or rather, that was my argument a year ago. To cast the argument into human rights terms, I suppose I have always seen that within the framework of Security Council Resolution 1272, UNTAET needed to place the highest value on the right to self-determination and the right to consultation, and that other international norms and standards should be addressed by the UN within those parameters. I have since written an article about these matters with another Australian UNTAET lawyer, Rachel White, which I hope to have published one of these days, and that article argues, in broad terms, that to the extent that UNTAET ultimately succeeded it was because it learned to grapple with some of the problems which Janelle Saffin has raised today: it learned to behave like a government, separating the organs of government, and establishing workable and affordable structures of accountability well enough to give its most important decisions true legitimacy, legitimacy both in strict international law terms but also legitimacy in the eyes of the East Timorese. Looked at in these terms, some of UNTAET's greatest achievements in the administration of international law have less to do with the more familiar process of human rights monitoring and investigation, and have more to do with the recognition of rights of participation and the real partnership that was forged between the UN and the East Timorese, particularly at the senior levels of government. Thus, to take one example from my work at the moment: the Timor Sea Treaty that was signed by East Timor and Australia on 20 May should be seen, apart from anything else, as the result of an extremely successful collaboration between the UN and East Timorese that was both pragmatic but also mindful of the requirement under international law for UNTAET to consult and work with the East Timorese in the interests of the East Timorese people. The article we have written also argues that the relatively minor failures on the part of UNTAET can be attributed, in broad terms, to the inertia of UN bureaucratic structures, and in particular the tendency of UNTAET to think of itself as a standard peacekeeping mission, armed with a bunch of international human rights instruments and with the limited role of standing outside government and looking in.

So there is one argument. I am not sure what has happened in the last few weeks, but I am now less inclined to insist that UNTAET's collaboration with the East Timorese leadership on the constitutional process was an unmitigated success. Perhaps it is some weird form of nostalgia for the supreme executive, legislative and judicial powers conferred by Resolution 1272, and the realisation that it is now too late for the UN to correct any mistakes it made in East Timor. More likely it is seeing people like Andrew Ladley again, who reminds me of those chaotic early days of UNTAET in late 1999 when it was so difficult to get legitimacy for UNTAET laws because, in the devastation of Dili, neither the UN nor East Timorese political structures were properly in

place. The fact that a paper by Daniel Fitzpatrick is being presented at this conference also reminds me that in the field of land and property, UNTAET arguably consulted too much with certain sections of the East Timorese leadership, and failed to develop a land law regime where it definitely should have done so. And seeing Justice John Dowd and Janelle Saffin here remind me that one of UNTAET's most noble experiments in respecting a right to self-determination – that is, the appointment of an entirely East Timorese judiciary in January 2000 – was, in many respects, a noble failure.

So what does all this have to do with the Constitution? Well, I suppose in a sense I am arguing for a complex or descriptive model of constitutionalism. It is one thing for UNTAET to have set up a process where East Timorese had sovereign control over the formal constitutional drafting process. It is true that UNTAET fought hard to ensure that there was little or no interference with the right of the East Timorese people, through the elected Constituent Assembly, to prepare whatever sort of constitution they wanted, and that right was exercised. However that is only part of the picture – and it is worth remembering here that UNTAET, under Resolution 1272, had no special mandate to develop a formal constitution; it is quite conceivable that East Timor, like most countries, could have reached independence without one. In an important sense, UNTAET from the very beginning – from the very first UNTAET Regulation, which has been discussed by Justice John Dowd – had created an *earlier* constitution which East Timor has also inherited. It was a constitution which was all the more complex because it was, in the English sense, unwritten; and because it comprised both the law applicable to states and, in addition, the law applicable to international organisations. It was a constitution which had, as a central text, Resolution 1272, but included Indonesian legislation, as well as UNTAET legislation and government practice. It included, at least in theory, a strong commitment to international law and international human rights law in particular. Given the nature of the Electoral Law, it is possible to see the result of the 1999 Popular Consultation as part of this constitutional arrangement. The 'UNTAET constitution', if we can call it that, had many things going for it, and included fairly sophisticated Cabinet procedures and legislative procedures. However, it also included a judiciary that was congenitally weak, with no ombudsman's office, and included a large question mark where property law should have been. And, as Annemarie Devereux has pointed out, this proto-constitution left unanswered, or at least unclear, the question of whether UNTAET was bound by the international human rights instruments to which it referred in its own laws. Anyhow, my point is that the decision taken by UNTAET to ignore or defer these important and pressing legal problems until after independence was still a positive decision; in other words, the UN never had a real option to stay out of the constitutional process. In this sense, the newly independent East Timor, with its brand new Constitution, the subject of months of careful drafting by the Constituent Assembly, has for better or worse inherited from the UN a set of positive law and conventions which will for many years, shape East Timorese institutions and society. This is neither a wholly good nor a wholly bad thing, but a simple fact: and in retrospect it is possible to suggest, somewhat paradoxically, that UNTAET may have done better had it been more willing to face this fact – the fact that almost everything done prior to independence had, and continues to have, constitutional significance.

Panel 2: Peacekeeping / Criminal Law

Practical Human Rights: The Perspective of a Development Agency in East Timor

John Scott-Murphy*

From the first moment of realisation that a referendum was actually going to take place in East Timor, around January-February 1999, Caritas Australia was strongly aware of the human rights implications of that decision. Our own decision to undertake an operational human rights program commenced a little later, with a decision to locate Australian and New Zraland Religious as Witnesses for Peace, along the line of Peace Brigades International's well-know program of tagging human rights defenders so that a witness is always present for possible crimes. These witnesses accompanied communities, food relief convoys and Timorese NGOs in their daily work right up to September. There were 14 of them. None of our witnesses was harmed.

After the Indonesian withdrawal my organisation commenced an operational relief program, being one of the avalanche of international NGOs descending on East Timor as soon as security was guaranteed by the INTERFET. We had already started planning for a human rights program focused on the crimes committed against Timorese civilians during 1999. And we commenced, quite soon after, an operational human rights program. By operational I mean we have a direct presence in the field, undertaking work with our own staff, usually working closely with local people and organisations.

We wanted to assist with the recording of events and to enhance the possibilities for prosecution of those responsible. Above all we wanted to ensure that there was a Timorese presence and ownership of those actions. This is because we follow a philosophy of human development which is focused on the human person as the fundamental actor and have one eye on the long-term goals even as we operate in short-time frames.

We also wanted to assist in the process of incorporating human rights into the social and political life of the newly independent East Timor.

Legal justice, through prosecution of perpetrators of serious crimes, is a crucial element of any justice system. We looked for ways in which we could assist the UN-mandated organisations with this work. We knew that victims and their families were crying out for 'justice' – by this they clearly meant the prosecution of perpetrators in a court of law, the telling of the truth and the identification of those responsible.

Caritas Australia is a non-government development and relief organisation. As an agency established by the Catholic Church we have a strong emphasis on human development as well as relief work which provides for the immediate needs of people in emergency situations.

Human development work is based on the premise that the local people have the capacity to forge their own path to development. Working in this way ensures local ownership and the entrenchment of local needs in what otherwise can be a foreign imposition. It may require the removal of certain obstacles, the implementation of programs of training and education, of social change etc. Without strong local involvement development work runs the risk of becoming a set of projects with an uncertain future. Almost any aid worker can describe the skeletons of dead projects which they have seen littering the landscape of developing countries.

Emergency situations, of course, do not easily lend themselves to human development work. When people need food, repatriation, shelter and protection the most effective means are required to achieve that. East Timor changed from being a one hundred per cent emergency situation quite quickly. Security was guaranteed within weeks. Food was obtained quickly and other emergency needs were undertaken without delay.

Most of the organisations which came to East Timor in late 1999, including the UN staff of United Nations Transitional Authority in East Timor (UNTAET) were dominated by the emergency needs. They brought a contract culture and a way of doing things which leaves little room for local involvement. At almost every stage Timorese were by-passed. They became the objects of relief work and of development projects and very little attention was given to engaging their capacities to undertake the work themselves. The institutional momentum

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of the early relief operations continued well into the development phase. This attitude is not limited to UN staff, but was common in many NGOs.

Our investigation of the problems surrounding eventual prosecution of those responsible for crimes against humanity in East Timor looked at the example of Kosovo where a number of NGOs were able to cooperate with the Hague Tribunal's investigations. Most prominent of these was a large project undertaken by International Crisis Group to bring together a large number of witness statements, enabling the Tribunal's investigators to identify fruitful lines of inquiry.

In East Timor, however, the currents did not run smooth. The UNTAET presence had little time for human rights or prosecutions. The Human Rights section and the CivPol ran separately. There was a great deal of manoeuvring and negotiation within the UN system, to put it mildly. From a Timorese perspective this was all about dividing up the pie. It appeared that East Timor had swapped Indonesian repression for UN/foreign dominance.

Working in a developing country is fundamentally different to working at home in Australia, Europe or America. Working for human rights in countries which have not known rights, or the rule of law, where many people are illiterate, requires a developmental attitude coupled with strong empathy for the local people.

We found we were unable to work collaboratively with the UN agencies involved. Only later, when we were able to help the Civpol establish the Missing Persons Unit for the National Police, was there real cooperation. That was because we were able to bring expertise and funds which were otherwise not available.

Our initial program involved a series of workshops devoted to legal issues surrounding serious crimes and how courts might deal with them. We were able to put Australian lawyers into the field, both volunteers and salaried. They worked with local organisations, providing them with advice and real practical assistance. We promoted the idea of an International Criminal Tribunal for East Timor collaboratively with Timorese NGOs. And we are still doing that although we no longer see a role for Australian lawyers in-country.

When we talk about human rights here in Australia we possess assumptions about international treaties, Human Rights Commissions and anti-discrimination legislation underpinning our understanding. We can see the rights and obligations as written in texts at the UN, interpreted by our courts and parliaments. We read books devoted to the subject. Some of us even read papers given at conferences on International Law. We know that notions of citizens' rights in our country preceded the creation of the United Nations.

In a developing country very few of those assumptions can be relied on. The text of a convention, for which we have a holy reverence, may mean little, or nothing at all, in East Timor or Indonesia. What to us is a matter of law, means something quite different in a place where the law lies at the mercy of individuals who have no qualms about twisting it to suit their purpose.

The essential notion of human rights, in situations of repression by military and police, is almost totally focused on making the security forces accountable for their actions. Police violence is a breach of human rights. But discrimination, vote rigging, corrupt judges may not be. Throughout Indonesia there is very little faith in democracy because voting has been so thoroughly manipulated for so long. Similarly courts, lawyers and judges are not trusted. This is the case today in Papua or Aceh.

In such a situation workshops and classes which utilise the Universal Declaration of Human Rights or other conventions, have limited value. In the first few years of the UNTAET mandate these sort of educational activities amounted to little more than promotional activities for the UN.

Practical approaches to human rights must start with the people's lived experience and build on that. It is pointless to utilise our worship of the text of the Universal Declaration in a different culture. It may even set human rights back by devaluing it into a set of meaningless words promising a lot but delivering nothing.

So, how does a human development agency approach such a problem?

In the South Asian context a lot of effort by our local partners is put into what we call "animation" programs. These are essentially self-awareness about one's own position in society and the roles that have been established. What often emerges as the key is land ownership – tenants versus landowners. When tenants start to understand their position in relation to large landowners and how land is accumulated by individuals and their

families you have the beginnings of a social and political awareness which can break down feudalism and replaces it with modernity.

In East Timor our Human Rights program is focused on the provision of information and strategies to counter sexual assault. For decades Indonesian security forces used sexual assault as a weapon against local people suspected of supporting independence forces. Some of the taboos against sexual assault were broken down over time, a factor which has led to a widespread current problem in many Timorese communities. There is a frightening level of domestic violence, and an almost complete lack of the rule of law in remote areas.

Our Sexual Assault Response Team is able to conduct educational programs and help communities develop their own strategies against sexual assault. It is not focused on Indonesian crimes at all. It concentrates on the present and the future. The team is composed of young men and women and they travel all over the country. They have developed their own teaching styles and materials. They are building a culture of human rights.

This is the necessary base on which human rights can eventually be implemented through the legal system.

Panel 3: Property and Resources

East Timor and the Timor Gap Treaty: Coming to Terms with the Past

Julie Atwell*

The signature of the Timor Sea Treaty between Australia and East Timor was the result of two years of negotiations. Both Australia and East Timor brought widely differing expectations to the negotiating table. Area A of the Zone of Cooperation under the Timor Gap Treaty between Australia and Indonesia was an example of a successful joint development area with a producing oil field in operation.[1] It was against this background that Australia as a party and co-architect of that regime considered that East Timor could benefit from continuation of arrangements under the Timor Gap Treaty. Alternatively, East Timor considered the Timor Gap Treaty illegal.[2] Australia had negotiated the Treaty with Indonesia and recognised Indonesia's annexation of East Timor. Indonesia had received revenue from resources that East Timor regarded as rightfully belonging to East Timor.[3] The existence of the Timor Gap Treaty and the significant amount of investment that had taken place in the Zone of Cooperation could not however be ignored. It was in the interests of both Australia and East Timor to reach an agreement that would ensure a stable basis for continued investor confidence in the area. This required both parties to take into account the changed political reality of East Timor's emerging independence.

The Timor Gap Treaty between Australia and Indonesia concluded on 11 December 1989 was the culmination of more than a decade of negotiation between the two parties.[4] The Treaty provided a means of equally sharing the benefits of petroleum exploitation without prejudicing either party's maritime boundary claims. The Timor Gap Treaty embodied the concept of 'sovereignty neutral' whereby the applicable law of one country was not used exclusively in the joint area but rather solutions applied to ensure the joint control of both contracting states over the exploration and exploitation of petroleum in the area.[5] This ensured that no prejudice to either party's maritime boundary claims could result from the operation of the Treaty as the Treaty was only intended as an 'interim solution'. The perception of 'sovereignty neutral' was important in that the Timor Gap Treaty was 'not seen to favour the position of one country more than another'.[6] The Timor Gap Treaty at the time it was

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1 The Elang-Kakatua field contains reserves estimated to be about 30 million barrels. It produced 30-40 000 barrels of oil per day during 1999 and is expected to continue to produce until 2003. Department of Industry, Science and Resources presentation to the Senate Committee Inquiry into East Timor 1999. David Ong states in his article 'The Legal Status of the Timor Gap Treaty Post-Referendum: Is Joint Development Mandated by International Law' "This agreement is probably the most sophisticated joint development regime agreed to date." Masahiro Miyoshi states in *Maritime Briefing* Vol 2 No 5 (1999) (IBRU), at p. 19 "The extremely detailed provisions in the main Treaty and its annexes seem to be designed for all conceivable matters and circumstances relating to petroleum exploration and exploitation in the Zone of Cooperation."

2 See *Horta and Others v Commonwealth of Australia* (1994) 181 CLR 183 at 185 and *Case Concerning East Timor*-ICJ Rep (1995).

3 Dr Mari Alkatiri stated "the prior treaty had no type of validity for East Timor", 'Oil sharing in Timor treaty', *Sunday Telegraph* 18 February, 2001, Mr Peter Galbraith stated "Indonesia had no legal authority to contract for East Timor," 'Timor's oil and gas share 'must be seen to be fair', *The Sydney Morning Herald*, 17 October 2000, Mr Peter Galbraith also stated, "the view of East Timor … was that the Australian-Indonesian treaty was illegal because Indonesia didn't have the authority to make any decisions," in 'East Timor seeks Gap riches', *The Sydney Morning Herald*, 10 October 2000.

4 Negotiations with Indonesia recommenced in 1979 over the Timor Gap seabed boundary. Department of Industry, Tourism and Resources. H Burmester, 'The Timor Gap Treaty' (1990) *AMPLA Yearbook* 233-247. S Kaye, "The Timor Gap Treaty: Creative Solutions and International Conflict' (1994) 16 *Sydney Law Review* at 75.

5 H Burmester, "The Zone of Co-operation between Australia and Indonesia: A preliminary outline with particular reference to applicable law' 128-140 at p.134 in Fox, H ed, *Joint Development of Offshore Oil and Gas Vol II*, (1990) British Institute of International and Comparative Law. B Campbell, 'Maritime boundary arrangements in the Timor Sea' (2000) Vol 1 No 5 *International Trade and Business Law* 61-67 at p. 63.

6 H Burmester, 'The Timor Gap Treaty' (1990) *AMPLA Yearbook* 233-247 at p. 236.

concluded was considered unique in that both parties had agreed to a joint regulatory and fiscal regime, allowing the benefits of the resource development to be shared rather than simply dividing the resource.[7]

Security Council Resolution 1272 was adopted on 25 October 1999 which established the United Nations Transitional Administration in East Timor (UNTAET) to administer East Timor until independence, and formally signified the end of Indonesian jurisdiction over East Timor. At that time, revenue from the Elang-Kakatua field had been received by both Australia and Indonesia.[8] The Timor Gap Treaty had therefore proven by this time that it was an effective mechanism for allowing both parties to the Treaty to share the petroleum resources in the Timor Gap. It was therefore with the intention of ensuring that the success of the regime continued that Australia approached UNTAET acting on behalf of East Timor that 'for the period of its authority in East Timor, (UNTAET) succeed formally to the rights of Indonesia under the Timor Gap Treaty'.[9]

However, the implications surrounding East Timor's independence would have an impact on the future of the joint development area in the Timor Sea. Both East Timorese and UNTAET representatives rejected treaty succession declaring that the Timor Gap Treaty with Indonesia was 'illegal'.[10] As a result, some new form of agreement was required to ensure the continued international legal basis for exploration and exploitation of petroleum in the Timor Gap. The difficulty with this proposal was that one party to the bilateral Timor Gap Treaty, Indonesia, had withdrawn but East Timor had not yet attained independence. Any replacement agreement would have to be with UNTAET until such time as East Timor gained independence.

UNTAET, ensuring that it did not bind or in any way prejudice a future independent East Timorese government by entering into a bilateral treaty with Australia, agreed to an interim arrangement. Such an arrangement would apply only during the period of UNTAET's administration of East Timor, ceasing on the date of East Timor's independence. Some mechanism was required to ensure petroleum activities in the Timor Gap did not cease and that East Timor would have an opportunity to share the revenue from petroleum activities in the area. An Exchange of Notes took place on 10 February 2000 between Australia and UNTAET. The text of the Exchange of Notes provides an indication of how the opposing views of UNTAET/East Timor and Australia concerning the Timor Gap Treaty could be put to one side. The Exchange of Notes provided a mechanism, at least for an interim period that allowed both Australia and UNTAET/East Timor to share the benefits of petroleum exploitation in the area.

The Exchange of Notes in addressing the concerns of UNTAET/East Timor included a 'without prejudice' clause which stated:

> The conclusion of this agreement, however, is without prejudice to the position of the future Government of an independent East Timor with regard to the Treaty … In agreeing to continue the arrangements under the terms of the Treaty, the United Nations does not thereby recognise the validity of the integration of East Timor into Indonesia.[11]

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7 The closest analogy of joint control at the time was the 1979 Thailand/Malaysia Memorandum of Understanding on the establishment of a Joint Authority for the exploitation of seabed resources in an area of the Gulf of Thailand. However although this Memorandum established a Joint Authority it did not determine how the Joint Authority was to function or provide detailed rules and regulations applicable to petroleum operations in the area. See H Burmester, 'The Timor Gap Treaty' (1990) *AMPLA Yearbook* 233-247 at p. 235.

8 At the end of 1998 equal amounts of US$780,137 has been paid to both Australia and Indonesia in accordance with the production sharing arrangements in the Timor Gap Treaty. Department of Industry, Science and Resources presentation to the Senate Committee Inquiry into East Timor 1999.

9 B Campbell, 'Maritime boundary arrangements in the Timor Sea' (2000) Vol 1 No 5 *International Trade and Business Law* 61-67 at p. 64.

10 Peter Galbraith, the director for political affairs for UNTAET stated that "UNTAET was not prepared to accept a 'successor state model' for the continuation of the treaty." 'Indonesia-Australia treaty on Timor resources: "illegal"' *Energy/Asia* 24 July 2000. He also stated that "the 1989 Australia-Indonesia treaty was illegal, in that Jakarta had no right to negotiate for the territory it then occupied". 'Sounding the gap', *The Sydney Morning Herald* 21 October 2000.

11 Exchange of Notes constituting an Agreement between the Government of Australia and UNTAET concluded at Dili on 10 February 2000 (ATS 2000 No 9).

The Exchange of Notes meant that petroleum exploitation in the Timor Gap could continue, at least for the interim period relying on the terms of the Timor Gap Treaty to govern petroleum activities until East Timor's independence. However, it also meant that a new Treaty would have to be negotiated by Australia and UNTAET/East Timor with a view to it being adopted by an independent East Timorese government. Notwithstanding that the Timor Gap Treaty took over a decade to negotiate, the conclusion of a new agreement would have to take place in a much shorter time frame.

The Exchange of Notes marked the beginning of compromises that would be necessary on both the part of East Timor and Australia if the Timor Gap was to remain a successful joint development area. The Exchange of Notes indicated an acknowledgment on the part of UNTAET of the existence of the terms of the Timor Gap Treaty and a desire to continue petroleum exploitation in the Timor Gap, ensuring the revenue flows that would be vital to an independent East Timor. The Exchange of Notes for Australia meant although the terms of the Timor Gap Treaty would continue during the period of UNTAET's administration, it was a 'holding pattern' arrangement. In reality, a new arrangement must be negotiated with East Timor. The dependence of East Timor upon revenue from petroleum exploitation and political issues surrounding the Timor Gap Treaty meant that it was likely that any such arrangement would require revisiting the 'sovereignty neutral' principle or the equal sharing of petroleum resources.

The Exchange of Notes between Australia and UNTAET included a provision ensuring continuity of the administration of petroleum activities in the Timor Gap.

> all rules, regulations, directions, decisions, guidelines, procedures, approvals, authorisations and other determinations made by either the Ministerial Council for the Zone of Cooperation ("the Ministerial Council") or the Joint Authority for Area A of the Timor Gap Zone of Cooperation ("the Joint Authority") before 25 October 1999, will continue to apply.[12]

This allowed the Joint Authority to continue operating in relation to the administration of production sharing contracts issued prior to the Exchange of Notes. The continued application of the same administrative framework provided investors with some confidence that petroleum activities would proceed in the same manner as under the Timor Gap Treaty until the independence of East Timor. UNTAET assumed the responsibilities formerly held by Indonesia in the Joint Authority and Ministerial Council.

Notwithstanding the Exchange of Notes and the continuation of the terms of the Timor Gap Treaty during the period of UNTAET's administration of East Timor, the basis of future investment in the Timor Gap that would allow for projects to proceed beyond East Timor's independence remained uncertain. While the Timor Gap Treaty was in force, over US$700 million had been invested in petroleum exploration and development in the Timor Gap.[13] Further investment was required in order to ensure two other major petroleum projects, the Bayu-Undan field and the Greater Sunrise field which straddles the Timor Gap and an area under Australian jurisdiction could proceed. Such significant investments require a framework that provides a stable legal and fiscal basis for long-term petroleum exploitation. Investors were concerned that any new regime negotiated between Australia and East Timor would be 'no more onerous' on investors than the existing regime.

In 1999 investors, received a written commitment from East Timorese representatives that production sharing arrangements and taxation would be 'no more onerous' under a new agreement than under the previous Timor Gap Treaty.[14] The terms of the Timor Gap Treaty governing petroleum activities and in particular, fiscal arrangements were a delicate balance between the interests of both Australia and Indonesia. Both countries had petroleum projects within their own jurisdiction that were subject to completely different regimes. The competition between oil and gas projects in the region, the volatility of oil and gas prices, the cost of extraction, and access to available markets were all essential factors in determining the government share of revenue from petroleum activities in the Timor Gap under the Timor Gap Treaty. Investors were concerned that any new regime established between Australia and UNTAET/East Timor would maintain this balance. From an investor

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12 Paragraph 2(b) Exchange of Notes constituting an Agreement between the Government of Australia and UNTAET concluded at Dili on 10 February 2000 (ATS 2000 No 9).

13 Department of Industry, Science and Resources, presentation of the Senate Committee Inquiry into East Timor, 1999.

14 The Commitment was signed by Xanana Gusmao, Jose Ramos Horta, and Dr Mari Alkatiri, 'Tax row hits Timor gas' *The Courier Mail*, 2 August 2001, p. 25.

viewpoint, this could be achieved if the terms of any new production sharing contracts issued remained in the same terms as those held at 25 October 1999.[15]

Negotiations between Australia and UNTAET/East Timor on the Timor Sea Arrangement commenced in the latter part of 2000. The Memorandum of Understanding confirming that the Timor Sea Arrangement was suitable for adoption as an agreement between Australia and East Timor upon East Timor's independence was signed at Dili on 5 July 2001. Consistent with East Timor's view that the Timor Gap Treaty was illegal and therefore should not be acknowledged in any way, the Timor Sea Arrangement did not refer to the Timor Gap Treaty. However, the Timor Sea Arrangement does acknowledge the existence of prior petroleum exploitation in the area. The recitals of the Arrangement refer to the need to "maintain security of investment for existing and planned petroleum activities", "a continuing basis for petroleum activities" and "continued development of the petroleum resources". The Arrangement had to ensure that those commercial activities could and would continue in order for an independent East Timor to receive the benefits from those activities.

Perhaps the most controversial provision of the Timor Sea Arrangement was Annex F which provided that:

> contracts shall be offered to those corporations holding, immediately before entry into force of the Arrangements, contracts number 91-12, 91-13, 95-19 and 96-20 in the same terms as those contracts, modified to take into account the administrative structure under this Arrangement.[16]

This acknowledged that contracts were held by corporations prior to the existence of the Timor Sea Arrangement. Annex F was also an acknowledgment that in order to preserve current investment and to encourage future investment the contracts held by corporations in relation to current and planned projects had to remain substantially the same. The financial reality was that investment could not occur where the basis for that investment was non-existent. That is, the terms of any contract or licence would have to be agreed between both Australia and East Timor and made known to corporations well in advance of any major investment decisions for current or planned projects.

The signature of the Memorandum of Understanding concerning the Timor Sea Arrangement involved compromise by Australia. Revenues from petroleum production were no longer to be shared equally between the parties to the Treaty, but rather East Timor would receive 90 per cent and Australia 10 per cent.[17] The Arrangements provided for a 'Joint Petroleum Development Area' and that Australia and East Timor would 'jointly control, manage and facilitate the exploration, development and exploitation of the petroleum resources'.[18] The Designated Authority, the body responsible for day-to-day administration of petroleum activities after a three-year period would be the East Timor Government Ministry responsible for petroleum activities.[19] The Joint Commission, the body responsible for overseeing the work of the Designated Authority would have one more commissioner appointed by East Timor than by Australia.[20]

The concept of 'sovereignty neutral' was retained in both the 'without prejudice clause'[21] and the applicable law clauses relating to marine environment, health and safety for workers, criminal jurisdiction, customs, quarantine and migration, hydrographic and seismic surveys, petroleum industry vessel, surveillance and security measures, search and rescue and air traffic services.[22] These provisions were largely taken directly from the text of the Timor Gap Treaty. However, the sharing of the revenue from petroleum production moved significantly in favour of East Timor. In particular, East Timor could impose taxes on 90 per cent of petroleum production and

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15 'Tax row hits Timor gas' *The Courier Mail*, 2 August 2001, p. 25, 'Canberra tackles impasse over pipeline tax' *The Sydney Morning Herald* 2 August, 2001, 'Pipe halt leaves $11b plans at sea' *West Australian*, 2 August, 2001, 'Gas supply threatened' *Herald Sun*, 2 August, 2001.

16 Annex F, Timor Sea Arrangement, 2001.

17 Article 4, Timor Sea Arrangement 2001.

18 Article 3(a) and (b), Timor Sea Arrangement 2001.

19 Article 6(b)(ii), Timor Sea Arrangement 2001.

20 Article 6 (c) (i) Timor Sea Arrangement 2001.

21 Article 2, Timor Sea Arrangement 2001.

22 Articles 10, 12, 14, 15, 16, 17, 18, 19, 20 and 21, Timor Sea Treaty 2001.

on company profits.[23] The amount and level of taxation would be determined by an independent East Timor. As described above, the decision-making power over petroleum activities rests mainly with East Timor although the Joint Commission has to approve decisions of the Designated Authority and either party can at any time refer a matter to the Ministerial Council for resolution.[24] The sharing of administrative oversight of petroleum is in keeping with the alteration in revenue-sharing arrangements. Under the Timor Sea Arrangement preference is to be given to employment and training of East Timorese nationals,[25] not nationals of both parties as under the Timor Gap Treaty. The Timor Sea Arrangement may be perceived as favouring East Timor over Australia in the sharing of revenues and regulation of petroleum activities in the Timor Gap.

Following signature of the Memorandum of Understanding concerning the Timor Sea Arrangement in July 2001, negotiations between East Timor and Australia took place concerning the implementation of the Timor Sea Arrangement following East Timor's independence on 20 May 2001. A taxation code, one of the annexes to the Timor Sea Arrangement was agreed, and discussions on other annexes including the Petroleum Mining Code continued. As these discussions progressed it became obvious that the Timor Sea Arrangement, that was intended to become the Timor Sea Treaty would not be ready for implementation on the date of East Timor's independence. It was therefore necessary for both Australia and East Timor to agree upon a suitable mechanism for continuing petroleum exploitation in the Timor Gap during the period between East Timor's independence and entry into force of the Timor Sea Treaty. The Exchange of Notes with UNTAET would cease upon East Timor's independence.

On 20 May 2002 the Timor Sea Treaty was signed by Australia and East Timor and an Exchange of Notes also occurred on the same day. The Exchange of Notes governs exploration and exploitation of petroleum in the Timor Gap during the period between 20 May 2002 and entry into force of the Timor Sea Treaty. The Notes refer to the 'exploration and exploitation of petroleum (taking place) in accordance with the arrangements in place on 19 May 2002'.[26] This ensures an international legal basis for petroleum activity in the Timor Sea exists during the period between 20 May 2002 and entry into force of the Timor Sea Treaty.

The Exchange of Notes between Australia and UNTAET referred to 'practical arrangements for the continuity of the terms of the Timor Gap Treaty'.[27] The practical effect of the Exchange of Notes between East Timor and Australia on 20 May 2002 was to continue the position under the Exchange of Notes until entry into force of the Timor Sea Treaty, but it is one step removed from the Timor Gap Treaty. The Exchange of Notes also includes a specific provision that:

> the Government of the Democractic Republic of East Timor does not thereby recognise the validity of the "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia" (the "Timor Gap Treaty") or the validity of the "integration" of East Timor into Indonesia.[28]

Notwithstanding that much of the arrangement between Australia and UNTAET/East Timor will continue to apply to petroleum activities during the period until entry into force of the Timor Sea Treaty, East Timor can apply its law on income tax and Value Added Tax to 90 per cent of taxation.[29] Revenue from petroleum production from Elang-Kakatua, the only field currently producing petroleum and income tax that East Timor

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23 Article 5(b), Timor Sea Arrangement 2001.

24 Article 6(c)(iii), Timor Sea Arrangement 2001.

25 Article 11, Timor Sea Arrangement 2001.

26 Paragraph 3, Note from the Ministry of Foreign Affairs of the Democratic Republic of East Timor, Dili to the Australian Embassy in Dili. *Exchange of Notes constituting an agreement between the Government of the Democratic Republic of East Timor and the Government of Australia concerning petroleum in an area of the Timor Sea between East Timor and Australia.*

27 Note from UNTAET in East Timor, Dili to the Australian Mission in East Timor, Dili.

28 Paragraph 8 of the Note from the Ministry of Foreign Affairs of the Democratic Republic of East Timor to the Australian Embassy in Dili, *Exchange of Notes* 20 May 2002.

29 Paragraphs 4(a) and (b) of the Note from the Ministry of Foreign Affairs of the Democratic Republic of East Timor to the Australian Embassy in Dili, *Exchange of Notes* 20 May 2002.

would otherwise have received if the Timor Sea Treaty had been in force would be placed in a US dollar denominated account payable to East Timor on entry into force of the Timor Sea Treaty.[30]

Upon entry into force, the terms of the Timor Sea Treaty would apply and be taken to have applied as from the date of independence.[31] The latter provision was intended to reflect that when the Timor Sea Arrangement had been concluded it was intended that the Timor Sea Treaty would enter into force on the date of East Timor's independence. Once the Timor Sea Treaty enters into force, investors in the Timor Gap are likely to demand some mechanism to ensure that the decisions made during the period before entry into force by the Joint Authority will be adopted as decisions of the Designated Authority or Joint Commission.

The Timor Sea Treaty differs very little from the Timor Sea Arrangement. The main differences are the addition of a taxation code and changes to entry into force, application of taxation law and air traffic services.[32] Changes to the entry into force provision reflect the agreement that once the Timor Sea Treaty enters into force it 'will be taken to have effect and all of its provisions will apply and be taken to have applied on and from the date of signature'. Once the Timor Sea Treaty enters into force, this provision would operate as if the Designated Authority, the Joint Commission and the Ministerial Council were established on 20 May 2002 and operated from that time, rather than from the date of entry into force of the Treaty. In addition, new production sharing contracts held with the Designated Authority may be retrospectively dated 20 May 2002 rather than from the date of entry into force of the Treaty. If this operates in practice as envisaged in the terms of the Treaty and the Exchange of Notes, East Timor will have achieved as close as was possible in the circumstances its aims of a 'clean-slate' approach as from 20 May 2002.

Ultimately, as with all negotiations, compromise to the expectations of both parties is necessary. Australia and East Timor through negotiation have enabled petroleum activities in the area to continue notwithstanding political and legal impediments. The Exchange of Notes together with the Timor Sea Treaty provide a foundation for a successful joint development area. The development of the Timor Sea Treaty was also significantly influenced by the demands of investors in the Timor Gap and their requirement for a stable legal and fiscal framework for continuing investment in current and planned petroleum projects. The revenue streams flowing from these activities to both countries are significant, to the extent that both countries were willing to accommodate the concerns of investors in reaching an agreement. The implementation of the Timor Sea Treaty and the continued success of the Timor Gap as a joint development area will however depend on the continued cooperation and goodwill of both Australia and East Timor.

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30 Paragraphs 4(c) and (d), Note from the Ministry of Foreign Affairs of the Democratic Republic of East Timor to the Australian Embassy in Dili, *Exchange of Notes* 20 May 2002.

31 Paragraph 5, Note from the Ministry of Foreign Affairs of the Democratic Republic of East Timor to the Australian Embassy in Dili, *Exchange of Notes* 20 May 2002.

32 Annex G and Articles 25, 13 and 21 of the Timor Sea Treaty.

Restitution and Dispossession: International Property Norms in East Timor's New Constitution

Daniel Fitzpatrick*

East Timor's new Constitution has been hailed as "one of the most progressive" in the world. It includes rights to housing and private property,[1] equality before the law,[2] and equality between men and women "in all areas of political, economic, social, cultural and family life".[3] Most significantly, the new Constitution states that the "legal system of East Timor shall adopt the general or customary principles of international law";[4] and that property shall only be expropriated for public purposes and on payment of compensation "in accordance with law".[5] Amid predictions from Indonesia of renewed civil conflict, and in an environment still marked by property destruction and population displacement, the East Timorese deserve credit for peacefully developing this foundation for their new State. Without doubt, these features of the new Constitution reflect their general desire to establish a system of government which will stand in marked contrast to the brutality of Indonesia's period of occupation.

Also deserving of some credit is the United Nations Transitional Administration in East Timor (UNTAET). This body, established after the East Timorese voted overwhelmingly for independence in the popular consultation of 30 August 1999, appears to have been relatively successful in fulfilling five elements of its mandate under UN Security Council Resolution 1272, namely providing security and maintaining law and order, establishing an effective administration, assisting in the development of civil and social services, coordinating and delivering humanitarian and development assistance, and supporting capacity-building for self-government. After considerable criticism of UN transitional administrations in Bosnia and Kosovo, this relative success is welcome news for proponents of UN involvement in "peace-building" missions.

Yet, in respect of one element of its mandate – establishing conditions for sustainable development – UNTAET appears to have been less successful. In particular, and in notable contrast to the UN missions in Bosnia and Kosovo, it has failed to establish a land claims commission, or indeed any form of effective regulation of privately held land. In fact, currently there is no functioning land registry, no system to record or verify private land transactions, no effective regime to govern foreign interests in land, no untangling of ad hoc housing occupation by returning refugees, and no legal framework to determine competing claims to land. While this result has arisen largely from a desire to leave fundamental issues of land ownership to a democratically elected government of East Timor, it has led in the interim to a chaotic, unregulated and unrecorded market for private land, particularly in Dili.

What legal regime should govern these property ownership issues in East Timor? The new Constitution has introduced three potential foundational principles: first, the requirement that property only be expropriated for public purposes and on payment of compensation; second, the reference to customary international law (at least to the extent that it incorporates the doctrine of acquired rights in State succession); and third, the right to housing "of adequate size that meets satisfactory standards of hygiene and comfort and preserves personal intimacy and family privacy". All three of these provisions reflect equivalent articles in the Portuguese Constitution of 1997.[6] Yet East Timor is quite different from Portugal, and there is a risk that adoption of

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1 Arts. 58 and 54.

2 Art. 16.

3 Art. 17.

4 Art. 9.

5 Art. 54(3).

6 See respectively arts 62, 8, and 65.

Portuguese Constitutional norms will have unintended consequences, particularly in the area of claims to property.

This paper considers competing property claims in East Timor in the light of these references to property, housing rights and customary international law in the new Constitution. The topic is very large, and thus the most pressing issue will be highlighted: that is the tension between the incorporation of customary international law and the protection of private property rights, which arguably favours restitutionary claims by holders of pre-1975 Portuguese titles; and the inclusion of a right to housing, which could favour the claims of current occupiers over those asserted by holders of Portuguese or Indonesian titles. In order to explore this tension, and the associated issue of acquired rights in State succession, it will also be necessary to consider the legal status of the three entities that have sought to control East Timor, namely Portugal, Indonesia and UNTAET.

An Overview of Competing Property Claims in East Timor

The nature of competing property claims in East Timor may be highlighted by reference to two current disputes. The first concerns extensive coffee plantations in the highland district of Ermera, East of Dili. These plantations were established after 1910 on land expropriated by Portuguese interests, allegedly with inadequate compensation to the traditional owners. After the Indonesian invasion in 1975, the plantations were purportedly taken over by interests associated with the Indonesian military, although continuing civil resistance meant that effective Indonesian control was often in doubt. Currently, they are occupied by local smallholder interests, many of whom claim traditional associations with the land; however their claims have been disputed, at least in part, by some former Portuguese plantation owners. Of these, the most significant is the well-known Portuguese company, SAPT (Sociedade Agricola Partia e Trabalho), which has claimed inter alia for the return of its former 10,000 hectare coffee plantation.

The second example concerns a house in Dili which, prior to 1975, was held under Portuguese titles by an East Timorese civil servant in the Portuguese administration. The grant of such titles to senior civil servants was common, and a major source of Portuguese titles held by East Timorese nationals. After the Indonesian invasion, the house was allocated to an Indonesian official working in the Indonesian administration. It was subsequently sold under Indonesian title to an East Timorese man who claims that he acquired the house in good faith and without notice of any prior Portuguese title claim. This man fled to West Timor after the militia violence in late 1999, and the house is currently occupied by persons who were internally displaced during that violence. These persons have no alternative place of residence.

Categories of Land Claimants in East Timor

These two examples illustrate the four categories of property rights claimants in East Timor, namely traditional interests, holders of Portuguese titles, holders of Indonesian titles, and current occupiers. The following part provides some brief but necessary information on each of these categories of claimants.

Traditional Interests

Almost all rural East Timorese occupy land that has never been registered in a formal titles system, and enjoy relations with that land which are guided by traditional affiliations and institutions.[7] There is little doubt that this customary tenure must receive some form of recognition in independent East Timor. However, the nature of this recognition will be complicated by a number of issues, the most significant being the relatively high number of "outsiders" living on traditional lands. In large part, this is due to Portuguese and Indonesian re-settlement policies: during the Indonesian occupation in particular more than half of the East Timorese population was displaced, both in the late 1970s and after the militia violence in late 1999.[8]

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7 See Fitzpatrick, D., *Land Claims in East Timor*, Asia Pacific Press, Canberra 2002, pp. 26-42.

8 For example Indonesian military records state that by December 1978 a staggering total of 372,921 East Timorese – as much as half of the population – had been relocated into "strategic camps" and "model villages": see Taylor, J., 1999. *East Timor : The Price of Freedom* 90-92). While many of these people have now returned to their original lands, the author is aware of a number of re-settled traditional groups in the Districts of Manatuto and Los Palos who either wish to return to their traditional land or would prefer to remain in their re-settled locations pursuant to formal land titles. As to the displacement in late 1999 see Fitzpatrick, supra n. 7, 5-6.

A less well-known factor, however, is the phenomenon of migratory interactions between traditional East Timorese societies, particularly as between so-called "wife-giving" and "wife-taking" groups. These interactions mean that members from as many as four different ethnic groups may be found living in a particular area of "traditional" land.[9] The result for occupation patterns is analogous to South Africa, where the policies of apartheid also led to significant inter-mixing of traditional groups; and it is notable that in that country the recognition of customary tenure has been qualified by measures to protect the rights of outsider groups to housing and freedom from unreasonable evictions.[10]

Holders of Portuguese Titles

According to Indonesian government records, some 2,843 land titles were issued and registered by the colonial Portuguese Timor administration between 1900 and 1974.[11] These records do not provide useful information on the relative numbers of the different Portuguese titles, the nationalities of their holders, or the area of land they covered. As a result, it is difficult to assess the allegation that land ownership in Portuguese Timor unjustly favoured a colonial elite, which is said to have included commercial agricultural companies such as SAPT, the Catholic Church, traditional leaders favoured by the Portuguese administration, a "mestizo" elite of mixed Portuguese and indigenous descent, and Chinese-Timorese trading concerns.[12] A particular focus of this allegation is the claim that the well-known Carrascalao family held very large tracts of land in Portuguese Timor, most notably in Dili.

It is sufficiently clear, however, that in many cases Portuguese titles did rest on a foundation of colonial dispossession. After 1900, the Portuguese changed their economic policies to encourage cash-crop agriculture and an export-oriented plantation sector.[13] This led to a new law on overseas land concessions which inter alia provided that all land not proved to be based on Portuguese titles was held by the State.[14] Further laws of a dispossessory character included a 1910 decree by the Governor of Portuguese Timor that all transfers of "native tenure" be approved by the Governor; and a 1961 law for the "Overseas Provinces" (including Portuguese Timor) which classified traditional lands as "empty land", thereby allowing them to be expropriated without payment of monetary compensation.[15]

What happened to Portuguese title properties after the Indonesian invasion in December 1975? Many were abandoned, and were either (1) allocated to other users by the Indonesian army under its SKEP 40 allocation policy, (2) occupied by local residents or displaced peoples, or (3) possibly became subject to Indonesian titles under systematic registration programmes. Some also were sold, either directly or through powers of attorney. Others again were converted to Indonesian titles under Indonesian Government regulations. Importantly, however, the number of these conversions was relatively small, as Indonesian statistics suggest that only 142, out of a possible 1,503 in Dili, were so converted; and that, moreover, there was never any application for conversion by non-Indonesian citizens (i.e. East Timorese refugees in Portugal or Australia).[16]

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9 Fitzpatrick, supra n. 7, 27-32.

10 See for example the *Interim Protection of Informal Land Rights Act 1996.*

11 Da Cruz, P., 1999. *Studi Tentang Penguasaan dan Penggunaan Tanah Bekas Hak Portugis yang Ditunda Konversinya Dengan PP No. 34 Tahun 1992 di Kabupaten Dili Propinsi Timur-Timur*, ("Study concerning the Control and Use of Former Portuguese Title Land that was Converted under Presidential Decision No. 34 of 1992 in the Dili Region of East Timor Province"), Thesis completed at Sekolah Tinggi Pertanahan Nasional Yogyakarta, ("National Land College, Yogyakarta") 44. Copy on file with author.

12 George Aditjondro, *In The Shadow Of Mount Ramelau : The Impact Of The Occupation of East Timor* (1994) 55.

13 Taylor, supra n. 8, 10-11.

14 See the discussion in Dunn, J., 1996. *Timor: A People Betrayed*, 196-7.

15 This classification was made under the Regulamento da Occupacao e Concessao de Terrenos nas Provincias Ultramarinas Number 43894 of 1961 ("Regulation on Land Occupation and Concessions for Overseas Provinces"), which was ultimately applied to Portuguese Timor by Diploma Legislativo No 865 of 1971 (amending and/or replacing two earlier legislative decrees).

16 Da Cruz, supra n. 11, 49.

Holders of Indonesian Land Titles

According to Indonesian government statistics, a total of 34,965 Indonesian property titles were issued in East Timor between 1976 and 1996, covering approximately 10 per cent of East Timor's total land mass. Of these, some 8527 were issued in Dili, encompassing approximately 45 per cent of the total urban area.[17] By 1998, according to de Sousa Xavier, the total number of Indonesian titles had increased to 44,091 titles.[18] It is not known what the exact number of Indonesian titles was at 31 August 1999, the date of the UN-organised popular consultation, as the Indonesian government has refused to provide copies of its land records to the East Timor Transitional Administration.

Three brief points may be made about these statistics on Indonesian land titles in East Timor. First, it is not clear how many Indonesian titles were held in good faith by resident East Timorese nationals. The question is important because invalidating all claims based on Indonesian property titles could potentially dispossess significant numbers of bona fide East Timorese landholders. Second, whatever the situation concerning residential titles, it is relatively clear that almost all commercial property titles were held by Indonesian interests, usually associated with the Indonesian military or the Soeharto family; and in some cases the area covered by these titles was absurdly large.[19] Third, well-informed commentators estimate that up to 30 per cent of Indonesian property titles were issued or obtained corruptly without the agreement of the then occupiers of the land, and those occupiers often continued to live "informally" on the land during the period of Indonesian occupation.[20]

Current Occupiers

These comments serve to highlight the importance of the last category of potential land claimants, namely claims based on non-traditional or "informal" occupation. In particular, the number and extent of these claims will be disproportionately high because of:

- migratory interactions within traditional East Timorese societies;
- colonial Portuguese policies encouraging the use of migrant labour (e.g. Uato Lari), sedentary forms of agriculture (e.g. Maliana), or the grant of urban land titles to senior civil servants (e.g. Dili);
- massive population displacement after the Indonesian invasion in 1975 and the militia violence of late 1999, which in both cases led to widespread ad hoc occupation of surviving housing stock; and
- the large numbers of unrecorded and unregulated transactions in private land since August 1999 (including "leases" taken out by foreigners).

The result is that any land claims framework for East Timor which fails to protect the interests of these occupiers will most likely lead to large numbers of evictions, and potentially therefore cause substantial social conflict.

The Current Legal Context for Property Claims in East Timor

What is the current legal context for property regulation in East Timor? In the first instance, no specific laws or legal institutions have been established to determine competing property claims. In particular, in September 2000 the United Nations Transitional Administrator (on advice from the National Cabinet) rejected a draft

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17 Nasir Baisaku, Pelaksanaan Pensertipikatan Tanah Setelah Berlakunya Undang Undang Pokok Agraria di Propinsi Timor Timur (The Realisation of Certification of Land after the BAL in the Province of East Timor) (1996) (Unpublished manuscript, on file with author) 78.

18 de Sousa Xavier, P., 2000. *Aspek-Aspek Terbaru Pertanahan Timor Lorosae* [Current Aspects concerning the land in Timor Lorosae] (unpublished, on file with author) 2.

19 For example, over half of all the land in East Timor that was held under Indonesian title was held pursuant to only 9 "management rights" (hak pengelolaan), and 4 commercial use rights (hak guna usaha). This land was undoubtedly held for speculative or corrupt purposes, and almost certainly occupied "informally" by large numbers of East Timorese: see generally Fitzpatrick, supra n. 7, 90-95.

20 Id.

regulation which envisaged systematically registering uncontested titles, beginning first in Dili, while referring disputed claims to a proposed land claims commission. As a result of this decision, the Land and Property Unit of the East Timor Transitional Administration (ETTA) was authorised only to file and record property claims, but not to continue preparations either for a land claims commission, a systematic titles registration project, or indeed any form of normal land registry function. Its major task therefore remains supervision of the system for temporary allocation of public and abandoned properties; and it otherwise performs no role in relation to recording interests or transactions in private land. There has thus been no functioning system of private land administration in East Timor since August 1999.

There is, however, a general law which in theory governs basic property ownership issues. This is UNTAET Regulation No 1, which remains prima facie valid pursuant to article 165 of the new Constitution "Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein". This regulation establishes a governing law for East Timor that is based on the same formulation applied by the United Nations Mission in Kosovo, namely the law of the previous regime as modified by certain international human rights standards. Article 2 thus requires all persons undertaking public duties or holding public office in East Timor to observe internationally recognised human rights standards as reflected, in particular, in the Universal Declaration on Human rights, and a number of well-known covenants and conventions relating to civil and political rights, economic, social and cultural rights, racial and gender discrimination, torture and children's rights. Article 3 then states that until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor in so far as they do not conflict with the standards referred to in Article 2, the fulfilment of the mandate given to UNTAET under United Nations Security Council Resolution 1272, or any regulation and directive issued by the Transitional Administrator.

In referring to "the laws applied in East Timor prior to 25 October 1999", the drafters of UNTAET Regulation No 1 effectively adopted Indonesian law, but were careful not to imply that Indonesia had been the sovereign power of East Timor. This choice of Indonesian law remains a controversial issue which is not discussed at length in this paper.[21] For current purposes the question is this: how feasible would it be to apply Indonesian law – as modified by international human rights standards – to property ownership issues in East Timor? An immediate practical difficulty is the fact that the institutions which underpinned the administration of Indonesian land law no longer exist in East Timor. These include the private land notaries who were required to prepare and witness all transfers of interests in private land; the land offices that administered the Indonesian titles register; the land records (*warkah*) and land titles book (*buku tanah*) that were almost entirely destroyed or removed during the militia violence; and the Indonesian corporate entities which foreigners were required to establish in order to hold interests in private land.

Far more fundamentally, Indonesian law could not provide the basis for a reconstituted form of land administration because of its status as the law of a violent and often brutal invader. Well over one half of East Timor's population either died in the famine following Indonesia's 1975 invasion, or were forcibly relocated under Indonesia's re-settlement policies. Many lost land to the Indonesian authorities without lawful process or adequate compensation. In these circumstances, how could the East Timorese possibly accept Indonesian law as the foundation for determining ownership and title in the independent state of East Timor? For all the technical arguments that Indonesian law is prima facie the governing law under UNTAET Regulation No 1, the political reality is that most East Timorese would never accept Indonesian law as anything but temporary, and certainly not suitable to determining fundamental questions of land ownership and administration.

Thus the incongruous and unsustainable situation arises: there is no specific institution or law to govern competing property claims, and the general framework that is available is both impractical and unacceptable to most East Timorese. So it is that the fundamental question – who owns what land in East Timor? – still cannot be answered with any certainty; and this is why the new Constitution has taken on such importance in relation to

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21 Broadly speaking, the intention was pragmatic rather than political. It was felt that the interests of legal certainty and continuity were best served by retaining the system in which almost all available East Timorese lawyers and administrators were trained, while ensuring that its more objectionable aspects were removed by overriding international human rights standards: see HansJorg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", 95 *American Journal of International Law* 46.

the issue of property ownership and regulation. The challenge will be to develop, from foundational references to property in the Constitution, a sustainable system to resolve property claims and re-establish land administration in East Timor.

Issues of Sovereignty and Occupation: The Controlling Entities of East Timor

Before moving on to discuss the new Constitution, it is necessary to consider one more preliminary issue, namely the legal status of the three entities that have controlled East Timor: Portugal, Indonesia and the UNTAET. This is particularly important in terms of determining how the international law doctrine of acquired rights in State succession would apply in East Timor.

Portugal

As the colonial power Portugal held sovereign authority over Portuguese Timor; and for that reason all property rights issued or acquired during the period of Portuguese sovereignty were prima facie valid. But this begs the questions: when did Portuguese sovereignty come to an end? What effect did self-determination and/or Indonesian occupation have on the status of Portuguese property titles? In the first instance, it appears that Portugal's sovereignty continued notwithstanding the United Nation's declaration in 1961 that Portugal was the "administering power" of East Timor, with an obligation to supervise the decolonisation and self-determination process.[22] This is because there is no vacuum in sovereignty during the self-determination process itself; and, while sovereign authority may be restricted by decolonisation obligations, it is transferred only when self-determination is complete and the administering power yields to the newly independent State.

Indonesia

This paper does not consider whether self-determination was complete as at 28 November 1975, the date of East Timor's first declaration of independence by the leaders of Fretilin. For current purposes the question is irrelevant because it will be concluded, in any event, that the predecessor sovereign authority for East Timor was Portugal (whether or not self-determination was complete in 1975, 1999 or 2002). For what it is worth, however, it is doubtful that the first declaration of independence constituted a valid exercise of the right of self-determination as, although it was most likely supported by most East Timorese, it was not underpinned by the requisite democratic processes.[23] In particular, while it is true that Fretilin had won up to 90 per cent of the vote in local elections, there was no plebiscite concerning the specific issue of independence.[24]

Did Indonesia at any stage acquire sovereign authority over East Timor, particularly so as to displace the sovereignty vested in Portugal? It is suggested that Indonesia never acquired sovereignty over East Timor for two fundamental reasons. First, since the formation of the United Nations, annexation by conquest has no longer been recognised as a valid means of obtaining sovereign authority over a territory. The UN Charter is quite clear: the "threat or use of force against the territorial integrity, or political independence of any State" is forbidden.[25] Subsequent UN General Assembly Resolutions have elaborated on this principle. First, General Assembly Resolution 3314 on the Definition of Aggression (1974) defines aggression to include "attacks by armed forces or any annexations of territory accomplished through the use of force.[26] The Resolution adds that military, political or economic considerations may not justify any such aggression.[27] Second, General Assembly Resolution 2625 (1970), which contains the Declaration on Principles of International Law concerning Friendly

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22 See UN General Assembly Resolution No 1542, 1961. *Transmission of Information Under Article 73e of the Charter*, GA Resolution 1542, UN GAOR, 15th Sess., 948th mtg., UN Doc. A/4684; confirmed in UN Security Council Resolution 384, 1975. U.N. SCOR, 30th Sess., 1869th mtg. at 1, U.N. Doc. S/11915; see also Simpson, G., 1994. 'Judging the East Timor Dispute: Self-Determination at the International Court of Justice', 17 *Hastings International & Comparative Law Review* 2: 323; Clark, R., 1980. 'The "Decolonisation" of East Timor and the United Nations Norms on Self-Determination and Aggression', 7 *Yale Journal of World Public Order* 2.

23 See infra footnotes and accompanying text on the issue of the requirements for a valid act of self-determination.

24 Hill, H., 1978. *Fretilin: The Origins, Ideologies and Strategies of a Nationalist Movement in East Timor* 22-23.

25 Art. 2 (4).

26 UN GAOR, 29th Sess., Supp. 31, UN Doc. A9631, art. 3(a).

27 Id., art. 5(1).

Relations and Co-operation among States in accordance with the Charter of the United Nations (XXV), states that territorial acquisition relating from the use of force shall be unlawful.[28]

Second, Indonesia's argument that the East Timorese themselves exercised their right of self-determination to request annexation by Indonesia is not borne out on the facts. These facts are that on 11 August 1975 the UDT political party launched a coup which briefly succeeded until a counter-coup by Fretilin in September 1975.[29] This counter-coup was reportedly assisted by a majority of the East Timorese soldiers in the then Portuguese armed forces.[30] On 28 November 1975, Fretilin issued a declaration of independence for East Timor. In response, UDT and Apodeti issued a joint statement, on behalf of a group calling itself the "Anti-Communist Movement", calling for intervention by the Indonesian government and integration of East Timor into Indonesia. On 7 December 1975, Indonesian armed forces invaded East Timor. The Anti-Communist Movement then declared a Provisional Government of East Timor on 17 December 1975. On 31 May 1976, this government convened a Popular Assembly which petitioned Indonesia for integration. On 16 July 1976, the Indonesian Parliament passed Law No 7 of 1976 which accepted this request, and purported to incorporate East Timor into Indonesia. The official basis for the law was that the East Timorese people, through the Anti-Communist Movement, had expressed their desire for self-determination and integration into Indonesia; and that this act of self-determination had been made in circumstances where a plebiscite or referendum was unnecessary.[31]

The flaw in Indonesia's argument is that some kind of plebiscite or referendum was always going to be necessary for an effective act of self-determination involving integration with Indonesia. Two key conditions for self-determination are that there be adequate institutional capacity to ensure a responsible choice through "informed and democratic processes", and that a request for integration should be with full knowledge of the change in status, "expressed through democratic processes impartially conducted and based on universal suffrage.[32] Neither of these conditions were met until the popular consultation of 31 August 1999. In 1976, the situation was simply one where one side to a political conflict, disgruntled by loss of control after its own unsuccessful coup attempt, requested Indonesia to intervene and overturn a nascent civil administration and government. That is not a sufficient basis for an act of self-determination.[33]

If, then, Indonesia never acquired sovereignty over East Timor, what in international law was its status in that territory? The question could potentially be significant because, if Indonesia was a belligerent occupier within

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28 U.N. GAOR, 25th Sess., Supp. No. 28, 1883rd plen. mtg. at 124, U.N. doc. A/8028, at 271. Indonesia could also not have acquired sovereignty over East Timor by dint of its long-term occupation. While it is true that historically effective occupation has been accepted as a basis for sovereignty, that has usually occurred in respect of "terra nullius" territories, and it does not apply in relation to illegal invasion and annexation: see Ian Brownlie, *Principles of Public International Law* (4th ed. 1990), 138 – 9. Indeed, modern international law has not developed an analytical framework to determine when a belligerent occupation, masquerading as an annexation, becomes so established that legal products created under the law of the occupier should be recognised as valid and legitimate: see Gerson, A., 1978. *Israel, the West Bank & International Law*, 1978: 14.

29 Aditjondro, supra n. 12, 55.

30 Australian ICJ Submissions, 1995. *East Timor (Portugal v. Australia), Counter-Memorial of the Government of Australia*, available at http://www.icj-cij.org/icjwww./icases/ipa/ipaframe.htm: paragraph 34.

31 Id., paragraph 55.

32 UN General Assembly Resolution No 1541, 1960. *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*, UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 1960: 27; see also Rothert, M., 2000. "U.N. Intervention in East Timor", 8 *Columbia Journal of Transnational Law*: 257, 266-67.

33 It should also be noted that the ICJ decision in the Case concerning the Timor Gap between Portugal and Australia does not support Indonesia's claim to sovereignty over East Timor. The majority opinion simply refused to consider Indonesia's conduct, and therefore whether it had gained sovereignty over East Timor, on the basis of the well-known Monetary Gold principle (ICJ Reports 1954: 32). This meant, inter alia, that it would not rule on the merits of Indonesia's occupation in East Timor, including the critical question of whether it had gained sovereignty over it (paragraphs 33-35). However, it did note that both Portugal and Australia had accepted that East Timor remained a non-self-governing territory, and its people had the right to self-determination (paragraphs 36-37).

the meaning of the international law of belligerent occupation, then some of its laws and actions concerning Portuguese property titles may have been valid by reference to the principle of "military necessity".[34] The alternative view is that Indonesia was simply an unlawful occupier rather than a belligerent one; and that none of Indonesia's laws or actions in East Timor were valid in international law terms.[35] This would include Indonesian laws or actions relating to Portuguese property titles including (1) their conversion into Indonesia titles, and (2) their expropriation for hospitals, schools and other public purposes.

The question is complex and fortunately not necessary to answer for the specific purposes of this paper. For our purposes, the simple point is that *as at the end of Indonesia's occupation*, the underlying validity of Portuguese titles was unaffected by any law or action of Indonesia. This is because, regardless of whether or not the original law or action was valid under the law of belligerent occupation, the principle of military necessity by definition only justifies acts committed during the occupation itself. Once the occupation ends, there is no longer any form of military necessity, and all legal products supported by that principle thereby lose validity unless they can find some other form of legal justification.[36] By logical implication, it follows that (1) laws converting Portuguese titles to Indonesian titles, and (2) any Indonesian titles issued during the occupation, could not remain valid after the end of the occupation because there would no longer be a military necessity to underpin their validity.

UNTAET

If, in international law terms, Portuguese property titles as at the end of the occupation were unaffected by any law or action of Indonesia, what has been the effect on them of UNTAET's laws and actions relating to property? As a United Nations entity, UNTAET could not have acquired sovereignty over East Timor.[37] Yet in practical terms UNTAET appears to have exercised sovereignty in all but name. Under Security Council Resolution 1272, it held all legal and executive authority, including in relation to the administration of justice. Under UNTAET Regulation No 1, these powers were exercised by the Transitional Administrator (art. 1). Neither instrument states, in terms, that UNTAET holds its authority on trust for, or on behalf of, the East Timorese people or their future State. Instead, they refer only to general obligations to consult and cooperate closely with representatives of the East Timorese people (article 1).

As has been seen, UNTAET Regulation No 1 did not resurrect Portuguese law or Portuguese titles, but adopted a modified form of Indonesian law to govern the territory of East Timor. What effect did this have on Portuguese era property titles? On its face it suggests that, for as long as UNTAET Regulation No 1 forms part of the law of East Timor: (1) Indonesian property titles are prima facie valid, (2) Portuguese property titles are only valid to the extent that they satisfy Indonesian laws relating to their recognition and conversion, and (3) all temporary allocations made by UNTAET override Portuguese titles to the extent of any inconsistency. Needless to say, these consequences appear to be quite inconsistent with the international law conclusions that Indonesia was a belligerent or unlawful occupier, and that Portugal retained underlying sovereign authority in East Timor.

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34 See Fitzpatrick supra n. 7, 45-46, 59-60.

35 The distinction turns on the applicability of the law of belligerent occupation (which consists of the Hague Convention on Land War of 1899 and 1907, in particular the Regulations attached to the 1907 Convention, and the Fourth Geneva Convention of 1949) to Indonesia's occupation of East Timor. In the author's view, the law of belligerent occupation does apply because of definitions to be found in article 1 of the Regulations attached to the 1907 Hague Convention, and in articles 2(1) and 47 of the Fourth Geneva Convention: see Fitzpatrick, supra n. 7, 46-56. The alternative view is that the Second Additional Protocol to the Fourth Geneva Convention governing non-international armed conflicts evinces an intention to exclude the provisions of the Fourth Geneva Convention from conflicts such as East Timor, which did not involve two sovereignty powers as such but rather local resistance to an invasion.

36 That this is so is supported by the reasoning of the Israeli Supreme Court in *Dweikat v. Government of Israel* (the *Elon Moreh* case) (9 *Israel. Yearbook On Human Rights*, 1979: 345). This case concerned a challenge to the lawfulness of Israeli settlements on the West Bank. The Court accepted that the law of belligerent occupation applied to Israel's occupation of the West Bank. It accordingly applied article 52 of the Hague Regulations, which state that private property may only be requisitioned for military purposes, to hold that the acquisition of land to build the settlements was unlawful. This was because military necessity only justified acts committed during the period of military occupation, and thus could not justify requisitioning property for a development that was always intended to be permanent.

37 See Brownlie supra n. 28, 175.

This said, it is important to characterise the effects of UNTAET Regulation No 1 as intended to be temporary only. They represent a short-term practical response to post-conflict demands for legal continuity, and are not meant to assert permanent property rights that are inherently inconsistent with Portuguese property titles. This may be seen from the facts that, first, UNTAET did not have sovereign authority over East Timor, but rather held a temporary if all-encompassing mandate to administer the territory in preparation for independence. Second, UNTAET Regulation No 1 itself refers to its provisional nature when it states that Indonesian law shall apply "until replaced by ... subsequent legislation of democratically established institutions of East Timor" (art. 3). Third, all allocations of property by UNTAET were structured so as to be both temporary and not to prejudice the long-term underlying rights of the true owners. Thus, for example, the heart of the allocation guidelines is a "competing equities" approach which balanced the interests of returning owners with those seeking temporary use of abandoned properties.[38]

Conclusion on the Issue of Sovereignty

The perhaps surprising conclusion is thus reached that because, in the first instance, Portugal's status in East Timor at the time of the Indonesian invasion was that of a sovereign power with supervisory responsibility for the process of decolonisation; second, in international law Indonesia never gained sovereignty over East Timor; and, third, UNTAET itself could not have held sovereign authority in East Timor, the transfer of sovereignty to the independent state of East Timor comes directly from Portugal itself. To those – including the author – who find this a somewhat artificial conclusion, particularly as Portugal has not been in effective control of East Timor for more than 25 years, some solace may be found in Brownlie's comment that: "A states legal order may be projected on the plane of time for certain purposes although its physical and political existence has ceased."[39]

The questions thus arise: assuming that the predecessor sovereign authority of the independent State of East Timor is Portugal, does the doctrine of acquired rights in States succession require East Timor to recognise Portuguese era property titles? In more practical terms: do the references to property rights and customary international law in the new Constitution grant holders of Portuguese titles municipal rights to enforce their claims? Answering these questions requires discussion of three issues: the nature of the doctrine of acquired rights, the relevance of Constitutional guarantees relating to private property, and the extent to which the doctrine of acquired rights forms part of customary international law.

The Doctrine of Acquired Rights in State Succession

There is a principle in international law that private property rights are not invalidated by a change of sovereignty. Its classic exposition was given in the Permanent Court of Justice (the predecessor to the ICJ) in its Advisory Opinion No. 6, Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland.[40] This case concerned land ceded to Poland by Germany at the end of World War I; and the issue was whether Poland had to recognise leases over that land granted to German settlers by Prussian authorities. In holding that Poland was required to respect the leases, the Court stated that "even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights ... are invalid as against a successor in sovereignty".[41]

That therefore there is a doctrine of acquired rights in international law is not in doubt. Where confusion arises is in relation to practical issues of enforcement and expropriation. How enforceable are acquired rights in municipal Courts or international tribunals? To what extent may a successor State expropriate or otherwise vary

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38 In applying this fundamental principle, UNTAET and ETTA officers were required to assess the likelihood of return by lawful owners, the type of use and nature of proposed investment (if any) by the applicant for a property allocation, and the degree of community objections to the allocation. Pursuant to these criteria, three categories of public and abandoned land allocations were established: short term (up to three months), medium term (between three and twelve months), and long term (between one and five years). Credit must go to Andrew Ladely for creating the original "competing equities" approach. The first draft of the guidelines was written by the author. Nigel Thomson oversaw their application.

39 Brownlie, supra n. 28, 81.

40 1923 P.C.I.J. B.

41 Id., 36.

acquired rights, with or without the payment of compensation? In most historical examples, these issues have been determined by treaties of cession or incorporation. Absent such treaties, they fall to be determined by the Constitutional norms of the successor State. In this regard three different situations may be distinguished: where no municipal legislation is applicable, where municipal legislation is applicable, and where a Constitutional provision applies to the acquired right in question.

Where No Relevant Municipal Legislation is Applicable

Where no municipal legislation applies to acquired rights, the question of enforceability will turn on the approach taken by municipal Courts to the application of international law in their system. In English common law, for example, customary rules of international law forms part of municipal law in so far as they are not inconsistent with Acts of Parliament or prior judicial decisions of final authority.[42] To the extent that the doctrine of acquired rights satisfies these requirements, English Courts would recognise the right of holders of acquired rights to enforce their claims. Such enforcement could either take place against private parties who infringe the property rights in question, or against the successor State itself. In respect of the latter, however, it is important to distinguish this prima facie enforceability from the question of jurisdiction. In particular, in some systems municipal Courts will decline to exercise jurisdiction over an otherwise enforceable acquired right where it is sought to be enforced against the successor State itself. In the common law world, this notion is known as the act of State doctrine, and is justified on the basis of positivist principles of State sovereignty.[43]

Where Municipal Legislation is Applicable

Similar concepts of sovereignty and State authority found the principle that, in general terms, States may legislate with respect to property within their territorial jurisdiction. The only international law requirements are that any such legislation does not breach applicable treaty obligations or the general rules of customary international law. These rules include principles of non-discrimination and lawful process; and the obligation to pay compensation for expropriation of property belonging to non-nationals. In respect of property belonging to nationals, however, there is no such requirement of compensation: a State may do as it likes in relation to the property of its citizens. The result is that, even if a successor State is under an obligation to recognise acquired rights, there is no bar to it subsequently adjusting those rights in a non-discriminatory and lawful fashion, so long as compensation is paid to affected non-nationals.[44]

Again it is important to distinguish international obligations from municipal enforceability. The principle of sovereign authority means that municipal legislation which evinces a clear intention to affect or override acquired rights will be applied by municipal Courts, even if that legislation were in breach of international law. While it is true that a State may not excuse itself from its international law obligations by referring to inconsistent municipal law, its sovereign authority usually allows it to implement and enforce that municipal law within its own jurisdiction.[45] In other words, unless it is shackled by its own Constitution, East Timor may legislate to vary or expropriate Portuguese property titles held either by East Timorese nationals or non-East Timorese nationals. Absent relevant Constitutional provisions, the only consequences if such legislation were in breach of international law would be in the international arena, and would not affect the validity of the legislation itself in the municipal Courts.

Similarly, whether an enforceable right of compensation is vested in holders of expropriated acquired rights will be determined – at least in the first instance – by reference to municipal law. This applies both to nationals and non-nationals, the only difference being that a law which denies non-nationals a right of compensation will be in breach of international law. A non-national will thus be left with a right to seek compensation through international tribunals; and any such claim will be subject to the proviso that, unless enforcement machinery is

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42 Brownlie, supra n. 28, 43-5.

43 Singer, M., 1981. "The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice", 75 *American Journal of International Law* 283: 283, 294.

44 For a general discussion of these principles see Oppenheim, L., 1947. *International Law: A Treatise*, 501, 522; O'Connell, D., 1956. *The Law of State Succession*, 78-9, 249; O'Connell, D., 1967. State Succession in Municipal Law and International Law, 441.

45 See Brownlie, supra n. 28, 35, 51, 56-57.

provided by bilateral or multilateral trade and investment agreements, jurisdiction will be denied in the case of non-State applicants.

The Relevance of Constitutional Guarantees of Property Rights

Are these conclusions affected by East Timor's new Constitution? In particular, will holders of acquired rights be protected by the Constitution's statements that "every individual has the right to private property" (s. 54 (1)), and that "expropriation of property for public purposes shall only take place following compensation in accordance with the law" (section 54 (3))? On its face, these provisions do appear to protect holders of Portuguese property titles because the basic principle is that private property rights are unaffected by changes in sovereignty; and, if this is so, such rights are therefore "property" for the purposes of section 54 of the new Constitution.

This interpretation is supported by a long line of United States authorities which upheld the duty of the United States to respect existing private property rights in its newly absorbed territories. Importantly, because this duty had its basis in Constitutional references to rights to property, Act of State doctrines were not applicable and the holders of acquired rights had no jurisdictional difficulties in asserting their claims.[46] Similar reasoning founds O'Connell's conclusion that a State may only act to alter acquired rights in accordance with any private property guarantees in its Constitution.[47]

Yet, this conclusion is by no means free from doubt, notwithstanding the analogous private property guarantees in the Constitutions of East Timor and the United States. In the first instance, there is no settled theory of State succession, and its myriad instances are notoriously resistant to generation of universal propositions. Thus, for example, while there is a Lockean or natural law view that private property rights continue ineluctably for municipal law purposes until varied or extinguished by the successor State, a contrasting view has been put by some "imperative" or positivist theorists that – regardless of international law obligations to respect acquired rights – private property rights do not continue for municipal law purposes until they are tacitly or expressly endorsed by the successor State.[48] In short, it is not at all clear that of their own nature, and without further action by the successor State, Constitutional references to property necessarily include acquired rights issued or obtained under the predecessor sovereign.

This point highlights a second, more specific issue for East Timor. The question in terms of Constitutional interpretation is whether Portuguese property titles are "property" for the purposes of the municipal legal system of East Timor. The problem is that the municipal law of East Timor already includes provisions relating to Portuguese property titles. As has been seen, these are to be found in UNTAET Regulation No 1, and have the effect that in current municipal law Indonesian titles appear to be prima facie valid, and Portuguese titles are only valid to the extent that they satisfy Indonesian conversion regulations. In short, the interpretation of private property rights for Constitutional purposes is already subject to guidance from municipal law; and so, for a different interpretation to apply to protect Portuguese property titles, further municipal legislation is required from the East Timorese State. In other words, Portuguese property titles are not ipso facto protected by the new Constitution, and will only receive that protection if the new State at its discretion legislates to amend UNTAET Regulation No 1.

Has the Doctrine of Acquired Rights Entered Customary International Law?

If, then, the private property guarantees in the new East Timorese Constitution do not necessarily protect Portuguese property titles, what is the effect of the further Constitutional provisions that the "legal system of East Timor shall adopt the general or customary principles of international law"? In particular, has the doctrine of acquired rights entered customary principles of international law so as to provide another form of

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46 O'Connell 1967, supra n. 44, 240-1; see also the excellent discussion in L. Benjamin Ederington, "Property as a Natural Institution: The Separation of Property from Sovereignty in International Law", 13 *Am. U. Int'l L. Rev*. 263 (1997).

47 O'Connell 1967, supra n. 44, 237.

48 Id. 101-4 (for a general discussion of these contrasting views); see also Brownlie, supra n.28 , 657 (for a criticism of the "question-begging" nature of O'Connell's approach to acquired rights).

Constitutional protection to the holders of Portuguese property titles? Substantial support for the proposition that customary international law includes the doctrine of acquired rights may be found in expert commentary, most notably from O'Connell.[49] As discussed above, further support may be found in dicta of the Permanent Court of Justice in the *German Settlers* Case.

For practical purposes, however, this does not necessarily mean that the East Timorese State must uphold all Portuguese era property titles. It is relatively common for States, particularly European State, to include Constitutional references to customary international law; and in many of these States the rules of Constitutional interpretation allow subsequent municipal legislation to override specific principles of customary international law. In other words, even if its incorporation is by way of the Constitution, customary international law does not thereby attain primacy over subsequent provisions of municipal law. Brownlie thus suggests that there should be "a sensible working relationship" or an "accommodation" between the two systems within the jurisdiction of a particular State.[50]

Additionally, in the specific circumstances of decolonisation and land injustice, there should be doubts as to whether the doctrine of acquired rights is part of customary international law.[51] Why should States who are newly freed from the shackles of colonialism be required to maintain a fundamental plank of that colonisation? Why should poverty and landlessness be perpetuated in order to continue colonial landholdings that themselves derived from dispossession and discrimination? Volkovitsch notes, for example, that such was the criticism of the doctrine by decolonised States at negotiations of the draft Vienna Convention on State Succession, that it was withdrawn from the deliberations.[52] Thus, even if this draft Convention comes to represent the customary international law of the State succession, it notably does not incorporate the doctrine of acquired rights.[53]

These doctrinal concerns are highlighted by the specific circumstances of East Timor. Upholding all Portuguese era property titles would substantially change the current mosaic of land occupation in East Timor. Very large numbers of people that now occupy former Portuguese title land, either without permission or under Indonesian titles or through traditional connections, would at one stroke become liable to eviction by an owner that may have been absent for 25 years.[54] Similarly, the large number of leases taken out by foreigners in Dili since late 1999 would, to the extent that they have not been granted by pre-1975 Portuguese title owners, become liable to termination and possibly even payment of compensation to those owners. In short, because a large-scale process of evictions would provoke social conflict, potentially overwhelm law enforcement institutions and undermine the confidence of foreign investors, it is suggested that a fundamental aim of any land claims framework for East Timor should be to avoid the need for evictions wherever possible.

The Right to Housing

One way for East Timor to avoid the inequities and impracticality of upholding all Portuguese era property titles would be to elaborate on the Constitutional reference to a right to housing (article 58). This right, in particular,

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49 O'Connell, supra n. 44, 436; O'Connell, supra n. 44,: 78-9, 249; see also Schwarzenberger, G., 1967. *A Manual of International Law*, 87.

50 Brownlie, supra n. 28, 51.

51 Id., 521 –52; Ezetah, C., 1997. "International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma", 19 *Loyola of Los Angeles International and Comparative Law Journal* 811, 850-851.

52 Volkovitch, M., 1992. " Righting Wrongs: Towards a New Theory of State Responsibility for International Delicts", 92 *Columbia Law Review* 2162, 2201.

53 It is also notable that the declaration of the United Nations General Assembly on Permanent Sovereignty over Natural resources states that "nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Government's in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule". (Resolution 1803 (XVII). Paragraph 4 concerns the obligation to pay compensation in the event of nationalisation or expropriation of property.

54 This would be the case in the former coffee plantations of Ermera, were any attempt at evicting the local occupiers would most likely provoke significant social conflict.

could serve to protect current occupiers who do not rely on Portuguese era property titles (particularly where there is no public housing available).[55]

This category of occupier includes:

- outsider groups on traditional lands;
- displaced persons with no alternative place of residence;
- those living without formal documentation in urban and peri-urban areas;
- those relying on Indonesian property titles or documents (generally this will not include Indonesian nationals as almost all have fled and no longer occupy land in East Timor); and
- those who have taken out residential leases since August 1999 from purported owners who do not themselves rely on Portuguese property titles.

It may also include traditional groups to the extent that their rights were not protected by Portuguese property law. In short, the number of "informal" occupiers who could be protected by a right to housing would be very large indeed.

Support for a right to housing in customary international law may be found in a range of well-known international instruments. In particular, there is now a general right to housing under the International Covenant on Economic, Social and Cultural Rights (1966: article 11); and a right to adequate housing conditions under the Universal Declaration on Human Rights (1948: article 25 (1)). There is also a more specific right to equality before the law in relation to housing under the International Convention on the Elimination of All Forms of Racial Discrimination (1965: article 5(e)(iii)). Further, under the International Convention on the Elimination of All forms of Discrimination against Woman (1979: article 14(2)(h)), women have a right to adequate living conditions; and under the International Convention on the Rights of the Child (1989: article 27(3), children have a right to State assistance in relation inter-alia to housing.

In addition to these rights to housing, there are developing international norms relating to protection against eviction. For example, under the UN Covenant on Civil and Political rights (1988: article 17) "interference with one's home, may only take place according to law, and should be "reasonable in the particular circumstances" (Human Rights Committee General Comment No 16 1988). Additionally, the General Comment No 4 on the Right to Adequate Housing, which was adopted by the UN Committee on Economic, Social and Cultural Rights (1991: para. 8(a)), states that the right to housing encompasses a right to "a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. State parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection."

How could this "legal security of tenure" be conferred on current "informal" occupiers of land? One answer is to base a programme of tenure reform on the Constitutional reference to a right to housing. In particular, it may be that occupiers in possession of land for more than 12 years, without either the agreement of the original owner or any attempt to evict them, should receive rights to that land which would defeat all other claims. This principle simply amounts to the "adverse possession" rules of many systems of property law. However, it may not be appropriate outside urban areas where migrant or displaced groups have been in long-term occupation of land traditionally belonging to a customary group. In this type of case, granting formal rights to migrant or displaced groups may provoke social conflict, and is best handled both by case-by-case mediation and the principle that no-one should be evicted unless there is alternative land available.

An alternative, more extreme version of tenure reform would be to uphold the rights of all current occupiers who hold land in good faith, regardless of how long they have been in occupation. Good faith, in this context, would especially mean that the occupiers had no notice of other claims to the land, particularly by Portuguese

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55 Currently, no public housing is available in East Timor, and the failure of UNTAET to budget for such housing has been criticised by the author: see Fitzpatrick, D., 2001. *Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor*, Journal of Humanitarian Assistance, http:\\www.jha.org\, 2001.

era titleholders. Again, however, this principle may not be appropriate in relation to traditional lands outside urban areas. It is important to emphasise that neither principle of tenure reform would result in the invalidation of all Portuguese property titles. Thus, claims based on Portuguese titles could be recognised unless the land was (1) designated for public purposes; (2) currently held in good faith by occupiers without notice of the Portuguese title claim (perhaps with a requirement that the occupation must have been long term: e.g. 12 years); or (3) currently held by traditional interests outside urban areas. Notice of a Portuguese title would arise where the land retained its pre-1975 buildings.[56]

Conclusion

This paper has discussed issues which are both practical and doctrinal in nature. In practical terms, East Timor urgently needs a land claims framework which does not lead to large-scale evictions and social conflict. The challenge is to develop such a framework from the new Constitution's references to customary international law and housing and property rights. This paper has discussed this challenge by highlighting the tension between the incorporation of customary international law and the protection of private property rights, which arguably favours restitutionary claims by holders of pre-1975 Portuguese titles; and the inclusion of a right to housing, which could favour the claims of current occupiers over those asserted by holders of Portuguese or Indonesian titles. It has argued that the doctrinal of acquired rights – even if incorporated into customary international law – does not necessarily prevent East Timor from enacting legislation which varies or extinguishes Portuguese era property titles. It has further argued that an equitable and sustainable foundation for a land claims framework may be found in the Constitutional reference to a right to housing.

In doctrinal terms, the paper has also sought to highlight certain anomalies in international law principles relating to property. Why is it, for example, that international law protects all property rights acquired under a colonial administration, but invalidates all property titles issued during a long term belligerent occupation (other than those justified by "military necessity")? Equally, why does international law uphold the right of non-nationals to compensation in the event of expropriation but not the right of nationals? Much as international norms protecting property rights are often cast in terms of Lockean bastions against State oppression, the truth is that property itself is fundamentally a source and instrument of social authority. As such, its regulation is as much about human rights and Lockean liberalism as it is about power and policy choices.

This suggests, in turn, that the injustice against which international property rights protections are directed should be carefully defined and characterised. In the modern world, that injustice is not so much that oppressive States will confiscate property rights acquired under a predecessor sovereign, or that non-nationals will lose their property without receiving compensation. Rather, it is that many millions now live "informally" on land without access to the benefits of formal tenure, or to formal protection against unreasonable evictions. These people will either be traditional occupiers whose rights are not recognized; or, more commonly, occupiers of urban and peri-urban areas who have been displaced by processes of globalisation and economic development. In either event, it is suggested that more appropriate international law sources for their protection lie not in traditional property rights doctrines, but in emerging international norms relating to rights to housing and freedom against unreasonable evictions.

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56 An expanded version of these proposals may be found in Daniel Fitzpatrick, *Property Right's in East Timor's Reconstruction and Development* in East Timor: Development Challenges for the World's Newest Nation, Institute of Southeast Asian Studies, Singapore 2001, pp. 177-193.

Panel 5A: International Criminal Law

Will the New International Criminal Court be Equipped to Prosecute Crimes of Sexual and Gender Violence?

Nigel Davidson*

Introduction

The coming into force of the 1998 *Rome Statute of the International Criminal Court*[1] in July this year represents an important step towards the end of impunity for those responsible for crimes of sexual and gender violence. The extent of this achievement is best assessed in the context of twentieth century international criminal law. Whether the new Court is equipped to prosecute crimes of sexual and gender violence will be greatly influenced by the definitions of crimes under the Statute, as well as the degree to which gender-related concerns are incorporated into Court procedures and the staffing of the Court.

Sexual violence in the twentieth-century law of armed conflict

Crimes of sexual and gender violence had a degree of recognition under the law of armed conflict at the beginning of the twentieth century. However, references to such crimes in these early treaty instruments were implicit at best, and problematic with respect to the terminology in which they were couched. An early example is Article 46 of the 1907 *Hague Convention* (IV) which states:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.[2]

Looking at this provision from the mind-set of the twenty-first century, the meaning of the words 'family honour and rights' appears to be quite obscure. In fact, the Article provides an implicit prohibition of rape and sexual violence.[3] However, an implicit reference lacks the value of an express provision in terms of naming the offence so as to clearly prohibit and deter it.

The concept of 'family honour' as it appears in Article 46 is a problematic one. It would appear that it is the honour of the 'family' which is damaged as a result of the sexual violence rather than the victim. This formulation fails to recognise that the damage sustained to the victim herself/himself ought to be the prime concern. The notion of 'honour' itself, in connection with sexual violence, is problematic. Many commentators argue that it is not the victim who is 'dishonoured' through the act of rape or sexual violence, but rather the perpetrator of the crime. Rather than a crime of 'honour', the crime should be recognised as a crime of violence against the person of the victim.[4]

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1 "Rome Statute of the International Criminal Court: Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998" The paper is A/CONF. 183/9, 17 July 1998 and can be located at http://www.un.org/icc/

2 Extract from the *Hague Convention of October 18, 1907, respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land (Convention No. IV of 1907),* cited in International Committee of the Red Cross & League of Red Cross Societies, *International Red Cross Handbook,* Eleventh Ed., Geneva: ICRC & LRCS, 1971, p.46.

3 See further: International Committee of the Red Cross & League of Red Cross Societies, *International Red Cross Handbook,* Eleventh Ed., Geneva: ICRC & LRCS, 1971.

4 J. Gardam, "Women and the law of armed conflict: why the silence?", *International and Comparative Law Quarterly,* vol. 46, January 1997, p. 57, 73-4; Centre for Reproductive Law and Policy, "Rape and Forced Pregnancy in War and Conflict Situations", http://204.168.19.126/043096forcedpreg.html in section 'Rape and Forced Pregnancy as War Crimes'; H. Charlesworth, "Feminist Methods in International Law", *American Journal of International Law,* v. 93, No. 2, April 1999, pp. 386-7.

The 1949 Geneva Convention (IV) contains a more express reference to crimes of sex and gender violence in Article 27:

> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[5]

The explicit recognition and naming of these crimes of sexual violence – rape, enforced prostitution and indecent assault – represents a vital step forward in for the law of armed conflict. However, the reference to the problematic concept of 'honour' remains with the provision. Another inadequacy is that this reference, and others like it, fail to place this crime in the same league as the most serious crimes pursuant to the Geneva Conventions – the regime of 'grave breaches of the Geneva Conventions'. These 'grave breaches' create an obligation on States parties to prosecute or extradite individuals suspected of committing the crime.

The twentieth century witnessed not only some preliminary attempts at the criminalisation of acts of sexual and gender violence under international law, but also the first prosecutions of such crimes. Unfortunately, the record of the Nuremburg and Tokyo Tribunals established to prosecute crimes committed by the defeated powers during World War Two, is limited. In the Nuremberg trials, rape and sexual crimes were recorded in the transcripts considered by the prosecution, but no prosecutions were in fact carried out in relation to these crimes.[6]

At the Tokyo Tribunal, rape was included in the list of crimes charged in the Tokyo Indictment, and was regularly included in the Tokyo trial testimony and transcripts (although these acts were not prosecuted separately). Evidence of rape and sexual violence was lead in relation to the Japanese occupation of Nanking, with reference to the Geneva conventions definitions of 'inhumane treatment', 'ill-treatment' and 'failure to respect family honour and rights'. Also of note is the trial of General Yamashita (in a separate trial) who was held criminally liable for failing to control, stop or prevent acts of rape and other serious crimes being committed by soldiers under his command.[7] However, the Tokyo Tribunal has been criticised for overlooking other areas where sexual crimes were committed on a large scale, such as the treatment of Koreans by the Japanese occupying forces – the so-called 'comfort women'.[8]

Since the time of the Nuremberg and Tokyo prosecutions, large-scale violations of international criminal law have occurred in countries as diverse as Cambodia, Uganda and Chile. However, there was a significant hiatus until the next major development in international criminal law, which was the establishment of ad hoc tribunals in the 1990s to prosecute genocide, crimes against humanity and war crimes committed in the former Yugoslavia and Rwanda.

The prosecutions which have occurred in these international tribunals have included, significantly, numerous prosecutions regarding sexual violence. The Tribunals have successfully prosecuted acts of rape and sexual violence pursuant to the traditional international humanitarian law crimes of 'torture', 'inhuman treatment', 'cruel treatment', 'outrages upon personal dignity', and 'wilfully causing great suffering or serious injury to body or health'.[9] The achievements of the 1998 *Rome Statute* in relation to sexual and gender violence can be

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5 *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 75 UNTS 287.

6 K. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff Publishers: The Hague, 1997, pp. 96-98 – although it should be noted that the in charter for the subsidiary trials of the criminals who were not the primary architects of the German war (Control Council Order 10) rape is explicitly listed as a 'crime against humanity'.

7 K. Askin, *War Crimes Against Women*, *supra* n. 7, pp. 180, 193.

8 A recent 'people's tribunal' was convened by non-governmental organisations to bring to light testimony from victims of these crimes – see C. M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery", *American Journal of International Law*, v.95, p. 335 (April 2001).

9 These categories were prosecuted pursuant to Articles 2 and 3 of the *Yugoslav Statute* – Security Council Resolution 827 (1993) (adopted 25 May 1993) (S/RES/827 (1993)) (adopting the Statute for the International Criminal Tribunal for the Former Yugoslavia); Security Council Resolution 1166 (1998), (Statute amended 13 May 1998 to add a third Trial Chamber of the Yugoslav Tribunal). They were also prosecuted pursuant to Article 4 of the *Rwandan Statute* – 8 November 1994, S/RES/955 (1994).

substantially attributed to the fact that it has incorporated the experience gained and lessons learned from the work of the ad hoc tribunals.

The Rome Statute of the International Criminal Court, 1998

The signal achievement of the *Rome Statute* is its explicit and unambiguous recognition of rape and sexual violence as constituting war crimes of the most serious order. Art. 8(2)(b)(xxii) of the *Rome Statute* reads:

> 2. For the purpose of this Statute, "war crimes" means …
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts …
> (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence *also constituting a grave breach of the Geneva Conventions* [emphasis added].[10]

The *Rome Statute* definition is significant in that it omits any reference to the problematic concept of 'honour'. It also clearly includes rape and sexual violence in the most serious category of war crimes, namely as 'grave beaches' of the *Geneva Conventions* (in relation to international conflict), and as 'serious violations of article 3 common to the four *Geneva Conventions*' (in relation to armed conflicts not of an international character).

The *Rome Statute* recognises and defines, in addition to the crime of rape, a broad range of crimes of sexual and gender violence, including sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. These prohibited acts are considered war crimes when committed in the context of armed conflict, and crimes against humanity, when committed as part of a 'widespread or systematic attack directed against any civilian population'.[11] Also of significance is the inclusion of 'gender' as a grounds on which the crime 'persecution' may be constituted as a 'crime against humanity'.[12]

One concern which has been raised, particularly in the context of the negotiations regarding the *Elements of Crimes*[13] document, is that sexual and gender violence should not be confined to prosecutions under the express provisions of the *Rome Statute*, but simultaneously prosecuted with respect to other 'traditional' international humanitarian law crimes where the elements of those crimes have been met.[14] This process might be considered analogous to 'mainstreaming' in the context of general human rights discourse. For example, where sexual violence forms a central component of a genocidal act, as in *Akayesu*,[15] it must be prosecuted as such and not

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10 Art. 8(2)(e)(vi), referring to non-international armed conflicts, states: For the purpose of this Statute, "war crimes" means: …

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

11 Pursuant to article 7(1)(g) of the *Rome Statute.*

12 Article 7(1)(h) of the *Rome Statute* proscribes: "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connections with nay act referred to in this paragraph or any crime within the jurisdiction of the Court."

13 Preparatory Commission for the International Criminal Court, "Report of the Preparatory Commission for the International Criminal Court: Addendum: Finalized draft text of the Elements of Crimes", PCNICC/2000/INF/3/Add.2, 6 July 2000.

14 Women's Caucus for Gender Justice, 'Excluding Crimes Against Women from the ICC Is Not an Option' at http://www.iccwomen.org/resources/marpaneleng.htm "The Women's Caucus has also insisted on the inclusion of a statement to the effect that acts of sexual and gender violence, while constituting crimes in and of themselves, must also be understood as constituting torture, enslavement, murder and genocide, etc., when the requisite elements of these crimes are met."

15 *Akayesu*, Jean Paul (ICTR-96-4).

confined to a simple 'rape' prosecution. Similarly, sexual violence meets the elements of the crime of 'torture' or 'enslavement' it should be prosecuted as such, above and beyond a direct 'rape' or 'sexual violence' prosecution.

The term 'gender violence' is often used in addition to sexual violence in particular to encapsulate the crimes of discriminatory intent which may not have a component of sexual violence. For example, either men or women may be subject to persecution, contrary to Article 7(1)(h), involving human rights violations because of their identity as men or women.[16]

'Forced pregnancy': a *Rome Statute* compromise

A key area of compromise in the negotiation of the *Rome Statute* crimes of sexual violence related to the crime of 'forced pregnancy'. The negotiations were controversial and involved the balancing of different value systems. The rationale behind including this particular crime was to proscribe certain acts which were, in particular, noted to have been committed in the context of the conflict in the former Yugoslavia. Crimes had been documented whereby perpetrators committed acts of rape against women of a particular ethnic background with the purpose of making the women pregnant with ethnically 'mixed' children. Such acts were designed to produce the result that the children would be rejected by their own ethnic community, and the mothers may also be rejected as a result of such behaviour.[17]

Article 7(2)(f) of the *Rome Statute* reads:

> "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.[18]

The first sentence of the definition describes the 'actus reus' of the crime: "the unlawful confinement of a woman forcibly made pregnant". This would appear to cover the situation which occurred in the former Yugoslavia where women were raped, became pregnant, and were forced to remain in confinement until the child was born.[19] The second sentence of the crime definition captures the motivation behind the crime "the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law". However, it is couched in such language as will make this a 'specific intent' which must be proven by the prosecution before the crime as a whole can be made out. This will make the task of the prosecution significantly more difficult and – as argued persuasively by some commentators – has the potential to relegate the crime to symbolic significance only.[20] Where the constituent elements of 'forced pregnancy' are made out, the prosecution is likely to forego a 'forced pregnancy' prosecution in favour of a more straight-forward prosecution in relation to a charge such as rape, torture or sexual violence. Such an outcome is a poor one, as 'forced pregnancy' must be seen as a conceptually distinct crime, as compared with other crimes of sexual violence, and should be prosecuted as such.

The inclusion of a 'specific intent requirement', along with the final sentence of the definition, was part of a compromise package designed to bridge the gap between those countries and non-governmental organisations (NGOs) desiring the inclusion of an efficacious definition of 'forced pregnancy', and those countries and NGOs concerned that such a crime will justify abortion in these circumstances and therefore threaten 'national abortion

16 K. Steains, "Chapter 12: Gender Issues" in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results,* (Kluwer Law International: The Hague, 1999), pp. 373-374.

17 K. Steains, "Chapter 12: Gender Issues", p. 366.

18 Article 7(2)(f) of the *Rome Statute.*

19 K. Steains, "Chapter 12: Gender Issues", p. 366.

20 H. Durham, "The International Criminal Court and Gender Issues", http://www.redcross.org.au/articles/international_crimin_and_gender_.htm

laws'. The negotiations regarding this provision were indicative of the sensitive and challenging nature of reaching agreement regarding the inclusion and definition of crimes of sexual and gender violence.[21]

Elements of Crimes – definition of 'sexual slavery'

Article 9 of the *Rome Statutes* states that "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8 [the ICC crimes]". In accordance with this provision, negotiations were held, resulting in a draft *Elements of Crimes* document in 2000, with this draft being open to adoption at the upcoming first Assembly of States Parties.

The development of the *Elements of Crimes* document is indicative of a move from 'flexibility' to 'certainty' in the arena of international criminal law. Whereas the characteristic of 'flexibility' has allowed ad hoc tribunals to capture novel criminal conduct within the broadly defined crimes of traditional international humanitarian law (eg: 'inhuman or degrading treatment'), the characteristic of 'certainty' is seen as the touchstone of fairness in established domestic criminal justice systems. Certainty interpretation is better able to protect the rights of the accused and, in a context where the military personnel and leadership of States Parties are potentially liable to prosecution, precisely defined crimes can serve to ease the anxiety of these States.

However, some difficulties arise from the fact that not all the draft *Elements* were well framed. The nascent International Criminal Court may do well to proceed with caution regarding the weight they give these 'elements', in particular as they relate to crimes of sexual and gender violence.

The following are key elements of the 'sexual slavery' and 'enforced prostitution', respectively, as defined in the draft *Elements of Crimes* document:

> The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as *by purchasing, selling, lending or bartering such a person or persons*, or by imposing on them a similar deprivation of liberty [emphasis added].[22]
>
> The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.[23]

These elements are problematic in the context of the definitions of these crimes as they both emphasise an aspect of 'commercial transaction' as a component of the crime. The definition of 'sexual slavery' requires a commercial exchange in persons to qualify for this crime, while the 'enforced prostitution' definition requires a financial gain for the perpetrator for all the requirements of the crime to be met.

The difficulty with such a commercial focus is there is a lessening in the correspondence of these crimes to the known historical occurrences of 'sexual slavery' and 'enforced prostitution'. The two most commonly cited cases of sexual slavery includes the rape camps of Japanese occupying forces in Korea in World War Two – the so-called 'comfort women' cases – and rape camps established during the conflict in the former Yugoslavia. In both cases, women have been confined and repeatedly subjected to rape and sexual abuse. However, an element of commercial or financial gain was not present in either situation. It could be argued that based on the *Elements*

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21 See discussion in K. Steains, "Chapter 12: Gender Issues", pp. 365-369.

22 The remaining key element reads "The accused caused such person or persons to engage in one or more acts of a sexual nature", with category-related elements involved where the crime is a 'crime against humanity' (per article 7(1)(g)-3, p. 12 of the draft *Elements of Crimes*, *supra* n. 14) or a 'war crime' (per articles 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2, at pp. 32 and 41 of the *Elements of Crimes*).

23 The remaining key element reads "The accused caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage or a coercive environment or such person's or persons' incapacity to give genuine consent." (as a 'crime against humanity', per article 7(1)(g)-3 at p. 12 of the *Elements of Crimes*, *supra* n. 14; or as a 'war crime', per article 8(2)(b)(xxii)-3 and 8(2)(e)(vi)-3, at pp. 32 and 41 of the *Elements of Crimes* document).

of Crimes definitions of these crimes, it would be impossible to successfully prosecute individuals for the crimes committed in either of the historical situations mentioned.[24]

There are strong arguments to suggest that the jurisprudence emerging through the ad hoc Tribunals has formulated a more appropriate approach to situations of sexual slavery. The *Kunarac, Kovac and Vukovic Case* (ICTY, 2001) resulted in the first convictions relating to acts of sexual violence relating to 'enslavement' as crime against humanity. The situation involved girls being confined, forced to do domestic chores and subject to rape and sexual violence over a significant period of time, by Serb armed forces.[25]

The Trial Chamber presented this definition of 'enslavement' in the course of reaching their verdict in the case:

> In summary, the Trial Chamber finds that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.
>
> … Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.
>
> … The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement [emphasis added].[26]

The *Kunarac* definition of 'enslavement' focuses broadly on the concept of the exercise of the powers attaching to the right of ownership. However, they list such 'powers' as including physical hardship, sex and prostitution 'often without remuneration'. Even more expressly, the Tribunal states that the 'acquisition' or 'disposal' of someone for monetary or other compensation is not a requirement for enslavement. Their formulation of 'enslavement' was found to encapsulate the acts committed in the camp in the Foca municipality in Bosnia. It provides a more appropriate and workable definition than the *Elements of Crimes* definition of either 'sexual slavery' or 'enforced prostitution'. However, it might be noted the general crime of 'enslavement' is retained in the *Rome Statute*,[27] which may be a more effective vehicle for such prosecutions.

Sensitivity to gender concerns in staffing and procedure

Beyond reforming traditional legal doctrine, the experience of the ad hoc tribunals has shown that women legal and judicial officers, and gender-sensitive criminal procedures are vital towards the effective functioning of courts regarding crimes of sexual and gender violence.[28] The *Rome Statute* is ground-breaking in that it mandates a "fair representation of female and male Judges".[29] Similar provisions require that women be represented in the prosecutor's office and the registry.[30]

The *Rome Statute* also requires the inclusion of staff with expertise "including, but not limited to violence against women or children". Art. 36 (8) sets this requirement for the Court as a whole, although there is a particular emphasis on such expertise with respect to the Office of the Prosecutor; Art. 42(9).

The experience of the Yugoslav and Rwandan Tribunals has shown that the involvement of women and persons with expertise in these areas is vital to the functioning of such institutions. The prime example of the efficacy of such staffing can be found with reference to the unfolding events of the ground-breaking *Akayesu* case.[31] In

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24 See Women's Caucus for Gender Justice, "Women's Caucus advocacy in ICC negotiations: Recommendations and Commentary for the Elements of Crimes" at http://www.iccwomen.org/icc/iccpc/032000pc/elementsannex.htm

25 *Kunarac, Kovac and Vukovic* Case (Trial Chamber II, 22 Feb 2001, IT-96-23-T & IT-96-23-1-T), p. 11.

26 *Kunarac, Kovac and Vukovic* Case (Trial Chamber II, 22 Feb 2001, IT-96-23-T & IT-96-23-1-T), pp. 192-194.

27 Article 7(1)(c) of the *Rome Statute.*

28 See generally K. Steains, "Chapter 12: Gender Issues" in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results*, (Kluwer Law International: The Hague, 1999), esp. pp. 376-390.

29 Article 36(8)(a)(iii) of the *Rome Statute.*

30 Articles 36(8), 44(2) of the *Rome Statute.*

31 *Akayesu*, Jean Paul (ICTR-96-4).

Akayesu, one of the trial Judges was Judge Navanathem Pillay, a judge with a strong background in dealing with cases of sexual and gender violence. Questions from the bench by Judge Pillay were crucial in eliciting evidence from witnesses regarding sexual violence in the context of the *Akayesu* prosecution.[32] The trial chamber found that Akayesu's encouragement of acts of rape and sexual violence in the Taba district of Rwanda were a sufficient basis for a conviction for the crime genocide.

The creation of a Victims and Witnesses unit for protective measures, counselling services, security arrangements is mandated in Art. 43(6) of the *Rome Statute*. Such units, again, have their predecessors in the *Rwanda* and *Yugoslav* Tribunals.

Parts 5 and 6 of the *Rome Statute* deal with 'investigative, procedural and evidentiary measures', explicitly mentioning that protection of victims and witnesses, including those traumatised by sexual violence, must be paramount. Art. 68(2) permits the use of *in camera* procedures or electronic relay equipment where requested by a witness in a sexual violence case, so as to minimise the court-room trauma of giving testimony. Discretion can be exercised, however, to allow victims to give their testimony in public if they so wish, where the victim places importance on such a process in the interests of 'truth-telling'. These safeguards in the *Rome Statute* itself have been further reinforced in the draft *Rules of Procedure and Evidence*[33] document which was developed negotiations in 2000.

Conclusion

International humanitarian law at the beginning of the twentieth century gave scant recognition to crimes of sexual and gender violence. The hesitant steps taken by the Nuremberg and Tokyo Tribunals, at the close of the second world war, to prosecute such crimes did, however, provide a crucial precedent which was followed with the creation of the ad hoc Tribunals to prosecute international crimes committed in the former Yugoslavia and Rwanda. Although couched in the language of traditional international humanitarian law, crimes of sexual and gender violence have been successfully prosecuted by the twin tribunals. It was not until the creation of the 1998 *Rome Statute* that rape and sexual violence were explicitly recognised as being in the category of the most serious war crimes under international criminal law.

Despite this signal achievement by the *Rome Statute*, difficulties with the formulation of particular crimes arguably remain – particular examples being the definition of 'forced pregnancy' and, through the mechanism of the problematic *Elements of Crimes* document, the definitions of 'sexual slavery' and 'enforced prostitution'. Perhaps, through the definition forming process, the emphasis given to ensuring legal 'certainty' in future rulings of the Court has hampered the creation of optimal definitions of crimes.

An important structural develop regarding the court is, however, the sensitivity to gender concerns which has been built into the Court procedure and also the staffing of the Court. These developments build on the experience of the ad hoc tribunals, thereby laying the foundation for a permanent system of international justice under the aegis of the *Rome Statute.*

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32 See K. Askin, "Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: current status", *American Journal of International Law*, vol. 93:97, 1999.

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Bridging the Gap: State Prosecutions of Serious Crimes Outside the Jurisdiction of the International Criminal Court: Some Lessons from Pinochet

Jennifer Mora*

Introduction

This paper addresses an aspect of the developing international criminal justice system which, since the advent of the Rome Statute of the International Criminal Court,[1] tends to be ignored. It is the role of individual states,[2] and the important part they will continue to play in prosecuting serious international crimes, crimes which are now included in the ICC Statute; war crimes, genocide and crimes against humanity.[3]

The unexpectedly early entry into force of the International Criminal Court (ICC)[4] generated relief and optimism among its supporters. But this enthusiasm has tended to lead many to overlook some of the effects of the court's jurisdictional limitations, the most significant of which for the purposes of this paper is its lack of retrospective jurisdiction.[5] The effect of this limitation is that serious crimes[6] already committed by 1st July 2002 – of which there are clearly a great many[7]- will go unpunished unless a state chooses to intervene.

The notion that as from 1st July 2002 individual states will no longer have a role in the prosecution of alleged perpetrators of serious crimes on an extraterritorial jurisdictional basis – as is implied by many contemporary commentaries – is, therefore, a fallacy. A consequence of the ICC's limited jurisdiction is that states under pressure to take action in relation to serious crimes which have already occurred, whether within their own territory or abroad, will have to face existing legal and political challenges, such as those which have been confronted by Spain and Belgium in the recent past.

In order to identify the most significant of these problems, it is proposed to focus on the *Pinochet* case, [8] which engaged the legal systems of Chile, Spain and Britain and has implications for the international community in general. Pinochet's exposure to the vagaries of various legal and political systems provides a unique context for identifying the major issues arising from state prosecutions based upon universal and other forms of extraterritorial jurisdiction. It is important to be aware of the nature these issues, as they are not going to evaporate with the coming into the force of the ICC. Not all stem from the doctrine of universal jurisdiction itself; but from the legal, political and other complexities inherent in a case such as Pinochet's.

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1 Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9; hereafter ICC Statute.

2 The term "state" is used throughout to denote a country, or nation state.

3 *Ibid*, articles 5 (a), (b) and (c), and articles 6, 7 and 8. The ICC Statute provides for a fourth crime, the crime of aggression, which has yet to be defined; see article 5.1 (d) and 5.2.

4 The ICC Statute entered into force on 1 July 2002, in accordance with the terms of article 126 (1).

5 *Ibid*, article 11.

6 The term "serious" crime is used in this paper as a generic term covering war crimes, genocide and crimes against humanity.

7 Mengistu Haile Mariam for example, the former Ethiopian dictator, is still living in Zimbabwe, where he has been granted asylum by Robert Mugabe. Mengistu's government is believed to be responsible for the deaths of up to one million Ethiopians before he fled Addis Ababa in 1991. South African authorities moved too slowly when he visited that country in 1999 to arrest him on the war crimes charges for which Ethiopia has requested his extradition.

8 The term "*Pinochet* case" rather than "*Pinochet* cases" will be used to refer to the Spanish, British and Chilean legal proceedings, as well as to the sequence of political and diplomatic events with which the cases are connected. Where appropriate, full case citations will be given.

Part I of this paper deals with the exercise of universal jurisdiction by states and the background to the charges against Pinochet. **Part II** is a brief summary of relevant aspects of the legal proceedings against Pinochet in Spain, Britain and Chile. Aspects of the Spanish proceedings will be given more attention than is usually the case and treatment of the British proceedings kept as brief as possible. This is in order to give proper emphasis to some important matters which emerged from the proceedings in Spain. A brief account of Pinochet's legal adventures after his return to Chile is also included. **Part III** is an appraisal of some of the principle issues arising from cases such as *Pinochet.*

Part I

1. The exercise of universal jurisdiction by states

Extraterritorial proceedings are likely to be more problematic from a legal standpoint than those based upon territorial jurisdiction.[9] Although most of the serious crimes already committed arise from domestic rather than international conflict, the degree of reliance on other states for their prosecution is not necessarily reduced; thus prosecuting states are likely to have to continue to rely on the universality principle.

As to the nature of universal jurisdiction, Professor Madeline Morris observes:

> Under universal jurisdiction, the courts of any state may exercise jurisdiction without any regard to the territory where the crime occurred or the nationality of perpetrators or victims. The rationale for universal jurisdiction is that crimes such as genocide, war crimes and crimes against humanity are an affront to humanity, and therefore, are of concern to all states.[10]

This interpretation of the universality principle is particularly appropriate as it does not put the emphasis, as many such definitions do, on the presence of the defendant within the territory of the state intending to prosecute.[11]

There are three distinct sets of circumstances in which the ICC has no jurisdiction over serious crime, and in which, therefore, individual states may be confronted by the prospect of initiating criminal prosecutions themselves. As far as states parties to the ICC Statute are concerned, there are two temporal aspects to this issue; the first relates to serious crimes *which have already been committed* by the date the ICC Statute came into force, and which are referred to in the introduction. The second relates to states parties to the ICC Statute undertaking such prosecutions in relation to crimes committed *after* that date and in respect of which the ICC will not, or cannot, take action. The Court itself does not have universal jurisdiction, and so cannot act in relation to crimes committed by nationals of non-party states, if those crimes were committed on the territory of a non-party state.[12] Finally, there is the potential for extraterritorial prosecutions where one or both of the states involved are not parties to the ICC.

Some serious crimes committed before 1 July 2002 will fall within the jurisdiction of the existing *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY)[13] and for Rwanda (ICTR).[14] The statutes

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9 This is not to suggest that domestic prosecutions for serious crimes committed within national borders don't present enormous challenges, in both the political and strategic spheres. The various attempts to prosecute Pinochet in Chile are illustrations of problems faced by domestic courts when local political and legal issues remain unresolved. As to strategic problems- particularly those arising from lack of resources after a catastrophic civil conflict- those faced by the Rwandan National Courts are at the extreme end of the spectrum; see Morris, Madeline H, "The Trials of Concurrent Jurisdiction: The Case of Rwanda", (1997) *7 Duke Journal of Comparative and International Law*, 349, at 357.

10 Morris, Madeline H, "Universal Jurisdiction in a Divided World: Conference Remarks" from Symposium: Universal Jurisdiction in a Divided World, reported in (2001) 35 *New England Law Review* 337 at 337.

11 Custody, or at least the possibility of obtaining custody, are obvious prerequisites to prosecution. In fact most states in a position to prosecute serious crimes choose not to.

12 ICC Statute, article 12. This article also provides that if neither the territorial state nor the defendant's state of nationality are parties to the Statute, either state may provide consent on an *ad hoc* basis, thus enabling the ICC to exercise jurisdiction.

13 Established by Security Council Resolution 827; UN Doc. S/Res/827 (1993).

for both tribunals provide for concurrent jurisdiction,[15] and consequently some of the prosecutions may be undertaken by states and not by the tribunals themselves. Others cases will be picked up by the Special Court for Sierra Leone when it begins to function.[16] Unless further such tribunals are established however, state-initiated prosecutions remain the only option.

It is important to bear in mind that while the time lapse between the commission of serious crimes and the opportunity to prosecute them will vary, it is likely to be lengthy. It was 25 years after Augusto Pinochet's overthrow of the Allende government in Chile that the Spanish authorities were in a position to attempt to bring him to trial; consequently it will be to individual states, rather than to the ICC, that lobby groups and human rights activists will look to prosecute such crimes for many years to come.

In spite of some of the persistent misconceptions associated with the *Pinochet* case –the House of Lords decisions, for example, were not predicated on the issue of universal jurisdiction[17] – there is no doubting its widespread influence. It certainly generated support for the ICC, and was a factor leading to other attempted domestic prosecutions, successful and otherwise, for serious crimes committed in other states.

2. Background to the Pinochet case

The saga of Pinochet has been subjected to much academic scrutiny already, yet it remains a uniquely suitable case for considering these issues. The principal reason is that it is the first case of its kind, in which the authorities of one state have not only instituted criminal proceedings against a former head of another state for crimes committed when he was in office, but obtained a ruling that head of state immunity for torture and other crimes against humanity does not exist once that head of state has left office. Another reason for the prominence of the *Pinochet* case is that so much is known in the west about the Pinochet regime. Chile's recent history is well known in the western world; in terms of the politics of human rights, Chile is familiar territory.[18]

Allende's Chile and the United States

In Chile, a Latin American country with relatively stable democratic traditions, the election of the Marxist Salvador Allende in 1970 was regarded as a progressive, if surprising, step by many within both within Chile and abroad. His period in office was highly controversial; he was committed to what he called the 'Chilean Road to Socialism', a program of economic reform which included the creation of a substantial socialised sector of the economy, while retaining both a mixed sector and a private sector. He nationalised the Chilean copper industry and its banking system. He also expropriated large numbers of estates and businesses, some of which were foreign-owned. Although he achieved a considerable improvement in the conditions of the Chilean poor, his methods were unorthodox and sometimes drastic. His policies polarised opinion and created, or exacerbated, a great ideological divide. An assessment of the merits of his government is not proposed here.[19] What is certain is that he was democratically elected in 1970, and despite the controversial nature of his regime, he was again re-elected by a narrow margin in 1973.

The United States government was opposed to him and his party from the outset, and had been financing the opposition in previous elections. It was before Allende's victory in 1970 that Henry Kissinger reputedly remarked that "I do not see why we need to stand by and watch a country go Communist due to the irresponsibility of its own people." A US campaign of destabilising the Allende government followed, and many

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14 Established by Security Council Resolution 955; UN Doc. S/Res/955 (1994).

15 As to Yugoslavia, see UN Doc. S/25704 (1993). As to Rwanda, there is obviously concurrent jurisdiction; see n 12 above, article 8 (1). The ICTR is likely to hear hundreds of cases at most, while there are in all some 90,000 cases arising from the genocide. Moreover, restrictions on the temporal jurisdiction of the ICTR mean that crimes committed before 1994, of which there are many, are excluded; see Morris, n 9 above, at 349.

16 See UN Press briefing of 20 March 2002 at http://www.un.org./News/briefing/docs/2002/SierraLeonebrf.doc.htm

17 Human rights groups have tended to claim that they were. See for example "The Pinochet Precedent: How Victims can Pursue Human Rights Criminals Abroad", *Human Rights Watch*, http://www.hrw.org/campaigns/chile98/precedent.htm

18 There is an overwhelming amount of material available relating to the government of Salvador Allende, the military coup, the Pinochet regime, and US involvement. Some of it is referred to below.

19 See as to the Allende regime, Snyder, Edward C, "The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995", (1995) 2 *Tulsa Journal of Comparative & International Law*, 253 at 257.

of the details became public knowledge in 1999, when some 5,000 relevant CIA files and other relevant government documents were declassified. Tactics employed to assist in the destabilisation process included the allocation of ten million US dollars to the CIA by President Nixon, for use in undermining the Allende government. An unofficial economic blockade of loans and other forms of financial assistance to the Chile was imposed, and its economy generally undermined. The CIA was also active behind the scenes in its dealings with the Chilean military.

Chile under Pinochet

Allende appointed Augusto Pinochet as commander-in-chief of the Chilean army shortly after his re-election in 1973. Less than three weeks later, on 11 September 1973, Pinochet led the military coup in which Allende died. Soon afterwards, details of some of the human rights abuses that were to characterise the Pinochet regime began to leak out. In due course the information that emerged included the mass execution of Pinochet's perceived political enemies, as part of a particularly barbaric, well-planned program of torture and terror. Much of this information was later substantiated in detail.[20]

Pinochet move quickly to establish control over all branches of government.[21] He achieved this largely by the issue of decree laws. Immediately after the coup the military junta issued a decree law declaring a state of siege, and appointing Pinochet as President.[22] The government functioned in this manner from 1973-1978, when the notorious Amnesty Law [23] was promulgated. This prohibited prosecution of any individuals for politically motivated crimes committed from the date of the coup on 11 September 1973 until 10 March 1978, by which time Pinochet's secret police, the *Dirigencia Nacional de Inteligencia* or National Intelligence Directorate (DINA), which was created in 1974, had been dissolved.[24]

From the very beginning Pinochet took legal steps to protect himself and other members of his military junta, and succeeded in doing so with extraordinary effectiveness, and disastrous long –term political and legal consequences for the state of Chile. In 1980 his government enacted a new Constitution,[25] which did not enter into force until March 1988. It was intended to facilitate a gradual return to democracy; under its terms Pinochet ruled by means of a "transitional" government until October 1988, when Chileans were able to vote democratically for the first time since 1973. Its terms granted the President and the Executive unprecedented powers to declare states of siege and emergency, accompanied by almost unlimited power to intervene in any matter involving "national security".[26] The 1980 Constitution had the effect of validating the legal system he had already created by decree.[27] Provision was also made for an ongoing military presence in the Senate.

In 1988 a plebiscite was held, giving Chilean voters the opportunity to confirm or reject a presidential candidate nominated by the military; Augusto Pinochet. He lost. He had intended remaining in power until 1994, and the

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20 There is also a vast amount of data, official and otherwise, relating to the human rights abuses which occurred during the Pinochet regime. There is still a great deal of information available on the Amnesty International website at http://www.amnesty.org and the Human Rights Watch website at http://www.hrw.org/ See also Bhuta, Nehal, "Case Notes: Ex Parte Augusto Pinochet Ugarte", (1999) 23 *Melbourne University Law Review* 499; Wilson, Richard J, "Prosecuting Pinochet: International Crimes in Spanish Domestic Law", (1999) 21 *Human Rights Quarterly* 927; Snyder, above n 19 at 263-269.

21 See as to the changes wrought on the Chilean legal and political system, Snyder, above n 19 and Bhuta, *ibid.*

22 Snyder, *ibid.*

23 Decree Law No 2191, April 19 1978. The law contravenes international human rights obligations; see *Amnesty International*, "Chile: Legal Brief on the Incompatability of Chilean Decree Law N 2191 of 1978 With International Law", January 2001; http://web.amnesty.org/ai/nssf/countries/chile

24 Snyder, above n 19. His article is a detailed and authoritative account of Pinochet's manipulation of the Chilean legal system. Although written in 1995, many of the legal problems he describes still exist.

25 This replaced the 1926 Constitution, which embodied the separation of powers, and guaranteed civil and political rights for Chileans.

26 For further details relating to the Pinochet Constitution**,** see Snyder, above n 19 at 269-272.

27 Snyder, *Ibid*, p254.

Constitution provided for "protected democracy" over a transition period of 16 years.[28] However Pinochet remained in office until 1990, and continued as commander-in-chief of the army until 1997. Upon retiring, he assumed the position of "Senator for Life," thus ensuring senatorial immunity for himself. In Chile such immunity can be abrogated only by a decision of the Supreme Court, which by now was under the influence of the military government. The damage done to the Chilean legal system has yet to be entirely undone.

The worst excesses of the Pinochet regime occurred in the first few years, although they by no means ended with the dissolution of the DINA. An operation which he engineered only a month after the coup, and which was to have significant repercussions for him nearly thirty years later, was the so-called C*aravana de la Muerte*, or Caravan of Death. This operation was undertaken on written orders from Pinochet by his colleague, General Arellano Stark, who led a helicopter-borne army unit into five regional towns and secretly murdered or "disappeared" approximately seventy -two political prisoners. The crime of enforced disappearance is now recognised in the ICC Statute as a crime against humanity. [29] How the concept was accommodated by both the Spanish and Chilean legal systems was, as will be seen below, very interesting.

During Pinochet's 17 years as president of Chile, 2000-3000 people were killed and thousands more tortured by the DINA, which had been established as an autonomous agency answerable only to him,[30] and whose primary function was the liquidation of political parties and "enemies of the state" deemed dangerous to national security.[31]

It is known to have been responsible for the murder of Spanish diplomat Carmelo Soria in Santiago in 1976, and in the assassinations of former members of the Allende government referred to below in connection with Operation Condor. The DINA was disbanded in 1977; even so, its successor body, the National Centre of Information (CNI),[32] had identical powers; its methods were different, and it resorted largely to staged shoot-outs with supposed subversives rather than on disappearances.

A significant feature of the Pinochet regime was its complicity in "Operation Condor." During the 1970s the countries of the southern cone of Latin America[33] all fell under military rule. Operation Condor was a

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28 See Bhuta, above n 20 at 510.

29 Article 7(1)(i).

30 The two reports referred to below at n 31 document this fact; it was later confirmed by the DINA's director, Manuel Contreras, who was sentenced to seven years' imprisonment for his part in the murder of Orlando Letelier, and who subsequently confirmed Pinochet's role. His testimony formed the basis of some of the subsequent Spanish charges against Pinochet. The US declassification of documents relating to US policy in Chile further confirmed that Pinochet controlled the DINA; see Wilson, Richard J, "Prosecuting Pinochet: International Crimes in Spanish Domestic Law," above n20 at 976-977. The article was the result of more than two years' collaboration between the International Human Rights Clinic at the Washington College of Law and the team of Spanish lawyers and activists working on the cases against the leaders of the military regimes which caused such damage in Chile and Argentina in the 1970s and 80s. Further reference will be made to this article below, in relation to the Spanish proceedings against Pinochet.

31 Much of the information relating to the activities of the DINA came to light during the Chilean National Commission on Truth and Reconciliation which was created in 1990, and its successor, the Corporation for Reparation and Reconciliation, established in 1992. The first of these bodies produced the Rettig Report, which fully documents the nature and extent of many of the DINA's activities. The combined findings of these bodies recorded that 3,197 people were murdered (often under torture) or disappeared during this period; this figure does not include cases of torture, arbitrary detention or exile that did not result in death. An addendum to the reports submitted by Chile to the UN Committee Against Torture stated that "This policy [to torture] was characterised by very serious forms of human rights violations: executions without trial: executions following trials in which due process was not guaranteed: mass arrests of persons who were taken to concentration camps where they were subjected to very degrading conditions of detention and many of whom "disappeared"; widespread torture and ill-treatment….This is the context in which the use of torture and other cruel, inhuman or degrading treatment or punishment was situated during the previous regime"; see the Amnesty International website, above n20.

32 The CNI, or *Centro Nacional de Informacion*, was answerable to the Ministry of the Interior, and its members deemed to be part of the armed forces, as this status afforded them greater legal protection; see "Chile: A Time of Reckoning", 51 (1993) *International Commission of Jurists & Centre for the Independence of Judges and Lawyers.*

33 Chile, Argentina, Bolivia, Uruguay, Paraguay and Brazil.

cooperative exercise involving the exchange of information relating to political opponents of the various military regimes, with its headquarters in Chile. It facilitated the assassinations of political refugees from one military regime who had escaped to another, and the murders of political enemies abroad. Operation Condor, together with the DINA, was implicated in the murders if a number of prominent Chilean exiles from the Allende regime. These included the former Allende Defence Minister, Carlos Prats and his wife, who were killed by a car bomb in Buenos Aires in 1974; the shooting of Allende's former vice-president Bernardo Leighton and his wife in Rome in 1975; and the killing by car bomb of Allende's distinguished former Foreign Minister, Defence Minister and Ambassador to Washington, Orlando Letelier, and his American assistant in Washington in 1976.

One of the Pinochet government's more unlikely initiatives was the ratification, in October 1988, of the *Torture Convention*.[34]

In view of the notoriety of the Pinochet regime, when his extradition from London for trial in Spain was sought by the Spanish Judge Baltasar Garzon, on 16th October 1998, the general public reaction was one of amazed fascination, generated not only by the unprecedented nature of the proceedings, but also by the unique prospect of witnessing a ruthless dictator getting what he deserved.

To some extent this reaction may be attributed to the fact, referred to above, that the events in Chile had been widely reported over a long period, and it had been generally believed that Pinochet would never stand trial. Another probable factor is that the events in Chile were not on the unimaginable scale of, say, the Cambodian or Rwandan atrocities. This as well could have ensured an enduring degree of interest and sympathy for victims of the Pinochet regime; they suffered, but not in such numbers that the crimes were perceived as being beyond comprehension. Many of the victims had names and histories; an articulate group of Chilean activists, sympathisers and refugees, including artists and activists, kept the case of Chile alive. It is perhaps for these reasons that Pinochet himself, and his Chilean victims, have occupied such a significant place in the European consciousness; they are perceived as being "real."

It is important to acknowledge that there were as well many who were alarmed by this development; not only Pinochet supporters, but legal observers concerned at the implications if the case against Pinochet succeeded. These reactions reflect what among academic writers are basically two schools of thought; first those, including many human rights advocates, who maintain the view that there must be accountability for all human rights abuses; and then the "political realists" who insist on putting such cases within the context of the political reality, and who believe that the defence of sovereign immunity must be respected if international relations are to be maintained. Both approaches can be plausibly defended.[35]

Part II The Proceedings Against Pinochet

It is intended here to give emphasis to those aspects of the proceedings which might be regarded as 'problematic' for the purposes of this paper. For this reason more emphasis will be given to the Spanish proceedings than is generally the case, for reasons which will become apparent.

1. The Spanish proceedings

The preliminary proceedings in Spain were relatively complex, and both their nature and their jurisdictional basis are interesting, as they have no equivalent in the common law system. The Spanish cases attracted an enormous amount of publicity in Spain, Chile and Argentina.[36] This level of attention in the English-speaking

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34 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984, 1465 UNTS 85, entered into force 26 June 1987.

35 For a comprehensive summary of the two approaches, see Seyedin-Noor, Shahram, "The Spanish Prisoner: Understanding the Prosecution of Senator Augusto Pinochet Ugarte", (2000) 6 *University of California Davis Journal of International Law & Policy* 41. See also as to the "absolutist ethic of moral accountability", Perez, Antonio P, "The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution", (2000) 28 *Denver Journal of International Law and Policy*, 175 at 176.

36 See Wilson, above n 20 at 937.

world was not engaged until warrants were issued for Pinochet's arrest in London. It is significant that in Madrid, as in London, the legal processes mainly involved the application of domestic criminal law.

A large number of Chilean activists, together with an even larger number of Argentinians, and their sympathisers, had been active for years in Europe in general,[37] and in Spain in particular, to attempt to bring to some sort of justice to the perpetrators of the crimes committed in Chile and Argentina under the military regimes of the 1970s and 1980s. Under Argentinian military rule from 1976 until 1983 – the period of the so-called "dirty wars" – an estimated 30,000 people were "disappeared". The scale of the Argentinian atrocities was therefore considerably greater than in Chile, although none of the leaders responsible has acquired the familiar profile of Pinochet. Moreover, some 300 Spanish citizens had died in Chile and Argentina during this period. The notion of instituting proceedings was devised principally in order to draw attention to the nature of the events and human rights abuses which had occurred. The practice of granting amnesties in both Chile and Argentina had prevented many such cases from being exposed.[38]

The Madrid Judge Baltasar Garzon had compiled a file on Pinochet while investigating crimes against Spanish citizens committed by the Argentine military junta during the "dirty war;" this led not only to the compilation of information relating to crimes committed in Argentina, but to the nature and activities of Operation Condor. This in turn led him to evidence of its involvement with the Chilean DINA, and then to the fact that Pinochet was not only commander-in-chief of the DINA, but coordinated Operation Condor. The possibility of Pinochet's prosecution, at this stage, was not anticipated.

Accion popular

The proceedings devised in Spain were ingenious. In 1996, an association of Spanish prosecutors, acting in their private capacity, filed criminal complaints against former leaders of the Argentinian military, and charged them with genocide, terrorism, and other crimes against Spanish citizens living in Argentina. The filing of complaints set the criminal process in motion, but did not constitute an official prosecution. It was the subsequent filing of an *accion popular*,[39] or popular action, by private groups and individuals, principally the United Left Party, which had this effect. Spanish law allows private Spanish individuals and organizations to initiate criminal proceedings in instructing courts, even if they are not themselves victims of the alleged crimes alleged, and have no basis for standing, provided the action is in the public interest.

The Argentinian claims went before Judge Garzon, presiding over an Investigating Court of the *Audiencia Nacional*, who ruled that the court had jurisdiction to investigate the claims. This is a unique feature of the *accion popular*, which is unknown in common law countries and rare in civil systems.[40] Provided the Judge – in this case Garzon – is satisfied that an investigation has merit, he can permit it to proceed without either the agreement or consent of the state prosecutor; thereafter the complainants' lawyers can take over the private prosecution themselves, by means of the popular action.

Similar proceedings were instituted against Pinochet and other leaders of the Chilean military on behalf of Chilean victims of the regime; these claims were in the hands of Judge Garcia Castellon. The charges were genocide, terrorism and crimes against humanity. The particulars included the Prats, Leighton, Letelier and Soria murders. Both sets of charges referred to the killing of Spanish citizens in Chile and Argentina. These

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37 Criminal actions arising out crimes committed in those countries have been undertaken in Italy, Sweden and France; for details see Wilson, Richard J, "Spanish Criminal Prosecutions use International Human Rights Law to Battle Impunity in Chile and Argentina", *Ko'aga Rone'eta*, http://www.derechos.org/koaga/iii/5/wilson.html.

38 Wilson, *ibid.*

39 The *accion popular* is well entrenched in the Spanish legal system, being authorised by the *Constitucion Espanola de* 1978 (Spanish Constitution 1978), the *Ley de Enjuicamiento Criminal* (Law of Criminal Procedure) and the *Ley Organica del Poder Judicial* 1985 (Organic Law of the Judicial Branch). For more detailed information on relevant Spanish Law, see Wilson, above n 20 and footnotes thereto; Marquez Carrasco, Maria del Carmen and Alcaide Fernandez, Joaquin, "In re Pinochet: Spanish National Court, Criminal Division (Plenary Session) Case 19/97, November 4, 1998; Case 1/98, November 5, 1998", (1999) 93 *American Journal of International Law* 690.

40 Both Portugal and Brazil permit such proceedings.

charges did not form part of the popular action, but were based on the little –used "passive personality" principle of jurisdiction.[41]

Spanish law recognises universal jurisdiction. The *Ley Organica del Poder Judicial* (*Judicial Branch Act*) 1985 permits prosecution of Spanish and non-Spanish citizens for some crimes committed outside Spain, including genocide, terrorism and other crimes under international law contained in treaties ratified by Spain. It applies to victims of any nationality.[42] The Spanish *Criminal Code*[43] includes the crimes of genocide,[44] terrorism,[45] and torture. The offence of "forced disappearance", which in this context involved kidnapping, detention and probable torture and then murder, followed by the secret disposal of the body, is not codified, and so an ingenious strategy was adopted whereby the complaints included the *components* of the forced disappearance; kidnapping, illegal detention, torture and murder. These charges however were based on circumstantial evidence, as they related to victims whose bodies had not been found.

Upon learning that Pinochet was in England, one of the complainant organisations requested the *Audiencia* to apprehend Pinochet for questioning in relation to his role in Operation Condor, in which both Chilean and Argentinian officers were implicated, and further requested that he be charged with certain murders and abductions. Garzon issued the provisional arrest warrant pending a formal extradition request.

Judge Garcia Castellon then transferred his case against Pinochet to be consolidated with Garzon's case. After Pinochet's arrest, Garzon ordered the Spanish Government to request his extradition[46] through diplomatic channels on charges of genocide, terrorism and torture; this was duly transmitted on 6th November 1998. Once Pinochet had been arrested, the two cases were consolidated. It was at this point – when the extradition of Pinochet from London to Madrid became a possibility – that the Public Prosecutor appealed to the *Audiencia Nacional* on the issue of jurisdiction.

Role of the Prosecutor

The Spanish Public Prosecutor's office is responsible for the promotion of impartial justice by defending the rights of citizens and the public interest as established by law; consequently it is required not only to bring criminal and civil proceedings, but to oppose proceedings brought by others when appropriate. Once the Pinochet arrest warrant had been issued, the Prosecutor appealed, and the matter went to the *Audiencia Nacional*. The *Audiencia* is a special National Court which sits only in Madrid, and has jurisdiction over international crimes and certain crimes occurring outside Spanish territory.[47]

Jurisdiction

The central issue before the 11-member Full Court of the Criminal Division of the *Audiencia* was jurisdiction; the parties were Garzon and the Prosecutor. Garzon argued that, under the terms of the 1985 *Judicial Branch Act,* which defines the jurisdictional limits of Spanish Courts, they have jurisdiction over crimes committed abroad by Spanish or foreign citizens if, according to Spanish Law, the crimes can be deemed crimes of genocide or terrorism, or any other crimes which "according to international treaties or agreements must be prosecuted in Spain".

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41 See White, Jamison C, "Nowhere to Run, nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State", (1999) *50 Case Western Reserve Law Review* 127 at 144; Thorp, Jodi, "Welcome to Ex-Dictators, Torturers and Tyrants: Comparative Approaches to Handling Ex- Dictators and Past Human Rights Abuses" *(2001/1001) 37 Gonzaga Law Review* 167 at 174-5.

42 Article 23 (4).

43 *Codigo Penal, Ley Organica* 10/1995. The enactment of this Code was an innovative step; it also covers certain war crimes; see Graditzky, Thomas, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts", (1998) *International Review of The Red Cross* no 322, 29 at p 37.

44 *Ibid*, article 607.

45 *Ibid*, article 571.

46 He acted pursuant to the Spanish *Criminal Procedure Act* 1882, and the 1957 *European Convention on Extradition.*

47 Wilson, above n 20 at 934.

The Prosecutor argued that most of the alleged crimes took place between 1973 and 1983, and that the 1985 Act should not be applied retrospectively. The Court found that the Spanish Constitution permitted the retroactive application of jurisdictional or procedural norms, but not of substantive criminal norm, and that the relevant section of the Act, as a procedural norm, did not restrict individual rights. Thus, although the issue of universal jurisdiction was discussed, the decision was based on domestic law.

Genocide

The Prosecutor argued that the *Genocide Convention*,[48] Article 6,[49] confers exclusive jurisdiction over genocide on a tribunal of the state where the crime was committed, or on an appropriate international penal tribunal. The Court held that Article 6 does not deny jurisdiction to other states, but merely imposes an obligation to prosecute on those states where genocide has been committed. The Court stated that a contrary finding could preclude a state from trying even its own nationals abroad for committing genocide, thus undermining the Convention's purpose, but conceded that claims to jurisdiction by other states were subsidiary to those provided for in the Convention.

The most interesting issue relates to the Court's interpretation of the definition of genocide itself. Spain had ratified the *Genocide Convention* in 1968. Article 2 of the Convention defines genocide as undertaking certain criminal acts "with intent to destroy, on whole or in part, a national, ethnical, racial or religious group." The crime of genocide appeared in the Spanish *Criminal Code* in 1971. According to the Code, genocide was a "crime against the rights of peoples," and was committed when the defendant had the intent to destroy a "national ethnic, social or religious group." Thus there was no comma between 'national' and 'ethnic', and the term 'social' replaced 'racial'. The Code was amended in 1983, and the word 'racial' replaced the word 'social'. Then in 1995, a comma was added, bringing the Code definition into line with the Convention definition.

The argument concerning the definition was lengthy,[50] but eventually the Court rejected the Prosecutor's argument that the applicable definition was the Convention definition, now contained in the Code. Instead it upheld a definition of genocide which substituted "social" for "racial". Its reasoning was complex; in effect it accepted a compromise definition, observing that "genocide is a crime which consists in the destruction in whole or in part, of a race or human group, through death or the neutralisation of its members, a "concept that is socially understood" and is "incomplete if the characteristics of the groups that suffer the horrors and the destructive action are limited." Its reasoning was that the persecuted group was comprised of those citizens, whether opposed to the regime, or merely indifferent to it, who did not fit the type established by the oppressors as necessary for the new order in the country. The oppressors did not try to change the attitude of the group to the new political system, but wanted to destroy it through imprisonment, killings, disappearances and threats; this, in its view, constituted genocide.[51]

Terrorism

The court's approach here was equally creative. Under the Spanish *Criminal Code*,[52] terrorism involves acting to subvert (Spanish) constitutional order, or to gravely impair public peace. There is no specific provision for universal jurisdiction for terrorism. But the court found that the intention to subvert the national order relates to the "legal or social order of the country where the crime of terrorism is committed, or which is directly affected as a result of the attack", and that the fact that the country in question was not Spain was irrelevant.[53] Thus acts committed as part of Operation Condor were 'terrorism' and could be tried in Spain as international crimes although Spain was not the target of those acts.

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48 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

49 Article 6 states that "Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

50 See Lacabe, Margarita, "The Criminal Procedures against Chilean and Argentinian Repressors in Spain: A Short Summary" (1998) http://www.derechos.net/marga/papers/spain.html

51 This translation of the relevant parts of the decision has been taken almost entirely from the article by Maria del Carmen Marquez Carrasco and Joaquin Alcaide Fernandez, above n 39 at 693.

52 These provisions are mostly contained in articles 171-172.

53 Carrasco and Alcaide Fernandez, above n 39 at 693-4.

It has been suggested by Maria del Carmen Carrasco and Joaquin Alcaide Fernandez[54] that the court's acceptance of an unorthodox interpretation of the crime of genocide is attributable to the Spanish government's failure to keep abreast of the development of international law. When the *Genocide Convention* was drafted, political groups had been intentionally excluded from the definition; it was not considered appropriate to include them as targets for genocide. Carrasco and Alcaide Fernandez argue that as many of the offences charged had a political motivation, it would have been better to characterise such offences as 'crimes against humanity.' Spanish law does not include crimes against humanity as such, or identify them as constituting a universal crime; consequently the "far-fetched" interpretation of genocide may be seen as a means of overcoming shortcomings in Spanish domestic law.

Torture

The approach of the Spanish Courts to the crime of torture was interesting as well; in earlier proceedings relating to jurisdiction before a single judge, it had been held that the Torture Convention confers jurisdiction on a state when the victim is a national of that state. However, the *Audiencia Nacional* in this appeal took the view that acts of torture were constituents of genocide and terrorism, and were therefore within Spain's jurisdiction anyway. It was not therefore necessary to decide whether Spanish law in conjunction with international law provided an independent basis for jurisdiction.[55]

According to Carrasco and Alcaide Fernandez, the same may be said of the court's "superficial analysis of torture", which again could stem from the fact that the Spanish law is not "synchronised" with international law. In fact, successive Spanish criminal definitions of torture are equivalent, although not identical, to the definition in the Torture Convention, and given that the offence of torture is applicable to many of the facts alleged in relation to *Pinochet*, they suggest that this issue should have been pursued further by the court. In relation to the terrorism charges, they argue that the court's findings were simply incorrect; the Spanish crime does not provide a basis for universal jurisdiction.[56]

2. The British proceedings

Pinochet was arrested, in hospital, in London, and he immediately applied for judicial review and *habeas corpus*. The legal issues raised in the British hearings were; whether Spain had jurisdiction to hear the charges against Pinochet; whether Pinochet was immune from prosecution as the alleged crimes were committed whilst he was a head of state; and whether the arrest warrants listed offences for which the British authorities could legally extradite Pinochet to Spain.

A significant feature of the British extradition process is that the *Extradition Act* 1989 provides that almost every aspect of it is at the discretion of the Home Secretary[57]. He may grant authority to proceed with an extradition, except when he believes he cannot do so legally. In those circumstances, he must seek a judicial determination of the issues; thus the case was initially put in the hands of the courts. Eventually of course he removed the issue from the judiciary altogether, as he is also empowered to do under the Act.

The High Court[58]

On 28 October 1998, the High Court dismissed the first arrest warrant relating to the murder of Spanish citizens in Chile, as the proposed Spanish proceedings were based on the 'passive personality' principle of extraterritorial jurisdiction, which is not recognised in Britain.[59] The Court held that Pinochet was immune from arrest as he was a head of state at the time of the alleged crimes, but declared that he would remain in custody (in his case, house arrest), pending appeal. The Court rejected the Crown Prosecution's argument that a former

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54 These two academics from the University of Seville are the authors of the article referred to above at n 39.

55 *Ibid* at 694.

56 *Ibid*, at 695-6.

57 For a detailed treatment of British extradition law, see Merrigan, Eamon C, "The General and His Shield: The Extradition Process Against General Pinochet Ugarte", (2001) 15 *Temple International and Comparative Law Journal* 101 at 104-108.

58 *In re Pinochet*, (*Pinochet* No 1), 38 I.L.M.70 (1999).

59 "the murder of a British citizen by a British non-citizen outside the UK would not constitute an offence in respect of which the UK could claim extraterritorial jurisdiction;" Bingham C J *ibid* at 77.

head of state can be held liable for serious crimes against the law of nations, such as genocide and torture. It pointed out that the provision of the *Genocide Convention*,[60] which confers liability on rulers and officials, was not incorporated into the UK's implementing legislation, the *Genocide Act* 1969. It also noted that the second arrest warrant did not specify a charge of genocide.

The Court distinguished its grant of head of state immunity from the current international view *precluding* such immunity for certain crimes, as provided for by the Nuremberg Charter and International Criminal Tribunals. The court based its view on the fact that prosecutions of heads of state under International Military Tribunals were the result of international agreements, where one sovereign state was not being judged by another foreign state. In this case the prosecution of Pinochet was not being sought by an international body, but by Spain; and Spain intended to prosecute him in its domestic courts. The Crown, on behalf of the Spanish government, appealed to the House of Lords.

The House of Lords proceedings were complicated by the fact that two separate panels heard the appeal, and there were discrepancies in their approach to the issues in their respective findings. The British cases have already been analysed in great detail,[61] and references to them here will be relatively brief, dealing only with the most significant issues. It is important to note that in London, as in Spain**,** the final decision of the House of Lords was based on the application of domestic law; in this case the construction of the relevant British statutes and the *Torture Convention.*

First House of Lords decision[62]

In November, the first House of Lords Committee in a three to two decision held that Pinochet was not immune as a former head of state for acts "condemned as criminal by international law." It found that the alleged acts could in no way be regarded as part of the normal functions of a head of state, and that no immunity was to be had. This decision had to be set aside because of potential bias,[63] and the case was re-heard by a second panel.

Second House of Lords decision[64]

The second panel held in March 1999 that Pinochet could only be subject to prosecution for those crimes he had committed after 1988; for those acts of torture committed after the *Torture Convention* became binding on Britain, Spain and Chile. The House of Lords took the view, as did the majority in the hearing by the first committee, that in relation to the issue of *aut dedere aut judicare* – extradite or prosecute – there was a *responsibility* under the terms of the Torture Convention to do one or the other. It is notable however that at no time during Pinochet's long residence in London did the British authorities initiate proceedings against him. Nothing seems to have been further from their minds, despite the fairly emotive terms in which these obligations were referred to by the Law Lords.

In this hearing the "double criminality" rule was subjected to much greater scrutiny than in the first House of Lords decision. The relevant sections of the *Extradition Act*[65] were construed to the effect that the alleged conduct was required to be criminal at the conduct date, not the request date. As the substantive provisions of the *Torture Convention* were incorporated into British law in September 1988,[66] the range of crimes for which Pinochet could be extradited was greatly reduced.[67] The overall effect of this interpretation was to reduce the

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60 Article 4.

61 For article references see n 69 below.

62 *R v Bartle ex parte Pinochet* (*Pinochet* No2*)* 38 I.L.M. 581 (1999).

63 The potential bias arose from the fact that Lord Hoffman made the interesting mistake of forgetting to disclose that he was a director (unpaid) of Amnesty International, which organisation had been given leave to intervene in the proceedings. As his Lordship had given the third and decisive vote in the majority, in favour of Spain, this oversight was highly significant. Had he not been involved in the case, Pinochet could have been extradited to face a greater range of charges.

64 *R v Bow Street Metropolitan Magistrate ex parte Pinochet* (*Pinochet* No 3) [1999] 2 All ER 97.

65 (*UK) Extradition Act 1989,* ss2(1) – (3)

66 The relevant provisions of the *Torture Convention* are reproduced in s 134 of the *(UK) Criminal Justice Act 1988*.

67 In *Pinochet* (No 1), Bingham CJ was of the opinion that the relevant date for satisfying the double criminality rule was the date of the offence (the conduct date) and not the date of the extradition request (the request date). In *Pinochet*

original 32 alleged violations of criminal law for which Pinochet was sought to be extradited to three; one alleged act of torture and one of conspiracy to torture committed *after* September 1988, and one act of conspiracy to commit murder in Spain. There was substantial and confusing divergence of opinion[68] among the majority. There are many detailed commentaries analysing the British decisions in detail, and most concede that the reasoning behind denying Pinochet's immunity is confusing and sometimes contradictory.[69]

Since the second House of Lords decision, the International Court of Justice (ICJ) has ruled on another aspect of sovereign immunity in the *Yerodia* case,[70] holding that the issue of an international arrest warrant by a Belgian Judge[71] against the Foreign Minister for the Congo, charging him with war crimes and crimes against humanity, should be annulled. The ICJ found that, as a matter of customary international law, a Minister for Foreign Affairs must be able to travel abroad in order to perform his functions.[72] It emphasised the necessity of distinguishing between the rules governing the jurisdiction of national courts, and the rules governing jurisdictional immunities. However, it was conceded that the procedural immunity enjoyed by incumbent foreign ministers does not mean that they enjoy impunity in respect of crimes committed. Although the warrant was ordered to be quashed, Yerodia will not enjoy any immunity when no longer in office. Thus the findings of the House of Lords in relation to former head of state immunity are not undermined by this ruling.

In April 1999, after the second appeal to the House of Lords, the Home Secretary maintained that Pinochet would be extradited. It was not until March 2000 that he finally elected to release him from custody on health grounds, and Pinochet returned to Chile. He returned however not to the anticipated immunity from suit, but to face charges relating to the Caravan of Death.

3. The Chilean proceedings

Since Pinochet's sudden return to Chile, there has not been the same degree of academic legal interest in relation to the events that followed, at least in the English-speaking world. There has been more interest shown in the United States, where there is inevitably a greater degree of interest in Latin American affairs. Yet the events in Europe had a great impact in Chile, and subsequent events there are as much a part of the *Pinochet* case as were the events in Spain and Britain. The general indifference in the common law world to the civil system proceedings however has meant that the intriguing nature of the ensuing legal and political events have not been given the attention they deserve.

Pinochet returned to Chile on 3 March 2000; eight days later the centre-left leader Ricardo Lagos was elected president.[73] When Pinochet returned home, more than 60 domestic criminal complaints had been lodged against him by the relatives of the "disappeared", and those who had been extrajudicially executed.[74] The claims in

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(No 2), Lord Lloyd was of the same opinion, but this judgment was set aside in any event.

68 For a table which clearly sets out the findings of each Law Lord in relation to the various points of law addressed in Pinochet No 3, see Seyedin-Noor, Shahram, "The Spanish Prisoner: Understanding the Prosecution of Senator Augusto Pinochet Ugarte", above n 35 at 47.

69 See for example Bradley, Curtis A, and Goldsmith, Jack L, "Pinochet and International Human Rights Litigation" (1999) 97 *Michigan Law Review* 2129 at 2131-2147; Byers, Michael, "The Law and Politics of the Pinochet Case", (2000) 10 *Duke Journal of Comparative and International Law* 415; Seyedin-Noor, Shahram, "The Spanish Prisoner: Understanding the Prosecution of Senator Augusto Pinochet Ugarte", above n 35 at 45-75.

70 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 2002 I.C.J. (Feb. 14) available at http://www.icj-cij.org/www/idecisions.htm. Reprinted in (2002) 8 *Annual Survey of International & Comparative Law*, Golden Gate University School of Law 151

71 The Judge relied on a 1993 Belgian "atrocities" law, which permits the punishment of Grave Breaches of the Geneva Conventions and serious violations of International Humanitarian Law; see further Graditzky, above n 43 at 30. Warrants have been issued under this law against Pinochet, Ariel Sharon, the former Chadian leader Hissene Habre, and Fidel Castro.

72 The Court relied on customary international law in the absence of a relevant treaty.

73 Lagos's unexpected success has been generally attributed to Pinochet's long absence from Chile.

74 Human Rights Watch World Report 2001; Chile; Amnesty International Report Year 2000, Introduction to Pinochet: http://www.amnesty.org.

relation to the disappeared were based on 19 of the victims of the Caravan of Death, whose bodies had not been found. Lawyers acting for their families requested the investigating judge of the Appeals Court to strip Pinochet of his immunity as Senator for Life, so that he could face trial for his crimes. The claims relating to the disappearances were possible because of a development in July 1999, when the Supreme Court had confirmed the indictment of Arellano Stark and four other retired army officers for the kidnapping of the same 19 victims of the Caravan of Death. The charges against them had been "aggravated kidnapping". Under Chilean law, kidnapping is an ongoing offence until such time as the person is found; thus such "disappearances" are an ongoing crime. The court held that such charges could be sustained in spite of the Amnesty Law declared in 1978; the bodies of the 19 had never been found, and accordingly it was held that it was impossible to know whether they had been killed within the five-year period covered by the Amnesty Law of 1978.

On 23 May the Santiago Appeals Court, by a majority of 13 to nine, voted to strip Pinochet of his immunity, having found that there was a *prima facie* case against him. His counsel argued that his health was too poor for him to be able to instruct his defence, and was thus denied his right to due process, but the Court refused to order medical tests before ruling on the immunity issue. The decision of the Appeals Court was confirmed in August 2000 by the Supreme Court. The court held that in relation to the Caravan of Death charges, Pinochet could not only be prosecuted for kidnapping, but, even if the crimes were eventually found to be homicides, he would remain stripped of his immunity. This finding was made on the grounds that it would be up to the trial judge to decide whether or not the amnesty, or a statute of limitations, applied. The vertical nature of the chain of command in the armed forces was referred to as being a *prima facie* indication of his responsibility.[75]

In October 2000, an Argentinian judge sought the extradition of Pinochet and other former military officials to face murder charges arising out of the car-bombing that killed former Chilean commander-in-chief Carlos Prats and his wife in Buenos Aires in 1974. In June 2002, the Supreme Court unanimously authorised the Appeals Court to consider proceedings to remove Pinochet's parliamentary immunity so that proceedings could be commenced for his extradition to Argentina to face trial for the Prats murders. Throughout this period however, Pinochet's health appeared to be deteriorating, and it was believed by many that delaying tactics would be used until he was no longer fit to be prosecuted.

Under the Chilean Code of Criminal Procedure, trial proceedings on mental health grounds can be suspended only if the defendant suffers from madness or dementia. Medical tests on Pinochet in recent years have indicated that he was suffering from "moderate dementia", but the Supreme Court continued to hold that this level of disability is insufficient to satisfy the Code's requirements. Despite the enactment of a new Code permitting judges to suspend proceedings if a defendant's right to due process could not be guaranteed, the Supreme Court maintained it did not apply. Even so, by 1 July 2002 it was decided by that Court to terminate the prosecution on the grounds that Pinochet's health had deteriorated to the point where he was too ill to stand trial.[76]

A number of conclusions can be drawn from this series of events, one of which is that there is little doubt that the European proceedings gave fresh impetus to those seeking to prosecute Pinochet in Chile.

Part III

Extraterritorial prosecutions in general, and those based on an exercise of universal jurisdiction in particular, present a whole range of challenges to the prosecuting state, and have significant implications for the development of international criminal law.

The issues surrounding the *Pinochet* case inevitably overlap; practical issues overlap with the political, and political with the legal. It is not possible to identify, let alone address them all. For the purposes of this paper they are categorised as follows:

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75 The notion that Pinochet might have been unaware of these or any similar activities was regarded as ludicrous. One of his facourite,a nd much–quoted, sayings was "*en Chile, no se mueva una hoja sin que yo sepa*"; not a leaf moves in Chile without my knowing.

76 Human Rights Watch, "*Chile: Pinochet Escapes Justice*", Press Release, New York, 1st July 2002.

Difficulties confronted by states as opposed to international tribunals

States do not have all the powers of international tribunals; irrelevance of official capacity, including head of state immunity, can't be assumed as it can in prosecutions under the ICTY,[77] the ICTR[78] and the ICC.[79] This has been illustrated by the ICJ decision in *Yerodia*. Moreover there is no dispute over the capacity of such tribunals to try cases of genocide, and torture, whereas the relevant Conventions are open to varying interpretations in state prosecutions. On the other hand, states are not subject to the temporal and territorial jurisdictional limitations of the tribunals.

Universal jurisdiction and sovereign immunity

This is still a fundamental problem for states purporting to exercise universal jurisdiction. The extent of a state's power in this area is unresolved, and although both the *Pinochet* and the *Yerodia* cases have some bearing on the issue, it is impossible to predict how far states might be permitted to extend their powers in this field. It is still a contentious subject,[80] although it is now, clearly, part of the international system for the prosecution of serious crime.

Issues arising from the interaction of disparate legal systems

Some problems stem from significant differences between the common and civil law systems.[81] One of the most troubling of these from the common law perspective, arises from different perceptions of "due process". Others issues relate not only to the different nature of the legal systems of Spain, Britain and Chile, but to the various constitutional underpinnings of these systems. Then there are varying attitudes to extraterritorial jurisdictional principals; the passive personality principle is enshrined in Spanish law, but not recognised in English law.

Due Process

In most domestic legal systems in both civil and common law jurisdictions, a case is brought by a prosecutor operating under the control of the executive branch of government. In *Pinochet*, the Spanish proceedings were instituted by means of an *accion popular*. Although the validity of this process was confirmed by the *Audiencia Nacional*, the Spanish system permits complainants and their legal representatives to initiate an action and then to require the state to proceed with it. Although the legitimacy of such proceedings should be assessed on a case by case basis, it must be acknowledged that within those systems where there is a lack of judicial independence, such procedures are potentially problematic.[82]

From the human rights perspective however there is a great deal to be said for concept of the popular action; even when it became apparent that the extradition proceedings might be successful, only the public prosecutor intervened, and lost. In Britain, the case was eventually removed from the legal system altogether by the executive in the person of the Home Secretary. In this respect too, Spain is a more attractive forum than Britain from the human rights point of view. The Home Secretary has very extensive powers and could have stopped the proceedings at any stage, which, eventually, he did. Had Pinochet been extradited, it is unlikely that Spanish government intervention could have been orchestrated as easily. The power of the investigating magistrate there is such that he could, once the *Audiencia* had conceded jurisdiction, instruct the executive on how to proceed.

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77 Article 7

78 Article 6

79 Article 27

80 See in general as to the exercise of universal jurisdiction by states, Bassiouni, M Cherif, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", (2001) 42 *Virginia Journal of International Law* 81; Morris, above n 10.

81 To date all such proceedings have been initiated in states whose judicial systems are based on a European model.

82 Facts such as this have given rise to fears that a universal jurisdiction may be used as a political tool and is therefore potentially dangerous; see, for example, Morris, above n 10 at 352- 360. The example given by Morris is the *Habre* case, in which the Senegalese charges against Habre for serious crimes he committed in Chad were dropped when the Senegalese President sacked the prosecutor. (Instances where unjustified prosecutions might be undertaken are even more worrying.) This issue cannot be dealt with in detail here, but the significance of the points made by Morris- and others- must be conceded.

Definitions of crimes and interpretation of international law

A significant feature of cases of this nature is that there are inconsistencies in definitions of relevant crimes; the cases against Pinochet in Spain and in the House of Lords highlighted major uncertainties as to the nature and status of international law rules.

An international crime may be incorporated into a domestic legal system in terms that are incompatible with that crime under established international law; this was the case in *Pinochet*, where Spain had adopted its own definition of the term "genocide". The charges formulated in Spain against Pinochet are unexpected from a common law perspective. Carrasco and Alcaide Fernandez refer to this being due in part because of a lack of "synchronisation" between Spanish and international law. But this could be equally said of the situation in Britain, where the *Genocide Convention*, for example, has been implemented, but without incorporating liability for heads of state, who are the most likely initiators of such crimes.

In the case of states parties to the ICC, the passing of implementing legislation should take care of inconsistent definitions; hopefully these will eventually be the definitions that will be applied in relation to cases prosecuted independently of the ICC.[83] This observation applies not only to the standard definition of "genocide" required by the ICC Statute,[84] but will permit prosecutions for "enforced disappearances" which are now characterised as "crimes against humanity".[85] The degree of flexibility that different domestic systems permit is bound to vary, so consistency in the definitions of serious crimes can't be guaranteed, particularly in relation to non-party states. The ingenious use of "aggravated kidnapping" in the Chilean courts is worth noting in this context.

Extradition laws

In the same category is the matter of differing extradition laws and complications arising from extradition. In many cases where a state proposes to prosecute, extradition will not be an issue, as the alleged offender is already present in the prosecuting state. When the issue of extradition does arise however it can be extremely complicated. This was the case in *Pinochet*, even though Britain and Spain were parties to an extradition treaty; both had ratified the 1957 *European Convention on Extradition*.[86] The potential delays in some, if not most, extradition processes present a real problem. Had the British Home Secretary agreed to extradite Pinochet to Spain, the extradition proceedings themselves would inevitably have been protracted. Estimates at the time varies from 18 months to two years, given that Pinochet's lawyers would have been able to appeal at various stages during the process. ICC extradition proceedings, by contrast, provide the crimes were committed on the territory of a state party, would have presented no such obstacles.[87] The relevant date for the application of the double criminality rule is another obstacle, as the consequences of the distinction between the "conduct date" and the "request date" can be very significant, as became apparent in the House of Lords proceedings.

International relations

In the political sphere, the use of universal jurisdiction has great potential for creating difficulties in interstate relations, and the imperatives dictating a decision to prosecute must be considered carefully. This issue takes on a different complexion in the context of the Spanish popular action, where the courts, and not the executive, sanction the prosecution. From the Spanish perspective, when the proceedings were initiated, jurisdiction was the only issue.

Other cases however will be initiated in other contexts. Prosecuting states will have to take into account the obvious risk of seriously undermining relations with the territorial state, as was the case in *Pinochet*, regarding Chile's relations with both Britain and Spain. The risk is even greater if the motives for such actions are purely political, as has already been the case in relation to proposed legal actions against Israel for serious crimes

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83 At least in relation to states parties to the ICC Statute.

84 ICC Statute, articles 5 (1) (a) and 6.

85 *Ibid*, article 7 (c). Such crime must be committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." As to this definitional issue and the advantages of prosecution under the ICC Statute, see Kelly, Michael, "Case Studies 'Ripe' for the International Criminal Court: Practical Applications for the Pinochet, Ocalan, and Libyan Bomber Trials", (1999) *Michigan State University-DCL Journal of International Law* 21 at 26-28.

86 Spain ratified in 1982 and the UK in 1991.

87 ICC Statute, articles 12-15.

committed against Palestinians.[88] In general however states have shown no great desire to get involved in proceedings of this nature at all.

As far as the *Pinochet* case itself is concerned, while Judge Garzon was undoubtedly acting on behalf of a strong Latin American lobby, the case had it come to trial would have put Spanish relations with most, if not all, Latin American governments at risk. It would probably have been regarded by Latin Americans governments as the ultimate hypocrisy; the trial of a former head of state, by a former colonial power, with a fascist past which it has, possibly wisely, elected to forget. Had the *Pinochet* case gone to trial in Spain, it would have involved the judgment of the Chilean state's former leader and possibly, in due course, other officials, in the courts of a state whose own leader had adopted comparable methods for nearly 40 years until his death in 1975.

Just as provocative is the perceived threat to sovereignty, an issue upon which Latin American governments in particular are understandably sensitive, partly no doubt as a result of the persistent interference in their domestic affairs by the United States.[89]

The selection process

The motives for selecting particular crimes and their perpetrators for extraterritorial prosecution need to be borne in mind. The tendency to undertake the prosecution of those cases deemed to be politically acceptable is an obvious factor in this process.

There is the issue of the "north-south" divide; this is not an entirely accurate term, but is preferable today than the first world-third world terminology. It is unthinkable that an American or European leader would be arrested and tried in Latin America for human rights abuses; the north-south divide dictates that this should not be so.[90] But the reverse situation is acceptable. It is also probably unavoidable; it simply reflects the contemporary reality, which is that some European states at least have relatively stable legal and judicial systems. This being the case, it would be strangely pointless to refuse assistance to victims of terrorist regimes seeking support on the ground that such action might be perceived as politically incorrect. Victims in such cases understandably look to Europe in these circumstances; to former colonising states which speak the same language and are frequently sympathetic to their cause.

There is another aspect to the issue of political acceptability. While Pinochet was in London, Fidel Castro was making a State visit to Spain. Castro has been a dictator for more than 40 years, and has no known plans to secure Cuba's future after he dies. Now that the Spanish Government is socially democratic, Castro is belatedly feted as a hero. While it is not suggested that Castro's human rights abuses equal those of Pinochet, it is worth looking objectively at the reality of the Castro's Cuba. His regime has a long and well-documented history of torture of its political opponents, and has persisted in retaining the death penalty.[91] However, the prosecution of left wing leaders in Spain is not likely in the near future. Does this render spurious or unacceptable the attempts of the Spanish judiciary to assist victims with whom they sympathised? Although Belgian authorities, on the basis of their "atrocities" law, have been persuaded to issue an extradition warrant against Castro, it is not a move which seems to have engendered a huge degree of support by human rights activists.

Non-interference

Finally, regardless of the pressure brought to bear on the prosecuting state to proceed, there remains the proposition that it may well be desirable in the long run for a country to be left to deal with its problems in its own way, and attempt to make its own peace with the past. The effects of outside interference in a case such as Pinochet's are unpredictable. In this context too the respective political backgrounds of Spain and Chile are very

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88 See Morris, above n 10 at 355-6.

89 A comprehensive assessment of this issue is not going to be attempted here. But the enormous impact of constant US interference in Latin American domestic political affairs cant be ignored in this context. See, for example, Bhuta, above n 20 at 502, and footnotes thereto.

90 A Chilean perspective on the north-south divide and the importance of non-interference is given by Frontaura Rivera, Carlos, in "Territorialidad, Prescripcion e Inmunidad en Materia de Derechos Humanos", (1999) 26 *Revista Chilena Derecho, Faculdad de Derecho, Pontificia Universidad Catolica de Chile*, 203. (Copy on file with author).

91 Details of serious human rights abuses including torture and the criminalisation of political dissidence have also been well-documented. See, for example, "Cuba's Repressive Machinery: Human Rights Forty Years After the Revolution," *Human Rights Watch* June 1999; http://www.hrw.org/reports/1999/cuba

interesting. After years of Fascist rule, the post-Franco government made the transition from fascism to constitutional monarchy with surprising ease. The Franco regime lasted for so long that the Spanish people appear to have been content to make the transition and their own form of peace with the past, although recent discoveries of mass graves suggest that this process is not yet over. Could Spain have justified the risk, in prosecuting Pinochet, of engendering more violence in Chile? There is no doubt that an active, even fanatical, pro-Pinochet lobby still exists there. Chile made some progress by holding a Truth Commission, but the country's dilemma is unlikely to be resolved until Pinochet is long dead and a new generation is free to make decisions about the Chilean constitution.

Conclusion

In relation to the *Pinochet* case, Richard J. Wilson states:

> The combined use of international and domestic criminal law to bring a former dictator to justice brings into focus the difficulty, in any era, of overcoming the limits of the traditional territorial and political sovereignty of nations. If the arrest of Augusto Pinochet teaches us that national sovereignty is eroding, it reminds us as well of why such limits have been so difficult to overcome. Inevitably, they must be. The precepts of international criminal law, in a direct line of precedent with origins in the Nuremberg Trials, provide countries that have chosen to adopt them with the necessary legal tools to punish, at any time and in any place, the most serious of crimes against the world: terrorism, genocide, torture, disappearance. That the arrest of General Pinochet so took the world by surprise is testimony to how rarely any one country, or any one judge, has the rare combination of political will and personal courage to apply those tools. [92]

This is fair comment; such undertakings arguably ought to be difficult when so much may be at stake. But they will continue to have their place, forming part of the patchwork system[93] of international criminal justice, which includes international military tribunals, joint state-United Nations courts, and the ICC.

The case of Augusto Pinochet, probably more than any other, helped to garner popular support for an International Criminal Court. Many human rights lawyers, activists and others have asserted that the ICC would have been the most appropriate tribunal in which to prosecute him, had it only existed during his regime.[94] They are undoubtedly right in theory, but such commentaries do not explain how this could have been achieved. If this hypothetical situation is considered carefully, it is apparent that his prosecution by the ICC would have been virtually impossible.

Pinochet would never have ratified the ICC Statute while he was in power; once in force it would have posed a real threat to him and many who served him, whereas ratification of the *Torture Convention*, at the time, appeared to be no more than a formality. Had a previous Chilean government ratified the ICC Statute, his would have withdrawn from it. While it is the case that withdrawal does not take effect until a year after notification,[95] and the state in question remains subject to the jurisdiction of the ICC during that year, it would not have been possible, or practical, for the prosecutor to institute proceedings *propio motu*[96] during that period; prosecutions take place after the damage is done. It is only at the end of a regime such as Pinochet's that criminal proceedings become viable, and Pinochet used the Chilean legal system too effectively to leave himself vulnerable at home.

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92 Wilson, above n 20.

93 This term is taken from Jodi Thorp's article, above n 41.

94 See, for example, Kelly, above n 85 at 23-30. All the observations he makes about the advantages of bringing Pinochet before the ICC are valid, but he fails, as do so many other commentators, to explain how it could have been done.

95 ICC Statute, article 27

96 *Ibid*, article 15. It is possible to envisage situations in which Pinochet could have been apprehended and tried; had he been unwise enough to visit a state party to the ICC Statute upon whose territory he had committed a crime; Argentina perhaps being the most obvious example. At the time however Argentina was complicit in the activities of Operation Condor and for many reasons would not have become, or remained, a party to the Statute. Realistically speaking it is most unlikely that he would have put himself in such a position.

Chile could in theory have become a party to the Statute after the regime ended, in order to refer the issue to the ICC, but the Chilean government had no desire to do so. Such a referral was impossible because of the continued military presence in the Senate, and would in any event have led to further internal strife in Chile. (In fact, Chile *has* signed the ICC Statute, but at a time and in circumstances where proceedings against Pinochet in that forum are not an issue.)[97]

As mentioned above, the failure to prosecute Pinochet successfully in Europe engendered enormous support for an international criminal court. But particular problems arise in cases such as his, where the crimes, or at least a very high proportion of them, are committed in the context of a domestic terrorist regime; and in this situation the ICC can offer no assistance, unless and until the issue is referred to it by a subsequent government. In such circumstances it is to state prosecutions, with all their attendant complexities, that activists must continue to look.

This, ironically, may be the most significant lesson to be learnt from the *Pinochet* case.

[97] Chile signed the ICC Statute on 11 September 1998. President Lagos and the Lower House are in favour of the ratification bill which was approved in 2001. It remains to be seen if the Senate will permit it to go through.

Panel 5B: International and Domestic Law Interface

A Legitimate Influence: Judicial Treatment of International Law in the *Yarmirr* Case

Jelita Gardner-Rush*

Those who argue in favour of the direct judicial application of international law have encountered a general reticence on the part of the bench. This reluctance may stem from concerns about legitimacy.[1]

In terms of constitutional legitimacy, the principle of the separation of powers means judges are reluctant to allow legal consequences for individuals to flow from actions of the executive in the conduct of foreign affairs and ratification of treaties, resulting in a de facto law-making power for the executive.[2] Concerns about the political legitimacy of enforcing rights and obligations that were not subject to the Australian democratic legislative process[3] and the procedural legitimacy of judges declaring new rights or even criminal offences[4] likewise stem from the rule of law that informs the appropriate limits on the judicial and executive arms of government.

A further obstacle is the unfamiliarity of judges with international law and the difficulty they may have in ascertaining whether a rule is established according to the applicable principles and employing international law sources.[5] This concern could be characterised as doubt about the legitimacy of international law as a legal system.

These concerns have led to a lack of clarity and predictability in judicial approaches,[6] in particular a poverty of theory and international law method in the small number of cases in which international law is afforded direct consideration, particularly outside the human rights context.[7] Not assisting the task of either judicial determination, or academic analysis of decisions, are the theoretical frameworks presently available to consider the spectrum of "legitimate influence" that international law may have on the domestic legal context.

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* Chambers of the Chief Justice of New South Wales.

1 See generally, Feldman, D (1999) 'Monism, Dualism and Constitutional Legitimacy' *Australian Year Book of International Law* 20: 105-126.

2 Ibid. at 107-110. Mason, A (1997) 'International Law as a Source of Domestic Law' *International Law and Australian Federalism*. BR Opeskin and DR Rothwell. Melbourne, MUP**:** 210-231 at 212.

3 Mason, A (1996). *The Internationalisation of Domestic Law*. Canberra, Centre for International and Public Law, Law Faculty, Australian National University at 7; Feldman, D (1999) 'Monism, Dualism and Constitutional Legitimacy' *Australian Year Book of International Law* 20: 105-126 at 111.

4 Mitchell, AD (2000) 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimma v Thompson*' *Melbourne University Law Review* 24: 15 at 32 (discussing the majority in N*ulyarimma v Thompson* [1999] FCA 1192 – hereinafter *Nulyarimma*); Walker, K (1996) 'Treaties and the Internationalisation of Australian Law' *Courts of Final Jurisdiction: The Mason Court in Australia*. C Saunders (ed), Sydney, The Federation Press**:** 204 at 214 (discussing Brennan J in *Dietrich v The Queen* (1992) 177 CLR 292 at 323-25).

5 Balkin, R (1997) 'International Law and Domestic Law' *Public International Law: An Australian Perspective*. Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), Melbourne, OUP**:** xl, 436 at 123-4; Triggs, G (1989) 'Customary International Law and Australian Law' *The Emergence of Australian Law*. MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), Sydney, Butterworths**:** 377 at 384.

6 For example Crawford, J and W Edeson (1984) 'International Law and Australian Law' *International Law in Australia*. K Ryan (ed), Sydney, Law Book Co.**:** 71-135. at 77-79; Walker, K (1996) 'Treaties and the Internationalisation of Australian Law' *Courts of Final Jurisdiction: The Mason Court in Australia*. C Saunders (ed), Sydney, The Federation Press**:** 204 at 231; Merkel J in *Nulyarimma* at [131].

7 Balkin, R (1997) 'International Law and Domestic Law' *Public International Law: An Australian Perspective*. Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), Melbourne, OUP**:** xl, 436 at 123.

Helpfully, for present purposes, the judicial handling of international law in *The Commonwealth v Yarmirr,*[8] highlights the practical difficulties with some of these theories.

The purpose of this paper is to consider some deficiencies of the present analytical tools and propose a more useful framework for both advocacy and analysis.

The particular significance of *Yarmirr*, for native title jurisprudence, is that it is the first application for a determination of native title in relation to an area of sea territory.[9] Five Aboriginal clans together claimed rights of exclusive "possession, occupation, use and enjoyment of the waters"[10] including control of access (to the exclusion of the public) and a right to trade in the resources of the waters (including those of the seabed and subsoil[11]). The claimed area, in the vicinity of Croker Island, is wholly located within the 12nm territorial sea[12] offshore from the Northern Territory.

The application for an offshore determination raised three questions involving a consideration of international law. The first was, does the *Native Title Act* provide a statutory basis for recognition of offshore native title? This question was not particularly contentious. The majority in the High Court decided that s6 and other references to waters in the Act manifested an intention to apply the Act offshore.[13] This intention was supported by Commonwealth legislative power in s52 (xxix) to govern offshore areas consistently with assertions of sovereignty as recognised in *New South Wales v Commonwealth* (*Seas and Submerged Lands Act* case).[14]

Native title is defined in the *Act* in s223(1):

> The expression 'native title'… means the communal, group or individual rights or interests of Aboriginal peoples … in relation to land or waters, where:
> (c) the rights and interests are recognised by the common law of Australia.

The second question relates to the requirement in s223(1)(c) of common law recognition, and is, must the common law apply to the claimed area as a precondition to recognition under the *Act*? This question presents a difficulty only in terms of offshore native title claims because of the precedent of *R v Key,n*[15] affirmed in the *Seas and Submerged Lands Act* case in which it was held that the common law of Australia does not apply beyond the low water mark.

The majority identified the process of determination under the Act as commencing with evidentiary findings about a continuing indigenous connection with land and waters giving rise to rights and interests. The subsequent, not anterior step was the identification of any conflicting right, interest or principle that would operate to prevent common law recognition. Subject to any such inconsistency claims for offshore native title are determinable under the Act.[16] This conclusion, and the restriction of the principle in *Keyn*, flowed from a consideration of sovereignty over offshore areas at international law.

The final question that raised international law interaction with native title was the claimants' assertion of exclusive possession over the offshore area. Such possession would be prima facie inconsistent with Australia's international obligation to provide for innocent passage through Australian waters.

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8 (2001) 75 ALJR 1582.

9 Previously, *Mason v Tritton* (1994) 34 NSWLR 572 and *Sutton v Derschaw* (unreported, 15 August 1995, Supreme Court of Western Australia) had considered native title fishing rights as a defence to infringements of fishing regulations, but *Yarmirr* was the first application for a substantive determination.

10 *Yarmirr v the Northern Territory* [1998] 156 ALR 370 (Olney J) at [4]; Case summary, Registry of the High Court of Australia, http://www.highcourt.gov.au/registry/matters/matters_feb2001.htm (last visited 29/10/01) at 1.

11 According to the definition of "waters" in *NTA* (s253(b)).

12 *Yarmirr v the Northern Territory* [1998] 156 ALR 370 (Olney J) at [31].

13 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [8].

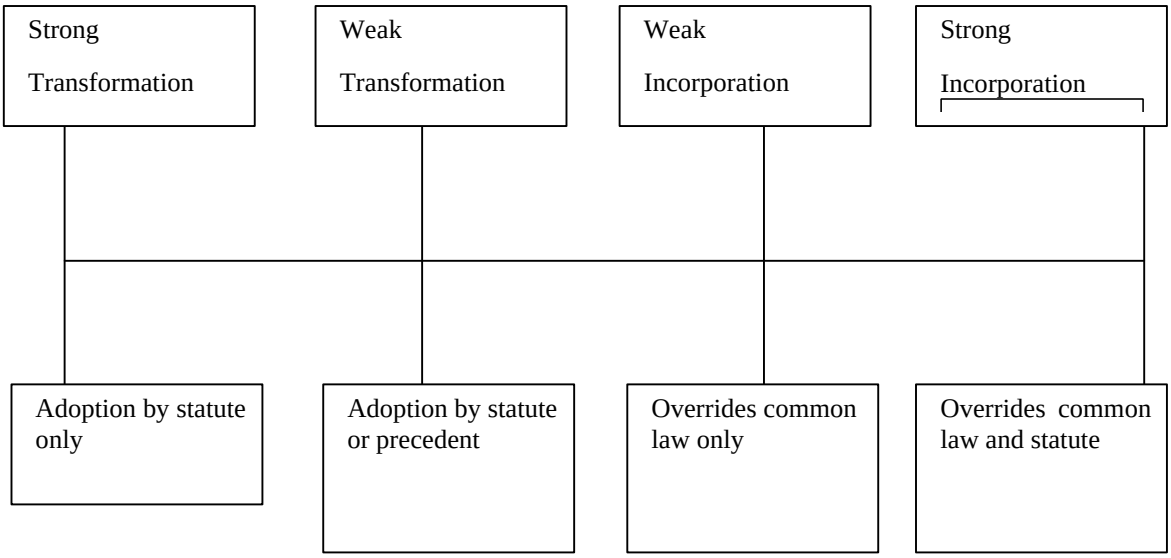
14 (1975) 135 CLR 337.

15 (1876) 2 Ex D 63; hereinafter *Keyn*.

16 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [50].

The majority examined British, Commonwealth and Northern Territory actions in relation to the claimed area, and concluded that the assertions of Crown sovereignty over time had included asserted rights of public navigation and fishing and were asserted subject to the international right of innocent passage.[17] These rights were inconsistent with the continuation of a traditional right to exclude others from the area.[18]

For the purposes of critical analysis of the judicial decisions in *Yarmirr*, I need to mention briefly the theoretical models I intend to employ. The first – monism/dualism/harmonisation – describes the appropriate relationship between international and domestic law.[19] The second, transformation/incorporation describes the circumstances in which international law can have domestic effect.[20]



Kristen Walker[21] has nominated a four-part continuum that distinguishes between strong and weak (or hard and soft)[22] incorporation based on whether the international rule will override both common law and statute, or common law only. Strong and weak transformation differ on the act that will be sufficient to adopt the international law rule – either a judicial decision or legislation, or legislation only.

A further possible characterisation is based on the effect or operativeness given to international law once adopted. This can be a direct or indirect operation, or no operation.[23] Examples of indirect operations include the application of an international law principle to the construction of a statute, the legitimate expectation that a

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17 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [59-61, 75].

18 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [98].

19 Shearer, IA (1997) 'The Relationship between International Law and Domestic Law' *International Law and Australian Federalism*. BR Opeskin and DR Rothwell (eds), Melbourne, MUP**:** 34-68 at 36-8; Balkin, R (1997) 'International Law and Domestic Law' *Public International Law: An Australian Perspective*. Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), Melbourne, OUP**:** xl, 436 at 119-121.

20 Mason, A (1997) 'International Law as a Source of Domestic Law' *International Law and Australian Federalism*. BR Opeskin and DR Rothwell (eds), Melbourne, MUP**:** 210-231 at 212-14; Triggs, G (1989) 'Customary International Law and Australian Law' *The Emergence of Australian Law*. MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), Sydney, Butterworths**:** 377 at 381-84.

21 Walker, K (1996) 'Treaties and the Internationalisation of Australian Law. *Courts of Final Jurisdiction: The Mason Court in Australia*. C Saunders (ed), Sydney, The Federation Press**:** 204 at 228.

22 As termed by Mitchell, AD (2000) 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimma v Thompson*' *Melbourne University Law Review* 24: 15 at 27.

23 Walker, K (1996) 'Treaties and the Internationalisation of Australian Law' *Courts of Final Jurisdiction: The Mason Court in Australia*. C Saunders (ed), Sydney, The Federation Press**:** 204 at 232.

decision-maker will act in accordance with international obligations, and the development of the common law in line with international principles.[24]

The methodology of the High Court majority in *Yarmirr* suggests that they may be pursuing a soft transformation approach that recognises and applies only so much of international law as has been adopted by statute or precedent. Their Honours confine their source material mainly to very early texts and cases on sovereignty and precedents from within the common law system – specifically *Keyn* and its contemporaries and the *Seas and Submerged Lands Act* case. The majority cite one modern text[25] and this is in relation to the state of international law in the 17th and 18th centuries. This historical focus on the development of sovereignty over the sea is explained by a concern in native title jurisprudence with the content of sovereignty asserted, in this case over the territorial sea, at the time of acquisition of sovereignty – 1824 in the Northern Territory. However, the majority depart from this approach in later statements that even if the right of innocent passage had not existed by 1824, later assertions of sovereignty must have occurred consistent with the preservation of that right.[26] At no point does the majority examine the content of the right of innocent passage under the United Nations Convention on the Law of the Sea (UNCLOS)[27] or the Territorial Sea Convention that are the bases for the enactment of the *Seas and Submerged Lands Act*.

One difficulty with this approach is that it does not provide a modern analysis of the state of the international law of the sea for the guidance of future judicial decisions. There is no discussion of the legitimacy or otherwise of employing international law in this context or whether the majority is engaged in developing the common law. In terms of the monist/dualist spectrum, the majority appears confused about whether international law is a function of state sovereignty or the reverse. Initially they identify the critical sovereignty question to be what reach the sovereign has asserted[28] and cite with approval the statement of Justice Lush in *Keyn* that municipal law may be extended only by statute and is not affected in terms of its territorial reach by the operation of international law. Later, however, their Honours consider sovereignty over the territorial sea to have been acquired by concession of the international community.[29]

This confusion, present also in the judgments of Justices McHugh and Callinan in which their Honours confine their examination of international law to the judgments in *Keyn* and the *SSLA* case, points up the central difficulty with the transformation approach, namely that it cannot take account of changes in international law. Lord Denning, convinced of this inadequacy, was converted in the *Trendtex* case[30] to the incorporation approach.[31] Further, there is no analysis of how the international law principle came to be legitimately recognised in domestic cases in the first place, a paradox for judges considering precedent alone to be a sufficient source of applicable international law.[32]

Of central importance, though, is the conclusion of the majority that the right of innocent passage in international law operates as a qualification both on Crown sovereignty and on the continuation of traditional laws and customs. This finding accords a direct operativeness for international norms and indicates that a majority of the High Court are prepared to apply settled principles of international law as limitations on Crown

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24 Ibid. at 209.

25 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [58], n98.

26 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [75].

27 ATS 1994 No. 31.

28 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [51].

29 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [59].

30 [1977] 1 All ER 881.

31 Mason, A (1997) 'International Law as a Source of Domestic Law' *International Law and Australian Federalism*. BR Opeskin and DR Rothwell (eds), Melbourne, MUP: 210-231 at 215.

32 Erades, L (1993) *Interactions between International and Municipal Law – a comparative case study*. The Hague, TMC Asser Instituut at 660; Walker, K (1996) 'Treaties and the Internationalisation of Australian Law' *Courts of Final Jurisdiction: The Mason Court in Australia*. C Saunders (ed), Sydney, The Federation Press: 204 at 229; Crawford, J and W Edeson (1984) 'International Law and Australian Law' *International Law in Australia*. K Ryan (ed), Sydney, Law Book Co.: 71-135 at 73.

sovereignty and that they consider exercises of sovereignty by the Crown to be justiciable in the domestic sphere. This shift to a more monist perspective (with international law as the superior source) may raise questions about the previously non-justiciable status of the prerogatives and executive conduct of international affairs in terms of conformity with international law.[33] I should at once acknowledge that this is an expansive reading of the implications of their Honours' decision.

It is not clear from the majority's analysis whether they consider themselves to be applying international law per se or the common law as it has adopted international law into the domestic corpus. The usual assumption is that a direct operation for international law is a consequence of a monist, incorporation approach, but in the majority's method, a mixture of source material is employed, some of it outdated and based on defunct principles, some of it domestic case law recognising international rules, and then to give this material an application governing both the reach of a statute and overriding common law recognition of otherwise valid indigenous proprietary rights.

The judgment of the majority in the High Court demonstrates that the incorporation-transformation continuum is directed at two separate concerns. Strong and weak incorporation, because it accepts the direct applicability of international norms, is distinguished according to the superiority of the rule, and strong and weak transformation focuses on the different acts that will be sufficient to transform a rule, questions of superiority then being decided by the method of transformation, that is, the domestic hierarchy of statute over common law. I would argue, however, that the majority have given more direct operativeness to international law in the present case than a transformation approach would justify, yet have not endorsed the incorporation approach because they have failed to consider the present content of international law. The judgments of the Federal Court below manifest similar disparities.

The Federal Court majority of Justices Beaumont and von Doussa reject exclusive native title by characterising the right of innocent passage as a skeletal principle of the common law.[34] This gives a surprisingly high status to an international law rule that has been, at best, quasi-incorporated by statute in the *Seas and Submerged Lands Act*.

In considering the extent of Australian sovereignty in relation to the area of application of the *Native Title Act*, the majority examine the international law sources directly, rather than relying on precedent. They note in detail the relevant provisions of the Conventions that were the bases and determined the content of the sovereign rights then asserted or implemented by the Executive or Parliament.[35] Each assertion of sovereignty is thus placed in the context of being supported by the contemporary state of international law (either customary or conventional). Again the direct operativeness of international law in the context of legislative power suggests a monist perspective where sovereignty is a function of the international sphere.

This limited examination of the various ways in which international law is employed and characterised by the judges of the High Court and Federal Court leads me to endorse a framework for analysis of judicial reasoning and the advocacy of international law applicability in three stages.[36]

The first, is to identify whether customary or conventional international law is being employed and to ascertain the present status of the rule proposed to be applied according to the international law method relevant to that source. The second is to define how the rule may enter the domestic sphere. This involves the application of the incorporation-transformation continuum as a method of plotting the sufficiency of various adoptive acts, such as previous judicial decisions, ratification, quasi-incorporation or legislative implementation. The final stage is to

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33 Lindell, G (1997) 'Judicial Review of International Affairs' *International Law and Australian Federalism* BR Opeskin. and DR Rothwell (eds), Melbourne, MUP: 160-209 161-2; *Horta v Commonwealth* (1994) 181 CLR 183 was dismissed on this basis: Fitzgerald, BF (1995) '*Horta v Cth*: The Validity of the Timor Gap Treaty and its Domestic Implementation' *International and Comparative Law Quarterly* 44: 643. Perhaps the matter would be considered substantively now.

34 *The Commonwealth v Yarmirr* (1999) 168 ALR 426 at [238].

35 *The Commonwealth v Yarmirr* (1999) 168 ALR 426 at [134-60].

36 The following is a development of the framework proposed by Mitchell, AD (2000) 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimma v Thompson*' *Melbourne University Law Review* 24: 15 at 28.

consider the effect or 'operativeness' to be given to an international law rule that has been adopted. This stage is not limited to the direct or indirect operation granted a rule but also includes questions of the superiority of a rule over statute or the common law.

Before I conclude there are two observations I would make about the possible applications of this framework. The first is that, in line with dualist understandings of the separate spheres of operation of international law, courts may be more prepared to give a direct operativeness to international law where it limits the conduct of government than where it would found a private right or obligation. For example, *Yarmirr* qualified Commonwealth sovereignty over the sea, and in *Teoh*[37] limitations on executive action could be viewed as allowing international law an operation that governs the state. By contrast, cases that have sought to extend the common law in favour of the individual based directly on international law rights or obligations have achieved limited success – for example *Nulyarimma* (the genocide case). If this characterisation is accurate, a claim that argues for a limitation on some aspect of government through the operation of an international law principle may be more likely to succeed, notwithstanding that the result may be to create individual or communal entitlements – for example, native title to land or sea or a legitimate expectation in administrative decision-making.

The second comment is that in terms of superiority, international law generally cannot override statute, but characterising the interaction of a statute with a universal principle of international law as an issue of statutory construction may provide a path for indirect operation which may have a substantive consequence. This is the path taken by Justice Kirby in *Yarmirr*, construing the *Native Title Act* and the operation of the common law in light of the international principle of racial non-discrimination. His Honour upholds an exclusive native title to the sea, including rights to exploit resources, subject only to the minimum concession for reasonable innocent passage and public navigation, and inconsistencies with subsequent licences.[38]

Whatever motivation guides a decision, the presentation of legitimate reasoning where an international norm is employed will be a central judicial concern. This is because a number of constitutional and political factors militate against the judicial application of international law. The three-stage approach I have outlined may address judicial reticence towards adoption of an international rule for fear of the extent of operativeness it may entail as a result of the conflation of the process of adoption and application under existing models. Likewise, judges more willing to give a high operativeness to international law may still, in a principled manner, confine the kinds of international law norms adopted domestically. It seems inevitable that the corpus and fields of international law will continue to grow and as a result, the internationalisation of Australian law. Courts will increasingly be asked to perform the role of harmonisation between domestic and international law. It is hoped that this approach will assist in discerning the legitimate means for doing so.

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

38 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at [294]; the argument is submitted in the Mirimbiak submissions at [5.4] and was also raised by a HREOC intervention in *Ben Ward & Ors v Crosswalk Pty Ltd & Ors* P67/2000 (High Court transcript 8 March 2001 – awaiting decision).

To Partition or Not to Partition? International and Constitutional Law Perspectives on the Territorial Space of an Independent Quebec

Peter Radan*

Introduction

It is an article of faith amongst the francophone secessionists of Quebec that an independent Quebec would have the same territorial scope and borders as those of the province of Quebec that are guaranteed under Canadian constitutional law.[1] The main pillar of support for this contention is a report commissioned by the Quebec government in 1992 and written by five international law experts, often referred to as the 'Five Experts Report'.[2]

However, there are many people within Quebec who vigorously dispute this contention. Amongst such people are the aboriginal communities in the Ungava region[3] of northern Quebec.[4] These communities overwhelmingly reject the idea that they can be separated from Canada without their consent.[5] Ungava is the traditional homeland to a number of Quebec's aboriginal peoples, in particular the Cree and Inuit peoples. It also accounts for approximately two-thirds of Quebec's present territorial scope. These opponents of the claims made by Quebec's francophone secessionists assert that they have a legal right to remain within Canada if and when Quebec becomes an independent State. The practical implications of their assertion are that Quebec's independence would result in new borders being drawn and a reduction in Quebec's current territorial scope. In short, a secession of Quebec would, they claim, necessitate a partition of the province.

The aim of this paper is to analyse, from the perspectives of international and Canadian constitutional law, the validity of the claims made by francophone secessionists in Quebec, in particular in relation to Ungava. However, before doing so it will first detail the emergence of the political and legal debate within Canada over

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1 By the *Constitution Act, 1871*, 34-35 Vict., c. 28 (UK), s. 3 Quebec's territorial limits can only be altered with its consent. By s. 43 of the *Constitution Act, 1982*, any alteration of Quebec's borders with other provinces can only be achieved with the consent of its National Assembly. The *Constitution Act, 1982* is Schedule B of the *Canada Act 1982*, 1982, c. 11 (UK).

2 T. Franck, R. Higgins, A. Pellet, M. Shaw, & C. Tomuschat, 'L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté' in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, Les Attributs d'un Québec souverain, Exposés et études, vol. 1, 377, Bibliothèque nationale du Québec, Quebec, 1992. An English translation of this report is reproduced in Anne F Bayefsky, *Self-Determination in International Law, Quebec and Lessons Learned*, Kluwer Law International, The Hague, 2000 at 241-303. The Five Experts Report was principally written by Alain Pellet, and relied heavily upon the decisions of the Arbitration Commission established by the European Community in 1991 as part of its Conference on Yugoslavia to respond to the wake break-up of Yugoslavia. Alain Pellet was also a key legal adviser to the Arbitration Commission. Hereinafter this report will be referred as 'Five Experts Report' and page references will refer to those in Bayefsky's book.

3 Although there is uncertainty as to the precise territorial scope of Ungava, for the purposes of this article it includes the areas of northern Quebec that were the subject of Quebec border legislation of 1898 and 1912. This legislation is discussed in more detail below.

4 Grand Council of the Crees, *Sovereign Injustice, Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec*, Grand Council of the Crees, Nemaska, 1995 (hereinafter *Sovereign Injustice*) at 171-217.

5 Claude-Armand Sheppard, 'The Cree Intervention in the Canadian Reference on Quebec Secession: A Subjective Assessment' (1999) 23 *Vermont Law Review* 845-859 (hereinafter Sheppard, 'The Cree Intervention') at 851.

the issue of an independent Quebec's borders. A brief sketch of the historical development of Quebec's current northern provincial border will then follow.

The emergence of the debate over Quebec's post-secession borders

It has only been since Quebec's unsuccessful referendum on secession in 1995 that the issue of its territorial scope and borders has become significant within the public debate over the broader question of the possible secession of Quebec. This significance is largely due to contributions to the debate of those Canadians (including many Quebecers) who would rather not see any secession from Canada. Most, but not all, of these Canadians are of the view that, if Quebec wants to secede, it should be allowed to do so, but not within the territorial scope of its current provincial borders. These Canadians reject the current Quebec government's assertion that Quebec's current borders are inviolable in the event of secession, and can be referred as 'partitionists'.[6] The partitionists argue that, if Canada's borders are not inviolable, then neither are Quebec's. In 1995, the then Canadian Foreign Minister, Andre Ouellet, noted as follows:

> [Secessionists] are saying Quebec is indivisible, but these people are ready to divide up Canada. It's one or the other. Either the two are divisible or the two are indivisible. And if Canada is indivisible, what is this story of separating Quebec.[7]

However, the partitionists are by no means agreed upon exactly how Quebec is to be partitioned.[8]

On the other hand, not all Canadians who are otherwise opposed to the secessionist movement in Quebec favour that province being partitioned if it secedes from Canada. These people argue that a partition of Quebec is not practically feasible and that if Quebec secedes it should be with its current provincial borders remaining intact.[9]

The Secession Reference

In 1998 the issue of partition was raised before the Canadian Supreme Court in its landmark *Reference re: Secession of Quebec*[10] (*Secession Reference*) decision. One of the Court's rulings in that case was that the *unilateral* secession of Quebec from Canada would be illegal under Canadian constitutional law.[11] This, however, did not mean that the secession of Quebec from Canada was not legally possible. The Court ruled that,

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6 It is ironical that Quebec itself does not accept that its present borders are inviolable. In 1927 the Privy Council made a ruling on the border between Quebec and Labrador (part of the Province of Newfoundland & Labrador): *Re Labrador Boundary* [1927] 2 DLR 401. However, no Quebec government has acknowledged the binding effect of that ruling: Renee Dupuis & Kent McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Volume 2, Domestic Dimensions*, Canada Communication Group – Publishing, Ottawa, 1995 (hereinafter Dupuis & McNeil, *Canada's Fiduciary Obligation*) at 94; Rheal Seguin, 'Bouchard Threatens Suit Over Labrador', *The Globe & Mail*, 6 December 1999; Louis-Edmond Hamelin, *Canadian Nordicity, It's Your North Too*, Harvest House, Montreal, 1979 (hereinafter Hamelin, *Canadian Nordicity*) at 160-161.

7 Quoted from Sarah Scott, 'Ouellet Questions Whether Borders Would Stay the Same if Quebec Separates', *The Montreal Gazette*, 20 September 1995. See also Patrick J Monahan & Michael J Bryant with Nancy C Cote, *Coming to Terms With Plan B: Ten Principles Governing Secession*, C D Howe Commentary, The Secession Papers, No 83, June 1996 (hereinafter Monahan et al, *Coming to Terms With Plan B*) at 35; Thomas M Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1996 (hereinafter Franck, *Fairness in International Law*) at 160.

8 See for example: Lionel Albert & William Shaw, *Partition: The Price of Quebec's Independence*, Thornhill, Montreal, 1980; David Varty, *Who Gets Ungava?*, Varty & Co, Vancouver, 1991 (hereinafter Varty, *Who gets Ungava?*); Scott Reid, *Canada Remapped, How the Partition of Quebec Will Reshape the Nation*, Pulp Press, Vancouver, 1992; *Sovereign Injustice*; Trevor McAlpine, *The Partition Principle: Remapping Quebec After Separation*, ECW Press, Toronto, 1996; Monahan et al, *Coming to Terms With Plan B*; Richard Janda, *Dual Independence, The Birth of a New Quebec and the Re-birth of Lower Canada*, Varia Press, Montreal, 1999 (hereinafter Janda, *Dual Independence*).

9 Reed Scowen, *Time to Say Goodbye, The Case for Getting Quebec Out of Canada*, McClelland & Stewart Inc, Toronto, 1999 esp at 127; Robert A Young, *The Secession of Quebec and the Future of Canada*, McGill-Queen's University Press, Montreal & Kingston, 1995 at 213-215.

10 *Reference re: Secession of Quebec* [1998] 2 SCR 217.

11 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 292-293.

following a referendum in Quebec in which there was a 'clear expression by the people of Quebec of their will to secede from Canada',[12] such a 'clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on the demands for secession',[13] and oblige the federal government and other provinces to enter into negotiations with Quebec. The purpose of these negotiations would be to seek agreement on a constitutional amendment to facilitate Quebec's secession.[14] However, the absence of such an agreement to a constitutional amendment would mean that secession was legally impossible.[15]

As to the question of Quebec's post-secession borders and territorial scope the Court observed as follows:

> Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.[16]

Furthermore, the Court later acknowledged the importance of submissions made to it by aboriginal groups on the issue of 'defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples'.[17] The Court went on to state that, in any secession negotiations, 'aboriginal interests would be taken into account'.[18] Given the proximity of these two quoted passages it is clear that the matter of 'defining the boundaries' is one of the 'aboriginal interests' to be taken into account at such negotiations. The inescapable implication of this part of the Court's decision is that the partition of Quebec is possible. This was the position adopted by the Canadian federal government in the subsequent debate following the decision in *Secession Reference*.

The Court's decision in *Secession Reference* stands in stark contrast to the position to be found in the Five Experts Report, where it is stated that, upon Quebec gaining independence, international law principles would ensure that Quebec's existing provincial borders would remain as international borders. The Report cites the principles of the territorial integrity of States and the stability of borders as the fundamental bases in support of its position.[19] The Report goes on to assert that its position is also supported by the principle of *uti possidetis juris*.[20] In the post-*Secession Reference* debate, the Quebec government continued to adhere to the position as presented in the Five Experts Report.

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12 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 265.

13 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 266.

14 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 265, 294.

15 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 263, 271, 273.

16 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 269.

17 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 288.

18 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 288.

19 Five Experts Report at 257.

20 Five Experts Report at 271.

The Clarity Act & Bill 99

Following the decision in *Secession Reference* most of the debate on the secession issue in Canada has focused on the issues of what majority vote is needed in the referendum to trigger the process of constitutional negotiations and what would be a clear question to place before the voters of Quebec. In this respect the federal government of Canada took the initiative and in early 2000 passed the so-called *Clarity Act*.[21] The *Clarity Act* stipulates that, unless the House of Commons is satisfied that the referendum question is clearly worded (s. 1)[22] and that a clear majority of the population of the province seeking to secede votes in favour of secession (s. 2),[23] the federal government has no obligation to enter into any negotiations. In coming to its conclusions on these matters the House of Commons is to take into account the views of various political actors in Canada as well as 'any formal statements or resolutions by representatives of the Aboriginal peoples of Canada', especially those in the province whose government proposed the referendum on secession (ss. 1(5), 2(3)). The *Clarity Act* also stipulates a number of items to be included on the agenda for negotiations towards a constitutional amendment in the wake of a successful referendum on secession (s. 3(2)). Two of those items are 'changes to the borders of the province' seeking to secede, as well as the 'rights, interests and territorial claims of Aboriginal peoples of Canada'.[24]

Within days of the tabling of the *Clarity Act*, the Quebec government tabled its response in Quebec's National Assembly in the form of so-called *Bill 99*, which was passed by the Assembly in December 2000.[25] Apart from asserting that all matters relating to the wording of any referendum question on secession were within the exclusive domain of Quebec's political institutions (ss. 1-3), and that a simple majority of votes cast was enough for the referendum to be approved (s. 4),[26] *Bill 99* also stipulates that Quebec's borders cannot be altered

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21 *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S. C. 2000, c. 21 (Assented to 29 June 2000).

22 In the October 1995 Referendum in Quebec the question asked was: 'Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed in June 12,1995?' In a CROP Opinion Poll of August 1999, 36% of Quebecers thought this question was clear and 61% of Quebecers thought it was not clear. The same poll indicated that 93% of Quebecers agreed that a question in a future referendum on secession must be clear: *Summary of the CROP Opinion Poll "Research in Public Opinion", August 1999*, at http://198.103.111.55/aia/docs/english/perspective/issues/cropopinion.htm visited on 25 March 2000.

23 In a CROP Opinion Poll of August 1999, 37% of Quebecers thought a simple majority vote was sufficient and 60% of Quebecers thought it was not. In the same poll 70% of Quebecers thought a 60% 'Yes' vote would constitute a clear majority: *Summary of the CROP Opinion Poll "Research in Public Opinion", August 1999*, at http://198.103.111.55/aia/docs/english/perspective/issues/cropopinion.htm visited on 25 March 2000. In both the 1980 and 1995 referenda in Quebec the Quebec government asserted that a simple majority 'Yes' vote was sufficient.

24 An amendment proposed by the Federal New Democratic Party to ensure that aboriginal groups be represented at the post-referendum secession negotiations was defeated when voted upon by the House of Commons: Joel-Denis Bellavance, 'Aboriginals Gain Say in Clarity Bill Interpretation', *National Post*, 15 March 2000. However, it can be noted that in *Secession Reference* the Supreme Court noted that in any secession negotiations 'aboriginal interests would be taken into account': *Reference re Secession of Quebec* [1998] 2 SCR 217 at 288. Janda suggests that this implies that aboriginal groups would be represented at such negotiations: Janda, *Dual Independence* at 100. See also Paul Joffe, 'Quebec Secession and Aboriginal Peoples: Important Signals from the Supreme Court' in David Schneiderman, *The Quebec Decision, Perspectives on the Supreme Court Ruling on Secession*, James Lorimer & Co, Toronto, 1999, 137-142 at 139-140.

25 *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, S. Q. 2000, c. 46 (Assented to 13 December 2000). *Bill 99* is currently the subject of a challenge as to its constitutional validity in Quebec's Superior Court: *Henderson and Equality Party v Attorney General of Quebec*, No. 500-05-065031-013. For strong criticism of an earlier version of *Bill 99* see *Bill 99: A Sovereign Act of Dispossession, Dishonour and Disgrace*, Brief of the Grand Council of the Crees (Eeyou Istchee) to the National Assembly Committee on Institutions, February 2000 at http://www.gcc.ca/Political-Issues/bill_99.htm visited on 11 June 2002.

26 Section 4 of *Bill 99* is not in accordance with the clear majority requirement set out in *Secession Reference*: Patrick J Monahan, *Doing the Rules, An Assessment of the federal Clarity Act in Light of the Quebec Secession Reference*, C D Howe Institute Commentary, No 135, February 2000 at 12-13; Cristie L Ford, 'In Search of the Qualitative Clear

without the consent of the National Assembly and that the government of Quebec is obliged to ensure the territorial integrity of Quebec (s.9). *Bill 99* does not exclude the possibility of negotiated changes to Quebec's borders, and therefore does not exclude the possibility of Quebec agreeing to border alterations in any negotiations for a constitutional amendment relating to an initiative by Quebec to secede from Canada.[27]

In any move towards the secession of Quebec from Canada, be it pursuant to negotiations as discussed in *Secession Reference*, or be it pursuant to a unilateral declaration of independence, the territorial scope and borders of an independent Quebec and the fate of Ungava would likely become a major issues.[28] Any legal arguments, be they from international or constitutional law, upon which it could be argued that Ungava should remain within Canada and not become a part of an independent Quebec would likely become part of the attempts to deal with Quebec's secessionist aspirations.[29] However, before analysing these legal arguments, an understanding of the historical development of Quebec's current provincial borders, especially it northern border, is necessary.

Historical sketch of Quebec's present northern border

In relation to the aboriginal populations within Ungava, initially it can be noted that they have been in occupation there from time immemorial. In 1670 England's King Charles II proclaimed this territory to be part of Rupert's Land. In the same proclamation the Hudson's Bay Company was incorporated and granted extensive commercial rights over Rupert's Land.[30] In 1713, by the terms of the *Treaty of Utrecht*,[31] France recognised British sovereignty over Rupert's Land.[32] However, the exact border between Ungava and the French colony of New France was never clearly settled.[33] In February 1763, pursuant to the *Treaty of Paris*,[34] France ceded New

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Majority: Democratic Experimentalism and the Quebec Secession Reference' (2001) 39 *Alberta Law Review* 511-560 at 559. For general comments rejecting a simple majority vote in any secession referendum see Allen Buchanan, 'Self-Determination, Secession, and the Rule of Law' in Robert McKim & Jeff McMahon (eds), *The Morality of Nationalism*, Oxford University Press, New York, 1997, 301-323 at 315-316; Franck, *Fairness in International Law* at 169. For arguments supporting a simple majority as being sufficient see Thomas Flanagan, 'Should a Supermajority be Required in a Referendum on Separation?' in John E Trent, Robert Young & Guy Lachapelle (eds), *Quebec-Canada, What is the Path Ahead*, University of Ottawa Press, Ottawa, 1996, 129-134.

27 Legal experts advising Quebec's government have indicated that Quebec's borders would be negotiable in the event of secession: Paul Wells, 'Welcome to the post-separatist era', *National Post*, 29 March 2002.

28 Quebec's anglophone community would also be likely to make claims that areas in which it is the majority population should be entitled to remain in Canada. The small anglophone Equality Party officially endorses a policy of partition in the event of Quebec's departure from Canada. On Quebec's anglophone community see Garth Stevenson, *Community Besieged, The Anglophone Minority and the Politics of Quebec*, McGill-Queen's University Press, Montreal & Kingston, 1999 esp at 225-229, 287-288.

29 In a CROP Opinion Poll of August 1999, 72% of Quebecers thought that it would be reasonable if the majority aboriginal regions of northern Quebec remained in Canada: *Summary of the CROP Opinion Poll "Research in Public Opinion", August 1999*, at http://198.103.111.55/aia/docs/english/perspective/issues/cropopinion.htm visited on 25 March 2000.

30 *Royal Charter for Incorporating the Hudson's Bay Company*, 2 May 1670, reprinted in Bernard W Funston & Eugene Meehan, *Canadian Constitutional Documents Consolidated*, Carswell, Toronto, 1994 (hereinafter *Canadian Constitutional Documents Consolidated*) at 63-74 . As to the territorial extent of Rupert's Land pursuant to the 1670 Charter see Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory*, Studies in Aboriginal Rights No 4, University of Saskatchewan Native Law Centre, 1982 (hereinafter McNeil, *Native Rights*) at 7-12.

31 *Treaty of Peace and Friendship Between France and Great Britain*, signed at Utrecht, 11 April 1713, 27 CTS 475.

32 McNeil, *Native Rights*, at 17-19; Dupuis & McNeil, *Canada's Fiduciary Obligation* at 6.

33 E E Rich, *Hudson's Bay Company 1670-1870, Volume I: 1670-1763*, The Macmillan Company, New York, 1961 at 654-655.

34 *Definitive Treaty of Peace and Friendship Between France, Great Britain and Spain*, signed at Paris, 10 February 1763, 42 CTS 279.

France to England. On 7 October 1763, by *Royal Proclamation*,[35] England's King George III delimited the territory of the colony of Quebec.[36] In 1774 the territorial scope of Quebec was further increased by the *Quebec Act*.[37] However, the *Quebec Act* did not include any part of Ungava within the territorial scope of Quebec, the northern border of Quebec being the southern border of the Ungava region of Rupert's Land.[38] In 1791 Quebec was partitioned and two new entities emerged: Upper Canada, largely populated by English speakers, and Lower Canada, largely populated by French speakers.[39] In 1840 Upper and Lower Canada were reunited to form the Province of Canada.[40]

In 1867 the Canadian federation was created by the *Constitution Act, 1867*, which was known as the *British North America Act, 1867*[41] until 1982.[42] Two of its provinces were Quebec and Ontario. These two provinces corresponded to the former Lower and Upper Quebec provinces created in 1791.[43] The *Constitution Act, 1867*, in s. 146, contemplated the future admission of Rupert's Land to the Canadian federation.[44] On 19 November 1869 the Hudson's Bay Company surrendered its rights in Rupert's Land.[45] In 1870, pursuant to *Rupert's Land and North-Western Territory Order* (*Rupert's Land Order*), the British Crown transferred Rupert's Land to Canada for the cost of 300,000*l* paid by Canada to the Hudson's Bay Company.[46] Parts of Ungava were subsequently included within the province of Quebec, with the critical legislation relating to this being enacted in 1898 and 1912. The end result of this process, undertaken without consultation with the aboriginal populations of the relevant territories,[47] was that the province of Quebec trebled in size, and aboriginal populations in the added territory came under the jurisdiction of Quebec for the first time.

The border legislation of 1898 and 1912 was facilitated by the provisions of s. 2 of the *Constitution Act, 1871*[48] which made it clear that Canada's federal parliament had the power to establish new provinces out of the former Rupert's Land. Furthermore, the *Constitution Act, 1871* enabled changes to be made to the territorial scope of a province. Section 3 stipulated as follows:

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35 Reprinted in *Canadian Constitutional Documents Consolidated* at 75-79.

36 Norman L Nicholson, *The Boundaries of the Canadian Confederation*, Macmillan Company of Canada, Toronto, 1979 (hereinafter Nicholson, *The Boundaries of the Canadian Confederation*) at 19-21.

37 *Quebec Act, 1774*, 14 Geo. III, c. 83 (UK), Article I; Nicholson, *The Boundaries of the Canadian Confederation* at 23-24. Quebec's territorial scope in 1774 extended south and west to the Ohio and Mississippi rivers. The southern parts of Quebec were lost when Britain ceded them to the United States of America in 1783.

38 McNeil, *Native Rights* at 45; Varty, *Who Gets Ungava?* at 12, 29.

39 *Constitutional Act, 1791*, 31 Geo. III, c. 31 (UK), Article II; Nicholson, *The Boundaries of the Canadian Confederation* at 33-34.

40 *Union Act, 1840*, 3-4 Vict., c. 36 (UK), Article I; Nicholson, *The Boundaries of the Canadian Confederation* at 48-49.

41 *British North America Act, 1867*, 31-32 Vict., c. 3 (UK); Nicholson, *The Boundaries of the Canadian Confederation* at 57.

42 *Constitution Act, 1982*, s. 53(2).

43 *Constitution Act, 1867*, s. 6.

44 *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (UK) and *An Act for the Temporary Government of Rupert's Land and the North-Western Territory when United with Canada, 1869*, 32-33 Vict., c. 3 (Can), were enacted to facilitate the surrender of Rupert's Land to Canada.

45 *Rupert's Land and North-Western Territory Order*, 23 June 1870, Schedule C (formerly known as *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, renamed pursuant to *Constitution Act, 1982*, s. 53, Schedule, item 3), reprinted in *Canadian Constitutional Documents Consolidated* at 189-209 (hereinafter referred to as '*Rupert's Land Order*').

46 *Rupert's Land Order*, Article 1.

47 *Sovereign Injustice*, at 212-214; Douglas Sanders, 'If Quebec Secedes From Canada Can the Cree Secede From Quebec?' (1995) 29 *University of British Columbia Law Review* 143-158 at 146.

48 *Constitution Act, 1871*, 34-35 Vict., c.28 (UK).

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed upon to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration in relation to any Province affected thereby.

The 1898 Quebec Border Legislation

In relation to the complementary border legislation of 1898 passed by Canada's federal parliament[49] and Quebec's provincial assembly,[50] one of the critical issues is the uncertainty as to whether it amounted to an extension of Quebec's territorial scope from that which existed at the time of confederation in 1867 by annexation of part of Ungava, or whether it was merely a confirmation of Quebec's territorial scope as at 1867. This uncertainty was further reflected in the parliamentary debates over legislation to extend the territorial scope of Quebec in 1912. Parliamentarians from Quebec argued that the legislation merely confirmed an existing border, whereas their counterparts from English Canada took the view that the legislation added part of Ungava to Quebec's territorial scope.[51] Although the border line between the northern part of the province of Quebec in 1867 and Rupert's Land was that stipulated by the *Quebec Act* 1774, the exact location of that border line was, and still is, a matter of uncertainty.

The 1898 legislation on Quebec's borders was part of the process of clarification of the northern borders of both Ontario and Quebec. In 1889 Ontario's northern border was resolved with the addition of territory to that province. By virtue of the 1898 legislation it was agreed that a similar amount of territory formed part of Quebec.[52] Kent McNeil has suggested that it may well be that the legislation was a confirmation of the border between Rupert's Land and the province of Quebec, on the basis that such a view is consistent with a ruling of the Privy Council in the *Ontario Boundaries Case*[53] which determined the northern border in 1867 between Ontario and Rupert's Land. Furthermore, in 1701 the Hudson's Bay Company was prepared to accept what was declared to be the northern border of Quebec by the 1898 legislation, as its then border with the colony of New France.[54] However, McNeil also notes that the Privy Council's determination of the border between Canada and Labrador in 1927[55] is consistent with the view that the 1898 legislation amounted to an extension of the territorial scope of Quebec.[56]

An analysis of the wording of the 1898 legislation is also somewhat ambiguous on whether it involved an extension of Quebec's territorial scope or merely confirmed the northern border of Quebec. On the one hand, there are a number of factors that indicate that the legislation was concerned with confirming an existing border rather than extending the territorial scope of Quebec. First, there is the fact that the federal legislation stipulating the border line is in the form of a declaration following an agreement between the federal government and Quebec's provincial government. There is no explicit statement to the effect that the legislation is extending Quebec's borders. Second, there is an absence in the 1898 legislation of 'terms and conditions' pursuant to s. 3 of the *Constitutional Act, 1871*. Third, there is the reference in the title of the Quebec provincial Assembly legislation to 'delimitation of … boundaries'. Finally, in the debates in the federal Parliament relating to the legislation, the Minister responsible for the legislation referred to its purpose as being one of 'ratifying a

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49 *An Act Respecting the North-Western, Northern and North-Eastern Boundaries of the Province of Quebec, 1898*, 61 Vict., c. 3 (Can).

50 *An Act Respecting the Delineation of the North-Western, Northern and North-Eastern Boundaries of the Province of Quebec, 1898*, 61 Vict., c. 6 (Quebec).

51 *Official Report of the Debates of the House of Commons of the Dominion of Canada, First Session – Twelfth Parliament, 2 George V, 1911-12, Vol CVI* at 6160-6173; Kent McNeil, 'Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have' in Daniel Drache & Roberto Perin (eds), *Negotiating With a Sovereign Quebec*, James Lorimer & Co, Toronto, 1992, 107-123 at 111.

52 Nicholson, *The Boundaries of the Canadian Confederation* at 104-107.

53 This decision in not reported. For an account of the case and its background see McNeil, *Native Rights* at 20-33.

54 Nicholson, *The Boundaries of the Canadian Confederation* at 104.

55 *Re Labrador Boundary* [1927] 2 DLR 401.

56 McNeil, *Native Rights* at 45-47.

conventional border on the north and north-east of the province of Quebec'.[57] All of these factors could be said to indicate that the 1898 legislation was only concerned with confirmation of part of Quebec's existing northern border.

On the other hand, it must be noted that the preambles to both the federal and Quebec provincial legislation state that the legislation is in pursuance of the *Constitution Act, 1871* which, in s. 3, stipulates that the federal Parliament can, with the consent of a province, 'increase, diminish, or otherwise alter the limits' of such a province. It can be argued that this provision is only concerned with changing the territorial configuration of a province and not with determining an existing border line between any of Canada's territorial units. As the 1898 legislation was enacted on the basis of s. 3 of the *Constitution Act, 1871*, it follows therefore, that it was concerned with a change to the territorial configuration of Quebec, in this case by means of extending its territorial space. On this interpretation of the legislation, its references to an agreement between the federal and Quebec governments simply referred to, and confirmed, compliance with the requirement of such an agreement in s. 3 of the *Constitution Act, 1871*. The references to the legislation declaring the border would be taken to imply a declaration of an agreement to an extension of Quebec's territory that resulted in the border line described in the legislation.

The 1912 Quebec Border Legislation

Whatever the case may have been with the 1898 legislation, it is clear that the 1912 legislation involved an extension of Quebec's territorial scope by the addition of territory in Ungava. The federal[58] and Quebec's provincial[59] legislation explicitly refer, both in their titles and substantive parts, to there being an extension of Quebec's territorial scope. The territory added to Quebec had never previously been part of the colony of New France or Quebec as it existed prior to confederation. This territory was clearly within sovereign British territory following the *Treaty of Utrecht*.[60]

What emerges from this analysis of the 1898 and 1912 legislation is that the end result was the addition of Ungava territory to Quebec's territorial scope as it existed in 1867. What is unclear is whether additional territory was granted to Quebec solely pursuant to the 1912 border legislation or as the result of a two-stage process pursuant to the 1898 and 1912 border legislation. This is a crucial issue in relation to the first legal argument presented below from the perspective of Canadian constitutional law in relation to whether Quebec is entitled to claim its existing provincial borders as international borders upon gaining independence.

The fate of ungava from the perspective of international law

In addressing the question of an independent Quebec's borders from the perspective of international law, the Five Experts Report refers to three relevant principles of international law in support of the view that, 'assuming that Quebec attained independence', its existing provincial borders automatically became protected international borders. They were the principles of the territorial integrity of States, the stability of borders and *uti possidetis juris*.[61] Looking at each of these principles it is suggested that a proper understanding of the does not support the analysis set out in the Five Experts Report.

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57 *Official Report of the Debates of the House of Commons of the Dominion of Canada, Third Session – Eighth Parliament, 61 Victoria, 1898, Vol XLVII* at 6746.

58 *The Quebec Boundaries Extension Act, 1912*, 2 Geo. V, c. 45 (Can), s.2.

59 *An Act Respecting the Extension of the Province of Quebec by the Annexation of Ungava, 1912*, 2 Geo. V, c. 7 (Quebec), s. 1.

60 McNeil has argued that the British never had sovereignty over what is now most of northern Quebec because they did not have effective occupation and control over that territory: McNeil, *Emerging Justice, Essays on Indigenous Rights in Canada and Australia*, Native Law Centre, University of Saskatchewan, Saskatoon, 2001 (hereinafter McNeil, *Emerging Justice*) at 1-24.

61 Five Experts Report at 257, 271.

The Principle of Territorial Integrity

In relation to the principle of territorial integrity, it is of undoubtedly validity in international law. It is reflected in various provisions in international treaties and documents protecting the territorial integrity of states and the inviolability of international borders.[62] However, the protections inherent in the principle of territorial integrity are dependent upon the existence of an internationally recognised State because the principles do not apply to federal units of an internationally recognised State.[63] Thus, Quebec as a Canadian province does not benefit from the territorial integrity principle. Merely to declare its independence would not change that situation because at that stage Quebec would not be seen as a State member of the international community. This is supported by the decision in *Lozidou v Turkey (Merits)*[64] in which it was held that the fact that the Turkish Republic of Northern Cyprus (TRNC) has only been recognised by Turkey does not mean that the former is a State for the purposes of international law and that it cannot be counted as a member of the international community of States. Consequently, the TRNC does not have the protection afforded a State by the principle of territorial integrity. The same would apply to Quebec after a declaration of independence and up until it gained general international recognition.

On the other hand, as the Supreme Court readily admitted in *Secession Reference*, a unilateral declaration of independence by Quebec could well be recognised by the international community.[65] It is arguable that the Court assumed that such recognition would be of Quebec within the confines of its existing provincial borders.[66] In such a case Quebec would then become a beneficiary of the principle of territorial integrity. However, there is no obligation upon States to grant international recognition within the confines of Quebec's existing provincial borders.

Thus, in the context of a secession of a federal unit of an internationally recognised State, the principle of territorial integrity, rather than mandating the transformation of existing provincial borders into international borders, only comes into operation once a secession achieves widespread international recognition. That operation will be with respect to the recognised borders of the new State, which may or may not be the same as those of the pre-existing federal unit. In short, the principle of territorial integrity has nothing to do determining international borders – it is simply a reward that attaches to a newly recognised State's borders whatever they may be and however they are determined.

The Principle of the Stability of Borders

In relation to the principle of stability of borders, the International Court of Justice in *Case Concerning the Temple of Preah Vihear*[67]observed as follows:

> In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called into question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent Treaty is discovered. Such a process could continue

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62 Charter of the United Nations, Article 2(4); Declaration on Principles of Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24 October 1970, Principle V; Final Act of Helsinki, 1 August 1975, Principle VIII.

63 Tomáš Bartoš, '*Uti Possidetis. Quo Vadis?*' (1997) 18 *Australian Year Book of International Law* 37-96 (hereinafter Bartoš, '*Uti Possidetis*') at 73.

64 (1996) 108 ILR 445. See also R Jennings & A Watts, *Oppenheim's International Law, Volume 1, Peace*, Longman, London, 1992 at 130.

65 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 274-275.

66 Peter Radan, 'The Supreme Court of Canada and the Borders of Quebec' [1998] *Australian International Law Journal* 171-176, at 174-175. The successful secessions, in 1991-1992, of the republics of Slovenia, Croatia, Macedonia and Bosnia-Hercegovina from Yugoslavia would support this conclusion. Each of these republics was internationally recognised within borders that were guaranteed to them under Yugoslav constitutional law as constituent units of the Yugoslav federation. For an account of the Yugoslav secessions see Peter Radan, *The Break-up of Yugoslavia and International Law*, Routledge, London, 2002 (hereinafter Radan, *The Break-up of Yugoslavia*) at 167-201.

67 *Case Concerning the Temple of Preah Vihear* (*Cambodia -v- Thailand*) (*Merits*) (1962) 33 ILR 48.

> indefinitely, and finality would never be reached so long as possible errors still remain to be discovered. Such a frontier, far from being stable, would be completely precarious.[68]

However, the stability of borders principle relates only to international borders.[69] The question of the stability of internal state borders is not a matter within the ambit of international law. Furthermore, the stability of borders principle is dependent on there being a treaty establishing a border. In *Case Concerning the Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) Judge Shahabuddeen, in his separate opinion, stated:

> The principle of the stability of boundaries, as it applies to a boundary fixed by agreement, hinges on there being an agreement for the establishment of a boundary; it comes into play only after the existence of such an agreement is established and is directed to giving proper effect to the agreement. It does not operate to bring into existence a boundary agreement where there was none.[70]

In the light of these observations, the stability of borders principle is not a justification at all for the transformation of Quebec's existing provincial borders into international borders following secession, for the following reasons. First, Quebec's existing provincial borders are not international borders, but rather internal administrative borders of a State. Second, even though Quebec's borders could be viewed as having resulted from agreements, it was with the idea of Quebec being and remaining a part of Canada that the agreements were negotiated. Had it ever been thought that future international borders of an independent Quebec were being negotiated at the time, it is almost certain that Quebec's provincial borders would have been far different to those that were actually agreed upon.[71] It must be the case that the stability of borders principle's pre-requisite of an agreement is only satisfied where the agreement is between States relating to international borders. It is not satisfied by any agreement pertaining to a State's internal federal unit borders. On this basis the stability of borders principle cannot be invoked in relation to any agreement relating to Quebec's provincial borders. Consequently the stability of borders principle provides no legal basis justifying the transformation of Quebec's provincial borders into international borders.

The Principle of Uti Possidetis Juris

In order to assess the relevance, if any, of the principle of *uti possidetis* to the issue of an independent Quebec's borders, an appreciation of its development as a principle in international law is necessary.[72]

The use of the Roman law principle of *uti possidetis* in international law was initially applied 'to connote a method of determining the territorial changes that had occurred as a result of armed conflict'.[73] Thus, subject to a provision in a peace treaty to the contrary, at the end of a war each state retained as its territory that which it

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68 *Case Concerning the Temple of Preah Vihear* (*Cambodia -v- Thailand*) (*Merits*) (1962) 33 ILR 48 at 72. See also *Case Concerning the Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) [1994] ICJ Rep 6 at 37; R Y Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, Manchester, 1963 at 70.

69 Milenko Kreca, *The Badinter Arbitration Commission, A Critical Commentary*, Jugoslovenski pregled, Belgarde, 1993 (hereinafter Kreca, *The Badinter Arbitration Commission*) at 35.

70 *Case Concerning the Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) [1994] ICJ Rep 6 at 45.

71 Peter W Hogg, 'Principles Governing the secession of Quebec' (1997) *National Journal of Constitutional Law*, Vol 8, No 1, 19-51 (hereinafter Hogg 'Principles Governing the secession of Quebec') at 43. In the context of administrative borders within Spanish Latin America prior to the independence movement in the early nineteenth century, the International Court of Justice has remarked that 'no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries'. The Court described the transformation of colonial administrative borders into international borders as 'investing as international boundaries administrative limits intended originally for quite other purposes': *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* [1992] ICJ Rep 383 at 388. In the case of Yugoslavia's internal borders established after World War II they were, according to one of the most senior leaders of the time, Milovan Djilas, never intended to be international borders: David Owen, *Balkan Odyssey*, Victor Gollancz, London, 1995 at 34-35.

72 For a detailed analysis of the development of the principle of *uti possidetis* see Radan, *The Break-up of Yugoslavia* at 69-134.

73 *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6 at 84 (Ajibola J).

actually possessed at the time hostilities ceased.[74] The use of *uti possidetis* in the context of border issues first arose in the early nineteenth century in the context of the decolonisation of Central and South America from Spanish and Portuguese rule. The principle, when applied, meant that former colonial borders became international borders of the newly independent states. There are two versions of the *uti possidetis* principle. By *uti possidetis juris* borders are defined according to legal rights of possession based upon the legal documents of the former colonial power at the time of independence. By *uti possidetis de facto* borders are defined by territory actually possessed and administered by the former colonial unit at the time of independence irrespective of the legal definition of former colonial borders.[75] Of these two versions, *uti possidetis juris* was more commonly applied in Latin America.

With the decolonisation of Africa after World War II the principle of *uti possidetis juris* was effectively adopted by a resolution of the Organisation of African Unity at its Cairo Conference in 1964 by which member states pledged themselves 'to respect the borders existing on their achievement of independence'.[76]

Prior to 1986, the legally binding nature of the *uti possidetis* principle depended upon it being specifically fixed by treaty between the relevant states as the basis for resolving a border dispute. In the absence of such a specific stipulation the principle did not apply.[77] The principles upon which any arbitral body was to determine a border dispute were dependent upon the provisions of the relevant treaty or agreement.[78] When such a treaty or agreement stipulated the application of the principle of *uti possidetis* it became the 'first duty'[79] of any appointed arbitral body to establish the border line according to that principle. If a treaty was silent on the basis upon which a border dispute was to be resolved, the arbitral body could, but was not obliged to, apply the principle of *uti possidetis*.[80]

Since 1986, following the decision of the International Court of Justice in *Case Concerning the Frontier Dispute – Burkina Faso/Republic of Mali*[81] (the *Frontier Dispute Case*), a treaty need not explicitly stipulate that the principle of *uti possidetis juris* governs the resolution of a border dispute for that principle to apply. In that case the Court dealt with a border dispute in which the Special Agreement between Burkina Faso and Mali required the Court to determine the border line in accordance with 'the principle of the intangibility of frontiers

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74 A Berriedale Keith, *Wheaton's International Law, Vol 2 – War*, 7th English ed, Stevens & Sons, London, 1944 at 622-623.

75 L M D Nelson, 'The Arbitration of Boundary Disputes in Latin America' (1973) 20 *Netherlands International Law Review* 267-294 at 270.

76 The text of the 1964 resolution is reprinted in Ian Brownlie, *African Boundaries, A Legal and Diplomatic Encyclopaedia*, C Hurst & Co, London, 1979 at 11.

77 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States, Vol 1*, 2nd rev ed, Little, Brown & Co, Boston, 1947 at 501, 507; Ian Brownlie, *Principles of Public International Law*, 5th ed, Clarendon Press, Oxford, 1998 at 133.

78 L M Bloomfield, The *British Honduras – Guatemala Dispute*, The Carswell Company Ltd, Toronto, 1953 at 94; L M Bloomfield, *Egypt and the Gulf of Aqaba in International Law*, The Carswell Company Ltd, Toronto, 1957 at 107-108; Yehuda Z Blum, *Historic Titles in International Law*, Martinus Nijhoff, The Hague, 1965 at 342; Bartoš, '*Uti Possidetis*' at 59.

79 *Honduras Borders (Guatemala/Honduras)* (1933) 2 RIAA 1307 at 1322. Examples of treaties stipulating the application of *uti possidetis* include, *Treaty of Friendship, Commerce and Navigation*, Argentina and Chile, 113 Con TS 333, 30 August 1855, art XXXIX; *Juris Arbitral Limits Treaty*, Colombia and Venezuela, 159 Con TS 87, 14 September 1881, art 1; *Bonilla-Gomez Treaty*, Honduras and Nicaragua, 180 Con TS 347, 7 October 1894, art II(4); *Treaty of Arbitration*, Bolivia and Peru, 192 Con TS 289, 30 December 1902, arts I and V; *Treaty of Arbitration*, Guatemala and Honduras, 132 BFSP 823, 16 July 1930, art V. In some of these cases the treaty did not specify which of the two versions of *uti possidetis* applied.

80 For example, see *Treaty of Limits*, Argentina and Paraguay, 150 Con TS 241, 3 February 1876; *Arbitration Treaty*, Great Britain and Brazil, 190 Con TS 190, 6 November 1901. In both cases the arbitrator effectively applied the principle of *uti possidetis de facto*. On these two border disputes see Gordon Ireland, *Boundaries, Possessions, and Conflicts in South America*, (first published 1938) Octagon Books, New York at 27-34, 152-158.

81 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554.

inherited from colonization'.[82] In its judgment the Court ruled that the principle of *uti possidetis juris* was 'a firmly established principle of international law where decolonization is concerned'.[83] This meant, as the Court subsequently stated in *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*,[84] that if a treaty stipulated that a dispute was to be determined by principles of international law, then the principle of *uti possidetis juris* was to apply, as compared to the situation prior to 1986 where an arbitral body in this situation could, but was not bound to, apply the principle of *uti possidetis juris*. On the other hand, the ruling in the *Frontier Dispute Case* does not apply if 'parties to the dispute … specifically agree to the contrary that the principle of *uti possidetis* should not apply'.[85] Thus, it is ultimately up to the states that are parties to any border dispute to determine whether the principle of *uti possidetis juris* applies to the resolution of the dispute.

In 1992, the relevance of the principle of *uti possidetis juris* in the context of secession of a federal unit from a State was canvassed by the Arbitration Commission established by the European Community as part of its Conference on Yugoslavia. The Conference on Yugoslavia was established in September 1991 in an effort to seek a resolution of the conflicts that had erupted in Yugoslavia in mid-1991. The Arbitration Commission relied, *inter alia*, upon the principle of *uti possidetis juris* as a basis for its decision that the borders of a federal unit of a State would become international borders if that federal unit gained independence.

In Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia[86] (Opinion No 3), the Arbitration Commission said:

> *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in the case between Burkina Faso and Mali (Frontier Dispute, (1986) ICJ Reports 554 at 565): 'Nevertheless the principle is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles'.[87]

However, it must be noted that the Arbitration Commission selectively quoted from the decision in the *Frontier Dispute Case*.[88] Immediately after the passage from the *Frontier Dispute Case* quoted by the Arbitration Commission, the International Court of Justice added the words:

> ... provoked by the challenging of frontiers following the withdrawal of the administering power.[89]

These omitted words clearly indicate that the principle of *uti possidetis juris* applied in the context of decolonisation. This point is made quite explicitly in other parts of the *Frontier Dispute Case* judgment. Earlier in the same paragraph as that quoted from by the Arbitration Commission, the International Court of Justice said:

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82 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554 at 557.

83 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554 at 565.

84 *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* [1992] ICJ Rep 383.

85 *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6 at 89. See also *Dubai-Sharjah Border Arbitration* (1981) 91 ILR 543 at 578; Santiago Torres Bernárdez, 'The "Uti Possidetis Juris Principle" in Historical Perspective' in Konrad Ginther et al (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität, Festschrift für Karl Zemanek zum 65. Geberstag*, Duncker & Humbolt, Berlin, 1994, 417-437 (hereinafter Bernárdez, 'The "Uti Possidetis Juris Principle"') at 420-421.

86 *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1992) 31 ILM 1499.

87 *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1992) 31 ILM 1499 at 1500.

88 Bernárdez refers to the 'misrepresentations of the reasoning' of the *Frontier Dispute Case*: hereinafter Bernárdez, 'The "Uti Possidetis Juris Principle"' at 435.

89 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554 at 565.

> Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber wishes to emphasize its general scope.[90]

Later in its judgment the Court said:

> *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.[91]

The Court's reference to the generality of the principle of *uti possidetis juris* was to indicate that it was not confined in its application to decolonisation in 'one specific system of international law',[92] namely that of Latin America, but rather that it applied to decolonisation wherever it occurred.[93]

Nothing in the decision in the *Frontier Dispute Case* suggests that the principle of *uti possidetis juris* applies to cases of secession from internationally recognised states.[94] Rather, the whole tenor of the decision indicates that the principle is confined to decolonisation. The principle is not, as claimed by the Arbitration Commission, recognised as a general principle applicable to all cases of independence. As Santiago Torres Bernárdez has written:

> As a principle of international law the uti possidetis rule is simply not concerned with the question of the definition of title to territory and boundaries in such types of succession as transfer of a territory of a State, separation from a State, dissolution of a State, [and] uniting of States.[95]

Malcolm Shaw has defended the Arbitration Commission's interpretation of the *uti possidetis juris* principle on the basis that the International Court of Justice in the *Frontier Dispute Case* did not need to discuss the principle of *uti possidetis juris* because it was binding upon it by virtue of the Special Agreement between Burkina Faso and Mali. Shaw views the fact that the Court did discuss the principle *of uti possidetis juris* in some detail as indicating that the Court viewed it as applying beyond the context of decolonisation.[96] However, Shaw's analysis cannot be sustained for two reasons.

First, it ignores the explicit and repeated references by the Court to *uti possidetis juris* applying specifically in the context of decolonisation. Second, although it was not strictly necessary for the Court to analyse the principle of *uti possidetis juris* because the Special Agreement between Burkina Faso and Mali clearly indicated the basis upon which their border dispute was to be resolved, the Court did so in order to establish the generality of the principle's application to decolonisation beyond the region of Latin America. The discussion on the generality of the principle of *uti possidetis juris* was clearly in relation to its generality in the context of decolonisation. There is nothing in the Court's judgment to justify the references to the generality of the principle as extending to cases involving secession from independent and internationally recognised states.

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90 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554 at 565.

91 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554 at 566.

92 *Case Concerning the Frontier Dispute* (*Burkina Faso and Mali*) [1986] ICJ Rep 554 at 565.

93 Kreca, *The Badinter Arbitration Commission* at 36-37.

94 Matthew C R Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Year Book of International Law* 333-413 (hereinafter Craven 'The European Community Arbitration Commission on Yugoslavia') at 388; Steven R Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States'(1996) 90 *American Journal of International Law* 590-624 (hereinafter Ratner, 'Drawing a Better Line'); Kreca, *The Badinter Arbitration Commission* at 36.

95 Bernárdez, 'The "Uti Possidetis Juris Principle"' at 434. Craven refers to the Badinter Commission's 'novel extension of the *uti possidetis* principle outside the context of decolonization': Craven 'The European Community Arbitration Commission on Yugoslavia' at 386. See also Thomas D Musgrave, Self-Determination and National Minorities, Clarendon Press, Oxford, 1997 at 234-235; Hurst Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 *Transnational Law & Contemporary Problems* 57-69; Ratner, 'Drawing a Better Line' at 614.

96 Malcolm N Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 *European Journal of International Law* 478-507 at 497.

On a more fundamental level the application of the principle of *uti possidetis juris* by the Arbitration Commission can be criticised as misconceived in the light of the principle's function in the context of border disputes following decolonisation. In Latin America and Africa the function of *uti possidetis juris* was to provide a mutually agreeable means of resolving disputes that were fundamentally different to the disputes that arose in the context of the secessions of republics from Yugoslavia. In Latin America and Africa, when the principle of *uti possidetis juris* was applied, there was no dispute that the former colonial borders would be future international borders. The principle of *uti possidetis juris* was applied in the arbitration process to resolve differences between neighbouring states who could not agree on the exact location of colonial border lines.

In Yugoslavia there was never any dispute about the location of the exact border lines between the various republics at the time of secession. What was in dispute was the question of whether these lines should be future international borders. Agreement that existing colonial borders were to be international borders was a pre-condition to the application of *uti possidetis juris* in the decolonisation context in Latin America and Africa. The principle of *uti possidetis juris* was not relevant to the resolution of a dispute as to whether existing colonial borders should be future international borders. Thus, in the Yugoslav context, the principle of *uti possidetis juris* was of no relevance, given that the issue in dispute was not the location of internal federal borders, but rather, whether they should be future international borders. If Yugoslavia's internal federal borders were to be future international borders, the principle of *uti possidetis juris* was irrelevant because the location of those borders was not in dispute.

Given that the situation of Quebec within Canada is much the same as with respect to Yugoslavia's former republics, the application of *uti possidetis juris* to Quebec could be criticised on the same grounds as it is criticised in the context of Yugoslavia's seceding republics.

It could be argued that the case of Yugoslavia has, however, established a groundbreaking precedent for further application in cases such as Canada and Quebec. However, if this is so there needs to be further analysis of whether the Yugoslav precedent is one where *uti possidetis juris* was applied in the context of a federal unit seceding from a State or the dissolution of a federal State.

In the context of the Arbitration Commission's decision in relation to Yugoslavia, a cursory reading of its *Opinion No 3* suggests that the principle of *uti possidetis juris* was applied to a case of the dissolution of a state. In its *Opinion No 1 of the Arbitration Commission of the Peace Conference on Yugoslavia*[97] (*Opinion No1*) the Arbitration Commission referred to Yugoslavia being, as of 29 November 1991, 'in the process of dissolution'.[98] *Opinion No 3*, which ruled that the principle of *uti possidetis juris* applied to the case of Yugoslavia, was delivered at a time when, in the light of *Opinion No 1*, Yugoslavia was in a process of dissolution. However, a closer analysis of *Opinion No 3*, read in conjunction with *Opinion No 11 of the Arbitration Commission of the Peace Conference on Yugoslavia*[99] (*Opinion No 11*), handed down by the Arbitration Commission on 16 July 1993, reveals that in the case of Yugoslavia the principle of *uti possidetis juris* was applied in the context of secession, and not the dissolution of a state.

In *Opinion No 3*, the Arbitration Commission ruled that the *uti possidetis juris* principle applies once a situation has reached the stage of 'the creation of one or more independent states'.[100] In *Opinion No 11* the Arbitration Commission referred to the dates upon which the various former Yugoslav republics became independent states. The first independent states were Croatia and Slovenia who gained that status on 8 October 1991. In the same opinion the Arbitration Commission asserted that the process of dissolution in Yugoslavia had commenced on 29 November 1991.[101] Thus, the states of Croatia and Slovenia were created before the process of the dissolution of Yugoslavia had commenced. Consequently, these two states arose as the result of secession. On this basis the *uti possidetis juris* principle was applied to cases of states emerging as the result of secession.

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97 *Opinion No 1 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1992) 31 ILM 1494.

98 *Opinion No 1 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1992) 31 ILM 1494.

99 *Opinion No 11 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1993) 32 ILM 1587 at 1588.

100 Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia (1992) 31 ILM 1499 at 1499.

101 *Opinion No 11 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1993) 32 ILM 1587 at 1587.

Whilst it is clear that, in the context of the fragmentation of Yugoslavia, the *uti possidetis juris* principle was applied to cases of secession, *Opinion No 3* did not necessarily rule out its application to cases of dissolution of states. There is support for the view that it applies to both situations. Thus, on the question of whether the *uti possidetis juris* principle applies to cases of secession or dissolution of a state, the Five Experts Report asserted the following:

> [I]n the case of the secession or dissolution of States, pre-existing administrative boundaries must be maintained to become borders of the new States and cannot be altered by the threat or use of force, be it on the part of the seceding entity or of the State from which it breaks off.[102]

On the other hand the federal Canadian government has argued that the *uti possidetis juris* principle does not apply to cases of secession and that it is confined to cases of dissolution of states. Canada's Federal Minister for Intergovernmental Affairs, Stephane Dion, has asserted that there 'is neither a paragraph nor line in international law that protects Quebec's territory [and that] international experience demonstrates that the borders of the entity seeking independence can be called into question'.[103] Dion has asserted that the *uti possidetis juris* principle only applies to cases of dissolution of states and not to those of secession and has cited the case of the break-up of Yugoslavia as support for this view.[104] This assertion is based upon an acceptance of the proposition that the break-up of Yugoslavia was a case of dissolution and not of secession by its constituent republics. Dion claims that the *uti possidetis juris* principle would only apply in the case of the dissolution of Canada, a process that could be triggered by the unraveling of that state following a unilateral secession of Quebec.[105]

It can be argued in support of the view of the Canadian government, that there is a significant difference between cases of secession and dissolution of a State. In a case of secession the former sovereign state remains in existence, whereas in a case of dissolution the former sovereign State ceases to exist. This distinguishing factor may justify a different approach to the question of borders following the creation of new States. As a matter of logic, in the case of dissolution of a sovereign State, either new States emerge or parts of the dissolved State become parts of pre-existing States, thereby filling the vacuum created as a result of dissolution. Internal borders of the former sovereign State may be a sound basis for the borders of these successor States. In cases of secession no such vacuum arises. If secession is successful, the sovereign State from which secession is achieved does not cease to exist. Ultimately, the only issue in such a secession is the territorial extent of the new State that is the result of secession. In cases of a federation there is no reason to insist in all cases that the new State's territorial extent should be that of a particular federal unit of the State from which secession has taken place. This is particularly so in cases where a significant minority opposes secession and wishes to remain part of the State from which secession is sought. Just as in the case of secession from a non-federal State, the territorial extent of the new State is ultimately a political question which will be resolved either (preferably) by negotiation or by force.[106]

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102 Five Experts Report at 273. In a similar vein Duursma has suggested that 'it serves no legal purpose to distinguish between secession, dissolution, separation or disintegration': Jorri Duursma, *Fragmentation and International Relations of Micro-States, Self-determination and Statehood*, Cambridge University Press, Cambridge, 1996 at 89.

103 Letter from Canada's Federal Minister for Intergovernmental Affairs, Stephane Dion, to the Premier of Quebec, Lucien Bouchard, 11 August 1997: Stephane Dion, *Straight Talk, Speeches and Writings on Canadian Unity*, McGill-Queen's University Press, Montreal & Kingston, 1999 (hereinafter, Dion, *Straight Talk*), 189-193 at 191. Dion restated this position in a subsequent letter of 26 August 1997 to the Deputy Premier of Quebec, Bernard Landry: Dion, *Straight Talk*, 194-197 at 195.

104 Letter from Canada's Federal Minister for Intergovernmental Affairs, Stephane Dion, to the Deputy Premier of Quebec, Bernard Landry, 28 August 1997:Dion, *Straight Talk*, 198-199.

105 Personal communication to the author by Canada's Minister for Intergovernmental Affairs, Stephane Dion, at the Jerusalem Conference in Canadian Studies, Hebrew University of Jerusalem, 30 June 1998.

106 Crawford suggests that the use of force in cases of secession appears to be exempt from the prohibition against the use of force contained in Article 2(4) of the Charter of the United Nations: James Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 1979 at 268-270. Crawford implies that force used in such cases is confined to the use of force by the State from which secession is sought and the secessionists.

In the light of the above discussion, if the *uti possidetis juris* principle is applicable in cases of secession of federal units from States, it can be argued that it is only applicable to cases of a secession that also leads to the dissolution of the State, and that it does not apply to cases of mere secession only. On the assumption that the secession of Quebec would not lead to the dissolution of Canada, (although this possibility cannot be altogether ruled out) and that the situation is one of nothing more than secession, the *uti possidetis juris* principle would be of no relevance in determining the borders of an independent Quebec.

The fate of ungava from the perspective of Canadian constitutional law

This paper's analysis of an independent Quebec's borders from the perspective of Canadian constitutional law, is based upon an assumption that Quebec's independence will, following the ruling of the Supreme Court of Canada in *Secession Reference*, be the product of principled negotiations leading to a constitutional amendment facilitating Quebec's legal secession from Canada.[107] It is suggested that, should the aboriginal peoples of Ungava clearly and democratically express their collective will not to be separated from Canada, such a constitutional amendment will only be possible if Quebec is partitioned and that Canada is legally entitled to retain most, if not all, of Ungava.

Various legal arguments could be presented in support of such a conclusion. This paper presents three such arguments. The first stems from the purpose and legal basis of the addition of Ungava territory to Quebec. The second stems from the Crown's fiduciary obligations owed to Canada's aboriginal peoples, these fiduciary obligations being part of Canadian constitutional law. The third stems from Canada's federal structure and the principle of federalism.

The Purpose and Legal Basis of the Addition Ungava to Quebec

In relation to the 1912 territorial expansion of Quebec it can be noted that the borders of Ontario[108] and Manitoba[109] were also extended at the same time. Parliamentary debates and records of the time clearly indicate that the motivating factors for these territorial extensions were, not to compensate the provinces for any territorial claims they may have had to the territories gained, but rather, for the purposes of enabling the provinces to better develop as provinces and thereby unify the Canadian federation.[110] Canada was concerned to ensure that each of these provinces had access to Hudson's Bay.[111] In relation to the Manitoba extension is was explicitly pointed out that the expansion of that province was the preservation of geographical symmetry and equality between the provinces which was deemed as essential for the purposes of Canadian federalism.[112]

David Varty has argued that:

> The sole basis of the transfer of jurisdiction to Ungava was Quebec's status as a province. The continuation of Quebec's status as a province was an implied condition of transfer.[113]

Similarly, Stephen Scott has argued in relation to the extension of territory to Quebec as follows:

> These territories … were attached to Quebec by the federal Parliament to form part of a Canadian province, – Quebec, – and to be governed by the institutions of that province, as a province and within its constitutional powers as such. Not for any other purpose.[114]

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107 In *Secession Reference* the Supreme Court made it clear that there is no absolute legal entitlement to secession in that even if principled negotiations are held, agreement on a constitutional amendment might not be reached: *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 267-270.

108 *The Ontario Boundaries Extension Act* 1912, 2 Geo. V, c.40 (Can).

109 *The Manitoba Boundaries Extension Act* 1912, 2 Geo V, c. 32 (Can).

110 *Sovereign Injustice* at 208-209.

111 *Sovereign Injustice* at 209; Nicholson, *The Boundaries of the Canadian Confederation* at 143-144.

112 Nicholson, *The Boundaries of the Canadian Confederation* at 195, 207; *Sovereign Injustice* at 209-210; Ratner 'Drawing a Better Line' at 603.

113 Varty, *Who Gets Ungava?* at 29.

As already suggested above, it is reasonable to speculate that in 1912 that the legislators in Canada's federal parliament would not have contemplated that the borders of Quebec then being created would one day be the borders of an independent Quebec. If secession had been contemplated at the time, different border lines would undoubtedly have resulted. The same can be said in relation to the border legislation of 1898, if it was in fact an extension, rather then merely confirmation, of Quebec's territorial scope. Quebec's current constitutional protection of its existing borders is contingent upon it remaining part of the Canadian federation. If Quebec secedes from Canada it is not entitled to retain the territory it gained over and above what it had in 1867 as a result of the 1898 and 1912 border legislation. Quebec cannot insist upon enforcing a protection contained in a constitution that it is otherwise prepared to reject. As Ratner aptly puts it, Quebec secessionists cannot 'have their cake and eat it, too'.[115]

Canada's Fiduciary Obligations Owed to Aboriginal Peoples

The second basis upon which it can be argued that Quebec cannot achieve independence within the scope of its present provincial borders is based upon the Crown's fiduciary obligations towards aboriginal peoples.

In relation to the Crown's fiduciary obligations owed to the aboriginal peoples of Ungava it must be established that the Crown owes fiduciary obligations to them. If such fiduciary obligations do exist it must then be shown that such obligations necessitate the consent of Quebec's aboriginal peoples to any proposed constitutional amendment to allow Quebec to secede, and that the absence of such consent would mean that such a constitutional amendment could not be legally adopted.

To establishing the above one needs to establish the following matters:

(a) The existence of aboriginal and/or treaty rights in relation to the aboriginal peoples of Ungava;
(b) The existence of fiduciary obligations owed by the Crown to aboriginal peoples of Ungava;
(c) The nature of the Crown's responsibilities in exercising the fiduciary obligations referred to in (b) above;
(d) The relevance of the Crown's fiduciary obligations in the context of a constitutional amendment to facilitate the secession of Quebec; and
(e) The illegality of a constitutional amendment to allow the secession of Quebec with its present provincial borders remaining unchanged obtained without the consent of the aboriginal peoples of Ungava.

(a) The Existence of Aboriginal Rights in Ungava

A significant source of the rights of aboriginal peoples in Ungava is the James Bay and Northern Quebec Agreement (JBNQA) of 1975. The roots of the JBNQA can, in part, be traced to *Rupert's Land*.[116] By the terms of *Rupert's Land Order* Rupert's Land, of which Ungava was a part, and the Northwestern Territory became

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114 Stephen A Scott, 'October 1992: Issue Relating to Quebec Independence, Remarks at a Public Meeting', Holiday Inn, Pointe Claire, Quebec, 19 February 1992, at 24. See also See also David J Bercuson & Barry Cooper, *Deconfederation, Canada Without Quebec*, Key Porter Books, Toronto, 1991 at 151-152; Peter Russell & Bruce Ryder, *Ratifying a Postreferendum Agreement on Quebec Sovereignty*, in David R Cameron (ed), *The Referendum Papers, Essays on Secession and National Unity*, University of Toronto Press, Toronto, 1999, 323-362 at 341-342. Shaw notes in relation to internal borders that they 'are not intended to constitute permanent boundaries. Nor are they boundaries protected as such under international law. They are created and exist solely under municipal law': Malcolm N Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 *The British Year Book of International Law* 75 at 117. A similar approach to internal borders was taken by the leadership of post-World War II Yugoslavia following the introduction of a federal structure to that country: Peter Radan, *The Break-up of Yugoslavia and International Law* at 152-153.

115 Ratner, 'Drawing a Better Line' at 607.

116 The Aboriginal rights of the peoples of Ungava are not dependent on the existence of *Rupert's Land Order*. The Supreme Court has held that they are inherent rights not dependent or any executive order or legislative enactment: Paul Joffe, 'Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec' (2000) 45 *McGill Law Reviw* 155-208 at 181.

part of Canada as from 15 July 1870.[117] The transfer of these territories to Canada was on certain terms and conditions. Term 14 stipulated:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the [Hudson's Bay] Company shall be relieved of all responsibility in respect of them.

This provision clearly acknowledged that the 'Indians' had land claims in Rupert's Land before the transfer of 1870 and transferred responsibility for their settlement to the Canadian government.

Furthermore, in a joint address of the Canadian Parliament of 28 May 1869 that was attached to *Rupert's Land Order* there was a protective provision that stated:

> That upon the transference of the territories in question to the Canadian government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.[118]

Although this protective provision was not contained in the terms of the order itself, but rather in a schedule to the order, the joint address in which the protective provision was found was approved by the British Crown as is explicitly stated in the preamble to the order. It is reasonable to assume that it therefore has the same constitutional force as does the order itself.[119] The effect of Canada's assumption of jurisdiction of territories the subject of *Rupert's Land Order* was the transfer by the British government of existing rights and duties owed to the aboriginal peoples of those territories to the federal government of Canada,[120] which by the terms of s. 91(24) of the *Constitution Act, 1867* had exclusive legislative competence in relation to 'Indians, and Lands reserved for the Indians'.

As to what are the 'interests' protected by virtue of *Rupert's Land Order*, McNeil suggests that

> … the term 'interests' should be construed broadly to include any interests that tribes might have, including, economic, social, cultural and political interests. … [T]he protection relates to the Indian tribes' cultural and political existence as nations.[121]

By virtue of s. 2 of the federal legislation extending the border of Quebec in 1912,[122] Quebec assumed certain responsibilities towards the aboriginal peoples of the Ungava part of Rupert's Land. In particular, by virtue of s. 2(c), Quebec was obliged to 'recognize the rights of Indian inhabitants in the territory' and to 'obtain surrenders of such rights' in the same manner as the Government of Canada had 'recognized such rights' and 'obtained surrender[s] thereof' to that date.

The enactment of s. 2(c) of the federal legislation raises two issues. The first is whether the federal delegation of power to Quebec was constitutionally valid. Pursuant to the Supreme Court's decision in *Attorney-General of Nova Scotia v Attorney-General of Canada*[123] a referral of by the federal government of its exclusive legislative power under s. 91(24) of the *Constitution Act, 1867* to a province is unconstitutional.[124] This would arguably mean that s. 2 (c) was of no effect at all and that the federal government retained its exclusive legislative

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117 On the background to *Rupert's Land Order* see McNeil, *Emerging Justice* at 326-330.

118 *Rupert's Land Order*, Schedule B.

119 Dupuis & McNeil, *Canada's Fiduciary Obligation* at 27-28; McNeil, *Emerging Justice* at 331-332.

120 *Baker Lake (Hamlet of) v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518 at 566, per Mahoney J; McNeil, *Emerging Justice* at 330.

121 McNeil, *Emerging Justice* at 335.

122 *The Quebec Boundaries Extension Act* 1912, 2 Geo. V, c. 45 (Can). The provisions of s. 2(c) were adopted by Quebec pursuant to *An Act Respecting the Extension of the Province of Quebec by the Annexation of Ungava* 1912, 2 Geo. V, c. 7, s.1.

123 [1951] SCR 31.

124 For a discussion of the so-called 'inter-delegation rule' see Peter W Hogg, *Constitutional Law of Canada, Loose-leaf Edition, Volume 1*, Carswell, Scarborough at 14-14 – 14-23.

competence granted by s. 91(24) and remained solely responsible for abiding by the obligations imposed upon it pursuant to *Rupert's Land Order*. Alternatively, it could be argued that these obligations became the joint responsibility of the federal and Quebec governments in relation to the territory that was the subject of the 1912 border legislation. In either case the federal government remained bound by its obligations to the aboriginal peoples within that territory after 1912.

The second issue raised by s. 2(c) of the federal legislation of 1912 relates to the meaning of 'rights' in that provision. The 'rights' referred to in s. 2(c) were not set out in the legislation. It could be argued that these 'rights' meant the same things as 'interests' recognised by the Canadian government in the protective provision contained in the joint address to the Crown of 1869 which in turn is referred to in *Rupert's Land Order*. However, it is arguable that 'rights' has a narrower meaning than 'interests'. This issue is only of significance if the effect of s. 2(c) resulted in the joint responsibility of the federal and Quebec governments (as discussed in the previous paragraph) in relation to obligations owed to the aboriginal peoples within the territory that was the subject of the 1912 border legislation. If 'rights' and 'interests' referred to the same things then the responsibility of the federal and Quebec governments was co-extensive. If 'interests' was a broader concept that 'rights' then federal responsibility was broader in scope than Quebec's.

The extension of Quebec's territorial scope by the 1912 legislation marked the beginning of increased controversy between Ungava's aboriginal peoples and the Quebec government. Generally, the Quebec government ignored its responsibilities to the aboriginal peoples as it pursued policies of economic development and exploitation of the newly acquired territories.[125] The federal government in this period through to the 1970s was similarly neglectful of its own obligations to the aboriginal peoples.[126]

With Quebec's determination to proceed with the development of a massive hydro-electricity project in the James Bay area, the JBNQA was entered into on 11 November 1975. The parties to the JBNQA were the federal government, the Quebec government, the James Bay Energy Corporation, the James Bay Development Corporation, Quebec Hydro-Electric Commission, the Grand Council of the Crees and the Northern Quebec Inuit Association. In 1978 the Northeastern Quebec Agreement amended the JBNQA by adding the Naskapi Indians of Quebec as a party.[127] Section 1.16 of the JBNQA stipulated that the territory to which the JBNQA applied was that which was the subject of Quebec border legislation in 1898 and 1912.

One of the effects of the JBNQA was to clarify, in relation to the aboriginal populations in the territory that was subject to the JBNQA, Quebec's obligations under the 1912 legislation which, prior to 1975, had 'remained undefined'.[128] Section 1 of the JBNQA stipulates, in preambular form, that 'Quebec now wishes to fully satisfy all of its obligations with respect to the Native people inhabiting the Territory'. In achieving this goal the non-aboriginal parties to the agreement agreed to 'give, grant, recognize and provide' the aboriginal parties to the agreement certain 'rights, privileges and benefits' set out in the agreement (s. 2.2). In return, the aboriginal parties to agreement agreed to 'cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be' to Canada and Quebec (s. 2.1). By s. 2.15, the JBNQA can only be amended with consent of all of its parties.

The JBNQA was implemented by federal legislation: James Bay and Northern Quebec Native Claims Settlement Act[129] (hereinafter 'the James Bay Act'); and Quebec legislation: Act Approving the Agreement Concerning James Bay and Northern Quebec.[130]

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125 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1103-1104.

126 Glen St Louis, 'The Tangled Web of Sovereignty and Self-Governance: Canada's Obligation to the Cree Nation in Consideration of Quebec's Threats to Secede' (1996) 14 *Berkeley Journal of International Law* 380 at 383-384; Hamelin, *Canadian Nordicity* at 162-193.

127 Dupuis & McNeil, *Canada's Fiduciary Obligation* at 34-35.

128 *Cree Regional Authority v Canada* (1991) 81 DLR (4th) 659 at 662.

129 S. C. 1976-77, c. 32.

130 S. Q. 1976, c. 46. For a critical account of the implementation of the JBNQA see Paul Rynard, 'Ally or Colonizer?: the federal State, the Cree Nation and the James Bay Agreement' (2001) *Journal of Canadian Studies*, Vol 36, No 2, 8-48.

An important provision of the *James Bay Act* is s. 3. In accordance with s. 2.6 of the JBNQA, s. 3 (3) of the *James Bay Act* stipulates:

> All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished.

By s. 3(2) the 'rights privileges and benefits' accorded to the aboriginal parties to the JBNQA came into effect simultaneously with s. 3(3). These 'rights, privileges and benefits' gained pursuant to the JBNQA are summarised in the Preamble to the *James Bay Act* as follows:

> [T]he [JBNQA] provides, *inter alia*, for the grant to or setting aside for Crees and Inuit of certain lands in the Territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the Territory of regional and local governments to ensure the full and active participation of the Crees and Inuit in the administration of the Territory, measures to safeguard and protect their culture and to ensure their involvement in the promotion and development of their culture, the establishment of laws, regulations and procedures to manage and protect the environment in the Territory, remedial and other measures respecting hydro-electric development in the Territory, the creation and continuance of institutions and programs to promote the economic and social development of the Crees and Inuit and to encourage their full participation in society, an income support program for Cree and Inuit hunters, fishermen and trappers and the payment to the Crees and Inuit of certain monetary compensation.

The *James Bay Act*, in its Preamble, also stipulates:

> [T]he Government of Canada and the Government of Quebec have assumed certain obligations under the [JBNQA] in favour of the … Crees and Inuit.

This provision makes it clear that both governments have responsibilities, set out in detail in the JBNQA, with respect to ensuring that the 'rights, privileges and benefits' referred to in s. 3(2) are delivered to the aboriginal parties to the JBNQA. One of the significant federal government responsibilities, pursuant to s. 9 of the JBNQA, was the obligation to enact federal legislation to establish local government for the Crees, and later the Naskapi. This was done in 1984 by virtue of the *Cree-Naskapi (of Quebec) Act*.[131]

In addition to the said 'rights, privileges and benefits', the *James Bay Act* indicates a further, more general, responsibility to the said aboriginal parties. This is clear from the Preamble which states that 'the Parliament and the Government of Quebec recognize and affirm a special responsibility' for the said aboriginal parties. This provision must be read in the context of s. 7 of the *James Bay Act* which, pursuant to s. 2.5 of the JBNQA, repealed s. 2 of the 1912 Quebec border extension legislation and thus removed whatever obligations Quebec had pursuant to that legislation, if any, towards the aboriginal peoples of Ungava. As noted above, the 1912 legislation may have resulted in Canada and Quebec being jointly responsible for the Crown's obligations towards the aboriginal peoples of Rupert's Land. The effect of s. 7 of the *James Bay Act* was to restore, beyond doubt, sole responsibility for these obligations to Canada's federal government and parliament. The Preamble to the *James Bay Act*, in its recognition and affirmation of a federal government 'special responsibility', effectively acknowledges this result.[132]

In the light of the above discussion it is clear that Ungava's aboriginal peoples have certain rights pursuant to the JNNQA and its implementing legislation.

(b) The Fiduciary Obligations of the Crown

Given the existence of aboriginal rights created by the JBNQA it needs to be established that the Crown owes fiduciary obligations to the aboriginal peoples of Ungava in relation to those rights. The existence of such fiduciary obligations can be established in, at least, two ways.

First, the effect of the JBNQA and the federal and Quebec legislation implementing it is to create fiduciary obligations on the part of both the federal and Quebec governments towards the aboriginal peoples that are

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131 *Cree-Naskapi (of Quebec) Act* S.C. 1984, c. 46.

132 *Sovereign Injustice* at 357.

parties to the JBNQA. In *Guerin v The Queen*[133] the Supreme Court of Canada ruled that where an aboriginal group surrenders its interest in land to the Crown, fiduciary obligations are owed by the Crown to that aboriginal group.[134] In that case Dickson J explained that the mere fact that aboriginal groups had an interest in land did not give rise to the Crown's fiduciary obligations. Rather it was the fact that aboriginal interests were inalienable except by surrender to the Crown. His Honour concluded:

> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. … The surrender requirement and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[135]

In the specific context of the surrender of land pursuant to the JBNQA this was specifically confirmed in *Cree Regional Authority v Canada (Federal Administrator)*[136] where Rouleau J in the Federal Court ruled that the federal government assumed fiduciary obligations to the Crees and Inuit in the wake of the extinguishment of rights pursuant to the federal act implementing the JBNQA. His Honour said:

> In light of the fiduciary obligation imposed upon the federal government in its dealing with the native population … the Agreement mandates the protection of the aboriginal people who relinquished substantial rights in return for the protection of both levels of government.[137]

Given that the surrender of rights pursuant to s. 2.1 of the JBNQA was to both Canada and Quebec, the fiduciary obligations that flow from such a surrender would be imposed on both the federal and Quebec provincial governments.

A second way in which the Crown's fiduciary obligations can be established is pursuant to s. 35 of the *Constitution Act, 1982*.

Section 35(1) stipulates:

> The existing aboriginal and treaty rights of the aboriginal peoples are hereby recognized and affirmed.

In *Sparrow v The Queen*[138] the Canadian Supreme Court ruled that the words 'recognized and affirmed' in s. 35(1) incorporated a fiduciary duty upon the Crown with respect to any of its legislation affecting aboriginal and treaty rights.[139] The Court stated that the 'guiding principle' for s. 35(1) was as follows:

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[140]

The Court stated that the Crown's obligations pursuant to s. 35(1) stemmed from the fiduciary obligations referred to in *Guerin* and the principle stated in *R v Taylor and Williams*,[141] that in its dealing with the

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133 [1984] 2 SCR 335.

134 *Guerin v The Queen* [1984] 2 SCR 335 at 376.

135 *Guerin v The Queen* [1984] 2 SCR 335 at 376.

136 (1991) 84 DLR (4th) 51.

137 *Cree Regional Authority v Canada (Federal Administrator)*(1991) 84 DLR (4th) 51 at 74-75. This decision was followed in *Mario Lord v Canada (Attorney General)* [1999] JQ No. 5413.

138 [1990] 1 SCR 1075.

139 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1109.

140 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1108.

141 (1981) 34 OR (2d) 360.

aboriginal peoples 'the honour of the Crown is always involved and no "sharp dealing" should be sanctioned'.[142]

Although *Sparrow* dealt with the fiduciary obligations of federal authorities, the Supreme Court stated that s. 35(1) also afforded aboriginal peoples constitutional protection in relation to the exercise of provincial power.[143] Subsequent cases before the Court confirm that s. 35(1) also governs provincial authorities.[144]

In relation to 'treaty rights' referred to in s. 35(1), s. 35(3) makes it clear that 'treaty rights' include rights that exist pursuant to land claims agreements. Thus, fiduciary obligations are owed by the Crown in relation to aboriginal treaty rights. Although it has not been ruled upon by the Canadian Supreme Court, there is authority determining that the JBNQA is a treaty within the scope of s. 35(3) and thus the Crown has fiduciary obligations in relation to the treaty rights created by the JBNQA.[145]

It must be recognised that the federal and Quebec governments have claimed that the JBNQA is not a treaty.[146] However, even if it is not a treaty there is authority from the Supreme Court of Canada to the effect that the fiduciary obligations that arise in the context of s. 35(1) apply 'by analogy'[147] irrespective of the type of document creating the relationship between the Crown and aboriginal peoples. This is because fiduciary obligations arise 'out of the nature of the relationship between the Crown and aboriginal peoples'[148] and not as the consequence of the characterisation of an agreement between the Crown and aboriginal peoples.

On the basis of the discussion above it is clear that Canada's federal and Quebec governments owe fiduciary obligations to Ungava's aboriginal peoples as a result of the JBNQA and its implementing legislation.

(c) The Nature of the Crown's Fiduciary Obligations

One context where the Crown's fiduciary obligations to aboriginal peoples arises is when federal or provincial legislation impacts on existing aboriginal and treaty rights. Prior to the introduction of s. 35 of the *Constitution Act, 1982* into Canada's constitutional law in 1982, aboriginal rights, because they did not have constitutional status, were capable of being overridden by legislation on the basis of the doctrine of parliamentary sovereignty.[149] However, the constitutional requirement placed upon federal and provincial parliaments by s. 35 that they respect existing fiduciary obligations owed towards aboriginal peoples places limitations upon their capacity to override aboriginal or treaty rights. The limitations relate to rights that were existing as at 17 April 1982, the date upon which s. 35 came into effect.[150]

In *Sparrow* the Supreme Court observed that aboriginal rights are not absolute and that the Crown had the power to legislate to override such rights. However, any such legislation would only be valid if 'it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1)'.[151] As the Court observed the incorporation of fiduciary duties by s. 35(1) meant that

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142 *R v Taylor and Williams* (1981) 34 OR (2d) 360 at 367, per MacKinnon ACJ.

143 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1105.

144 *Badger v The Queen* (1996) 133 DLR (4th) 324; *Cote v The Queen* [1996] 3 SCR 139 at 185; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1107; *Regina v Sundown* (1999) 170 DLR (4th) 385.

145 *Eastmain Band v Gilpin* [1987] 3 CNLR 54 at 67; *Cree School Board v Canada (Attorney General)*, [1998] 3 CNLR 24; *Lord v Quebec (Attorney General)* [2000] 3 CNLR 78 at 97.

146 See for example submissions in *Cree School Board v Canada (Attorney General)*, [1998] 3 CNLR 24.

147 *R v Badger* [1996] 1 SCR 771 at 785, per Lamer CJ & Sopinka J.

148 *R v Badger* [1996] 1 SCR 771 at 782, per Lamer CJ & Sopinka J.

149 *R v Van der Peet* [1996] 2 SCR 507 at 538; *R v Marshall* [1999] 3 SCR 456 at 496.

150 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1091.

151 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1109.

> … federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[152]

In *Sparrow* the Court established the test to determine whether the Crown has fulfilled its fiduciary obligations when legislation is passed that affects aboriginal rights.[153] The framework for the analysis of the *Sparrow* test is constituted by the following three questions:

i) Are there existing aboriginal or treaty rights?

ii) Has there been a *prima facie* infringement of those rights?

iii) Can the infringement be justified?

In relation to the question on infringement, in *R v Gladstone*,[154] L'Heureux-Dube J observed:

> The only thing that the claimant must show is that, on its face, the legislation comes into conflict with a recognized aboriginal right, either because of its object or its effects.[155]

In relation to the question on justification there are two matters to determine. In *Delgamuukw v British Columbia*[156] the Supreme Court described the first as the necessity of establishing that 'the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial'.[157] The Court held that the second part of the justification process 'requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples'.[158] The major aspect of such an assessment involves the requirement of consultation with relevant aboriginal peoples.

In *Delgamuukw* the Court also addressed at length the nature and scope of the duty to consult. Lamer CJ stated that:

> There is always a duty of consultation. … The nature and scope of the duty of consultation will vary with the circumstances. … Some cases may … require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.[159]

In *R v Marshall*[160] the Supreme Court ruled that the same justificatory test applied to both aboriginal rights and treaty rights.[161]

In summary, it can be said that the JBNQA imposes fiduciary obligations upon both the federal and Quebec governments.[162] The practical implications of such fiduciary obligations is that in any legislation which would

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152 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1109.

153 *Sparrow v The Queen* [1990] 1 SCR 1075 at 1111-1119.

154 *R v Gladstone* [1996] 2 S.C.R. 723

155 *R v Gladstone* [1996] 2 S.C.R. 723 at 810. In *Sparrow*, at 1112, it was held that the infringement test had the further three part test: (i) is the limitation reasonable; (ii) does it impose undue hardship; and (iii) does it deny the right holders the preferred means of exercising their rights? This aspect of the infringement test has been subsequently rejected in favour of the quoted statement from *Gladstone*. See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2002] 1 CNLR 169.

156 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

157 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1107.

158 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1108.

159 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1113.

160 [1999] 3 SCR 393.

161 For a critical evaluation of *Marshall* on this point see Leonard Rotman, 'Marshalling Principles From the *Marshall* Morass' (2000) 23 *Dalhousie Law Journal* 5-47, at 41-46.

162 On provincial fiduciary obligations see Leonard Ian Rotman, *Parallel Paths, Fiduciary Doctrine and the Crown-Native Relationship in Canada* (hereinafter Rotman, *Parallel Paths*), University of Toronto Press, Toronto, 1996 at 241-243, 251-254.

interfere with any of the rights of the aboriginal parties to the JBNQA, the Crown would need to comply with its fiduciary obligations in accordance with the principles set out in *Sparrow*.

(d) Fiduciary obligations and a Constitutional Amendment

Whilst it is clear that the *Sparrow* test is relevant in the context of federal or provincial legislation that affects existing aboriginal or treaty rights, such as fishing, hunting and trapping, it must be established that the same principles apply to a proposed constitutional amendment, particularly so for one that effects the secession of Quebec.

Part V of the *Constitution Act, 1982* sets out various procedures for amending Canada's constitution depending upon the nature of the amendment. None of these procedures stipulate any justification test along the lines set out in *Sparrow*. It may be noted that s. 35.1 of the *Constitution Act, 1982* stipulates that a constitutional conference be convened in relation to amendments to s. 91(24) of *the Constitution Act, 1867* or ss. 25, 35 and 35.1 of the *Constitution Act, 1982*. More significantly, s. 35.1 stipulates that representatives of Canada's aboriginal peoples be invited to participate in discussions at such a conference. However, the requirements of s. 35.1 fall well short of the justification principles in *Sparrow*, in that all that is required is the participation of aboriginal representatives in the constitutional conference.

It could be argued that s. 35.1 precludes any involvement of aboriginal peoples, especially those of Ungava, in relation to a constitutional amendment for the purposes of effecting the secession of Quebec. Initially, it could be argued that s. 35.1 sets out the only circumstances in which any kind of involvement or participation by aboriginal peoples is required, and that in no other cases of constitutional amendment do they have any role to play at all. On this basis, it could be argued that a Quebec secession amendment, not being an amendment to the four constitutional provisions governed by s. 35.1, can be adopted without any aboriginal involvement or consent. However, its is suggested that such an argument cannot be sustained for a number of reasons.

First, as Hogg has stated, although s. 35.1 does not apply to constitutional amendments that make no direct change to the four constitutional provisions governed by s. 35.1, that does not necessarily exclude the need to satisfy the justification principles in *Sparrow* in relation to any amendment that affects aboriginal or treaty rights.[163] Hogg does not detail why the justification rules in *Sparrow* would apply. However, it can be suggested that it would be illogical were the *Sparrow* rules not to apply.

The illogicality stems from the fact that aboriginal or treaty rights are being affected by a constitutional amendment rather than ordinary federal or provincial legislation. It would be illogical to argue that the *Sparrow* rules do not apply to the former but do to the latter. Notwithstanding the fundamental nature of a constitution, it is in essence no different to ordinary legislative acts passed by a State. In the Canadian setting, both the constitution and ordinary legislative acts create rights and obligations that are capable of being changed. It is only with the pre-requisites for such changes that there is a difference between the two. The constitution, because of its centrality and importance, has more significant hurdles to be cleared before it can be changed as compared to ordinary legislation. In the latter case all that is required is a simple parliamentary majority, either at the federal or provincial level depending upon where legislative competence for the particular subject matter of the legislation lies. A qualification to this parliamentary majority requirement is with cases of ordinary legislation that affect existing aboriginal and treaty rights. In such cases the legislation must satisfy the justificatory principles set out in *Sparrow*. The fact that a constitutional amendment that affects aboriginal or treaty rights, in order to be adopted, needs to be satisfy the more demanding procedure as set out in Part V of the *Constitution Act, 1982*, is not reason enough to dispense with the need to comply with the justification rules in *Sparrow*. This is so because none of the Part V requirements include provisions relating to consulting with or obtaining the consent of aboriginal peoples. If ordinary legislation affecting aboriginal or treaty rights must conform to the *Sparrow* test, it would be illogical if amendments to Canada's constitution that affected existing aboriginal and treaty rights were not subject to the same justificatory principles.

A second reason why the provisions of s. 35.1 should not be seen to exclude the application of the *Sparrow* rules in cases of constitutional amendments which affect aboriginal or treaty rights is to be found in a statement of the Supreme Court of Canada in *Secession Reference* where it stated:

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163 Peter W Hogg, *Constitutional Law of Canada, Loose-leaf Edition, Volume 1*, Carswell, Scarborough at 27-46.

> The 'promise' of s. 35 [of the *Constitution Act, 1982*], as it was termed in *R v Sparrow* …, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[164]

On the basis of this passage it is difficult to sustain the view that a constitutional amendment that affected aboriginal or treaty rights could be adopted without compliance with the *Sparrow* justification principles. To suggest otherwise would be to render meaningless the Court's ruling that aboriginal rights reflect 'an important underlying constitutional value'.

Thus, on the basis of the above arguments, it is suggested that the *Sparrow* principles do apply to any constitutional amendment that affects aboriginal or treaty rights and that therefore, s. 35.1 of the *Constitution Act, 1982* cannot be construed to exclude the application of these principles in this context.

(e) Application of Fiduciary Obligations to a Secession Amendment

If, as has been argued, the *Sparrow* principles apply in the context of a constitutional amendment that affects existing aboriginal rights, their practical application in the context of a constitutional amendment to effect a secession of Quebec with its present provincial borders remaining in tact must now be explored.

(i) Are there existing aboriginal or treaty rights?

In the light of the above discussion on the effect and terms of the JBNQA, it is clear that there are at least existing treaty rights that are involved.

(ii) Has there been a prima facie infringement of those rights?

The Crown's fiduciary obligations towards the aboriginal peoples of Ungava are only relevant if a secession of Quebec would affect their existing aboriginal or treaty rights. If Ungava were to remain part of an independent Quebec aboriginal rights under the JBNQA would be dramatically affected. As previously noted, under the JBNQA aboriginal rights were surrendered to both Canada and Quebec. This surrender was accepted by both Canada and Quebec. Accordingly the benefits granted to the aboriginal peoples by the agreement require the involvement of both Quebec and Canada. The creation of an independent Quebec within its present provincial borders would automatically remove Canada from its ability to fulfil its obligations under the JBNQA as well as from its ability to fulfil the 'special responsibility' referred to in the preamble to the federal legislation implementing the JBNQA.[165]

It could be argued that the secession of Quebec within its present territorial borders would not impact on aboriginal rights at all if there was a pre-condition to the secession that the Quebec government constitutionally entrenched all relevant aboriginal rights by replicating present Canadian constitutional guarantees into its own constitution. On this basis, this argument would suggest that there would be no infringement of aboriginal rights at all.

However, whilst this argument has superficial appeal, closer scrutiny reveals its deficiencies. The JBNQA was negotiated against the background of a federal political structure. As it makes no provision for the fulfillment of Canada's obligations in the event of Quebec leaving Canada, it is reasonable to assume that all its parties entered into it on the assumption of the continued existence of such a federal structure.[166] This was certainly the underlying basis for the agreement of the aboriginal parties to the JBNQA. They would not have entered into an agreement on the same terms as the JBNQA had it been negotiated with an independent Quebec.[167] The

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164 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 262-263.

165 It would also be inconsistent with the very essence of the trust like nature of the fiduciary relationship. On equitable fiduciary relationship principles it is almost certainly the case in that in the present context only the aboriginal peoples of Ungava could terminate the fiduciary relationship between themselves and the federal government: Rotman, *Parallel Paths* at 257; Hogg, 'Principles Governing the secession of Quebec' at 44.

166 Hogg, 'Principles Governing the secession of Quebec' at 44.

167 *Sovereign Injustice* at 278-279.

importance of this federal structure from the perspective of the aboriginal parties to the JBNQA is stressed by Bradford Morse who has written:

> The simple presence of federalism provides some semblance of added protection to aboriginal peoples, as there are two levels of government in place, thereby increasing the possibility that at least one level of government might advance their interests despite limited electoral or economic influence.[168]

Leaving the rights granted by the JBNQA to its aboriginal signatories to be protected within the confines of a (presumably) unitary Quebec would greatly increase the risk that such rights could be subsequently abrogated even if these rights were constitutionally entrenched in an independent Quebec's constitution. Amendment of such a constitution would, it is suggested, not be as difficult as amending the present Canadian constitution with its requirement of both federal and provincial support for any amendment. Even if a veto in favour of Aboriginal peoples were entrenched in the constitution of an independent Quebec, their aboriginal and treaty rights would inevitably be interpreted differently. This is because the context of a unitary Quebec constitution would be markedly different from the existing federal Constitution of Canada.[169] Thus, it is suggested that an integral part of the rights of the aboriginal parties to the JBNQA is the very strength of the constitutional protections they have because of the difficulties in amending Canada's federal constitution.[170] Transferring such rights to a constitutional structure that is inherently easier to amend thus becomes an infringement of those rights.

(iii) Can the infringement be justified?

On the basis that a constitutional amendment to facilitate the secession of Quebec within its present provincial borders is a matter that would infringe aboriginal rights, such an amendment would need to be justified in accordance with the two matters described in *Delgamuukw*.

The first element described in *Delgamuukw* is that the infringement must be in furtherance of a legislative object that is compelling and substantial. It can be readily conceded that a sufficiently strong vote at a referendum in Quebec in favour of secession would give rise to a compelling and substantial legislative object. So much can be inferred from the fact that the *Secession Reference* requires constitutional negotiations for such an amendment to begin in the event of such a vote. However, whether it could be said that the compelling and substantial legislative object is the independence of Quebec within its present territorial borders is open to doubt. Rather it could be argued that there would be a compelling and substantial legislative object with respect to those parts of Quebec where support for secession was clear. On the assumption that the aboriginal population of Ungava voted against secession it could be argued that Ungava was not within the compelling and substantial legislative object. Thus, by not satisfying the first part of the justification test, a constitutional amendment to facilitate the secession of Quebec within its present provincial borders could not succeed.

However, even if there was compliance with the first part of the justification test, it would also have to be established that the infringement of aboriginal or treaty rights was consistent with the special fiduciary relationship that exists between the Crown and aboriginal peoples. As previously noted this element involves the requirement of consultation. As was pointed out in *Delgamuukw*, in some cases of infringement 'may … require the full consent'[171] of the relevant aboriginal peoples.

It is suggested that the departure of Ungava from Canada would be such a serious infringement of aboriginal or treaty rights that it would come within the category of infringements for which would require the full consent of the aboriginal parties to the JBNQA before the second element described in *Delgamuukw* would be satisfied. Such a departure would, as already noted, remove Canada's federal government from its obligations under the JBNQA. The consent of the aboriginal parties to the JBNQA would be necessary before this could be legally done. This is in fact stipulated as necessary by s. 2.15 of the JBNQA itself which states that any changes to the JBNQA must be approved by all the parties to it.

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168 Bradford Morse, 'How Would Quebec's Secession Affect Aboriginal Peoples and Aboriginal Rights?' (1999-2000) 11 *National Journal of Constitutional Law* 107-145 (hereinafter Morse, 'How Would Quebec's Secession Affect Aboriginal Peoples and Aboriginal Rights?') at 122.

169 *Sovereign Injustice* at 279.

170 Sheppard, 'The Cree Intervention' at 852.

171 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1113.

On the basis of the above arguments, it is suggested that the independence of Quebec within the scope of its present provincial borders can only be achieved if there is the consent of the aboriginal parties to the JBNQA to the appropriate constitutional amendment. Without such consent such a constitutional amendment would be invalid and illegitimate.

The principle of federalism

The third basis upon which it can be argued that Quebec cannot achieve independence within the scope of its present provincial borders is based upon the principle of federalism. The federal principle, which is one of the underlying principles that 'inform and sustain the constitutional text'[172] and thus lies at the heart of Canadian constitutional law, requires more than mere compliance with Part V of the *Constitution Act, 1982* in the case of constitutional amendments that affect existing aboriginal and treaty rights.

In Reference re: Resolution to Amend the Constitution[173] the Supreme Court stated:

> The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.[174]

It is submitted that the federal principle, as enunciated by the Supreme Court in this case, can now be extended to make it impossible to reconcile it with an amendment to Canada's constitution by the unilateral action of federal and provincial authorities where such an amendment has the effect of modifying existing aboriginal and treaty rights. In effect this submission argues that Canada's aboriginal peoples form a third tier within Canada's federal system.[175] The proposition that such a third tier exists is reinforced by the following argument.

It has been consistently recognised by the Supreme Court of Canada that a purpose of s. 35(1) of the *Constitution Act, 1982* is to reconcile the sovereignty of the Crown with the sovereign rights of the aboriginal peoples of Canada who had lived as 'independent nations and political communities'[176] before European settlement of the continent. Thus, in *R v Van der Peet* [177] the Court's majority said:

> [T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[178]

Thus, s. 35(1) can be said to recognise the sovereignty of the aboriginal peoples prior to European settlement of North America, and further, to affirm the continued existence of such sovereignty after such settlement, albeit somewhat diminished by such settlement. This aboriginal sovereignty also survived the process of Canadian confederation in 1867. In particular, the distribution of legislative power between federal and provincial governments pursuant to ss. 91-92 of the *Constitution Act, 1867*, was not exhaustive in the sense that there remained no other competent legislative authority. Sections 91 and 92 simply distributed, between federal and

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172 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 247.

173 *Reference re: Resolution to Amend the Constitution* [1981] 1 SCR 753.

174 *Reference re: Resolution to Amend the Constitution* [1981] 1 SCR 753 at 905-906.

175 Morse refers to aboriginal peoples as 'constitutional entities': Morse, 'How Would Quebec's Secession Affect Aboriginal Peoples and Aboriginal Rights?' at 111.

176 *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 at 357.

177 *R v Van der Peet* [1996] 2 SCR 507.

178 *R v Van der Peet* [1996] 2 SCR 507 at 538-539.

provincial authorities, such legislative competence as was enjoyed prior to 1867 by colonial authorities within British North America.[179] Any other legislative competence, including that belonging to aboriginal peoples, remained untouched.[180]

In *Campbell v British Columbia (Attorney General)*[181] it was held, by Williamson J, that such aboriginal legislative competence that survived the European settlement of Canada was constitutionally guaranteed by s. 35(1).[182] To a large extent this entrenchment was justified by the principles of the rule of law and constitutionalism set out by the Supreme Court in *Secession Reference*. In that case the Supreme Court referred to and stressed the need for a constitution

> … to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against assimilative pressures of the majority.[183]

The constitutionalisation of aboriginal rights by s. 35(1) gives rise to a form of shared sovereignty between the Crown and aboriginal peoples. It can be noted that in the Supreme Court decision of *Mitchell v MNR*,[184] Major, Binnie JJ expressed support for a view that:

> … sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.[185]

The reconciliation of Crown sovereignty and aboriginal sovereignty is, as discussed above, one of the central purposes of s. 35(1). As stated in *Delgamuukw* the preferred means to achieve this is through negotiated treaty settlements.[186] Such treaties are accorded the constitutional protection of s. 35(1).[187]

On this basis, it can be argued that aboriginal peoples must support any constitutional amendment that affects of modifies their rights, just as provincial governments must support constitutional amendments that affect their legislative powers. It is suggested that a constitutional amendment to effect Quebec's secession would clearly affect the sovereign rights of Ungava's aboriginal peoples, and therefore require their consent for it to be legally adopted. In effect, the necessity of support of the aboriginal peoples to such an amendment points to the key aspect of the justificatory principles in *Sparrow*.

Conclusion

If and when the province of Quebec makes a move towards obtaining its political independence from Canada the territorial scope and borders of an independent Quebec are likely to be matters of serious concern. This is particularly so in relation to the northern parts of Quebec known as Ungava, which accounts for approximately two-thirds of Quebec's current territorial scope. The question of whether Quebec would be entitled to retain its existing provincial borders and transform them into international borders has been the focus of this paper. This is a particularly important matter, given the desire of the aboriginal peoples of Ungava to remain within Canada in the event of any move to secession by Quebec.

From the perspective of international law, the Five Experts Report has argued that the principles of territorial integrity, the stability of borders and *uti possidetis juris* all support the conclusion that Quebec's borders remain the same following secession. Although these were the principles used to justify a 'no changes to internal

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179 *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 at 441-442.

180 *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 at 352-253.

181 *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

182 *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333 at 366-368.

183 *Reference re: Secession of Quebec* [1998] 2 SCR 217 at 259.

184 *Mitchell v MNR* [2001] 1 SCR 911.

185 *Mitchell v MNR* [2001] 1 SCR 911 at 980-981.

186 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1123-1124

187 Campbell v British Columbia (Attorney General) (2000) 189 DLR (4th) 333 at 376.

borders' approach in the case of Yugoslavia, in analysing all three of these principles, it can be fairly concluded that none of them supports the conclusion of the Five Experts Report.

From the perspective of Canadian constitutional law, three arguments have been raised justifying a view that Quebec cannot insist upon its present provincial borders becoming international borders following secession, and that partition of Quebec would be necessary if and when Quebec seeks independence.

First, even though Quebec's provincial borders are constitutionally protected and cannot be altered without its consent, such protection exists only for as long as Quebec remains part of Canada. On the basis that Quebec's territorial expansion, by virtue of the 1912 border extension legislation was for the purposes of the development of Quebec as a province within Canada, Quebec would be required to relinquish its claim to the territory acquired in 1912 if it chose to secede from Canada. If the 1898 border legislation had the effect of extending Quebec's territorial scope, a similar relinquishment would be required.

Second, the constitutional entrenchment of aboriginal and treaty rights by s. 35(1) of the *Constitution Act, 1982* and the consequential fiduciary obligations owed by the Crown to the aboriginal parties to the JBNQA requires the approval of these parties to any constitutional amendment affecting their rights. A secession of Quebec would, at least, affect aboriginal treaty rights under the JBNQA. Any negotiated constitutional amendment that stipulated that Quebec's current provincial borders would become international borders would be illegal if it did not have the approval of the aboriginal parties to the JBNQA in accordance with the justification principles set out in *Sparrow*. These aboriginal parties to the JBNQA have signaled their desire to remain within Canada. Therefore, for Quebec to gain independence, the necessary constitutional amendment would need to be one which also partitioned Quebec.

Finally, the principle of federalism requires the aboriginal peoples, as an effective third sovereign tier in Canada's federal structure, to consent to any constitutional amendment that would affect that sovereignty. In relation to the application of the fiduciary obligations of the Crown and the principle of federalism it is thus unlikely that aboriginal consent to a constitutional amendment in relation to Quebec unless the amendment stipulated that Ungava to be partitioned from Quebec and remain a part of Canada.

Thus, although Quebec has consistently and vigorously maintained its claim its existing provincial borders in the event of its secession, this claim cannot be sustained from the point of view of either international law or Canadian constitutional law. From this perspective, Quebec's position is aptly summarised by the words of Mick Jagger and Keith Richard: 'You can't always get what you want'.[188]

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188 From the song 'You Can't Always Get What You Want' on the Rolling Stones album *Let it Bleed* (1969).

Panel 7B: International Human Rights

Barriers to International Freedom of Movement: A Lacuna in International Human Rights Law?

Michael Curtotti*

This paper explores the compatibility of the principles of the universality and indivisibility of human rights with widely accepted and indeed almost axiomatic restrictions on international freedom of movement. Related to this question, but less a focus of this paper, is the question of access to citizenship, the nature of democracy and the relationship between freedom of movement and global development policy.[1]

This paper arises from reflections on the Bahá'í International Community contribution to the 2001 World Conference Against Racism and from experience as a human rights worker over the last six years. Nonetheless, the views presented in this paper are my own, and do not necessarily represent the views of the Bahá'í community unless explicitly stated.

In 2001 the world community gathered in its third attempt to make progress in addressing issues of racism and xenophobia. The Bahá'í International Community, along with thousands of other civil society organisations contributed to that conference. The Bahá'í contribution focused on the ideal of the oneness of humanity: an ideal which is a fundamental ethic shaping the outlook of the Bahá'í community.[2]

The Bahá'í International Community suggested that it is the idea that humanity can be neatly divided into separate units, whether on the basis of race, or other categories, that is at the root of racism and xenophobia. It presented the view of Baha'u'llah, the founder of the Baha'i Faith, that "The Earth is but one country and mankind its citizens." It appears to have been one of the few organizations to offer this kind of perspective. In regard of questions of migration and refugee flows, the Bahá'í International Community suggested:

> Issues of xenophobia before the Conference in relation to contemporary problems of minority diasporas, the uneven application of citizenship laws, and refugee resettlement can likewise best be addressed in light of humanity's oneness and … the concept of world citizenship.[3]

The following analysis is an individual attempt to examine the question of freedom of movement in international human rights law from this paradigm of common global citizenship and to explore some of its potential implications.

Although it is only possible to undertake a survey of relevant developments it can be concluded that controls on immigration (although universally practiced) are at a fundamental level inconsistent with the basic philosophies of the human rights movement: equal human dignity, and the universality and indivisibility of human rights.

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* Australian Baha'i Community.

1 Although international freedom of movement can be examined from the point of view of restrictions on *emigration* – which it might be noted is well addressed in human rights discourse – I will here be primarily concerned with restrictions on *immigration.*

2 Bahá'í International Community Statement to the Third United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The statement draws attention to a number of implications of this principle as follows:

- It implies the removal of any law, tradition or mental construct that grants superior rights or privileges to one grouping of humanity over another.
- It implies that nation-states, as the building blocks of a global civilization, must hold to common standards of rights and take active steps to purge from their laws, traditions and practices any form of discrimination based on race, nationality or ethnic origin.It implies that justice must be the ruling principle of social organization, a corollary principle that calls for widespread measures to address economic injustice at all levels … so that the great disparities between the rich and the poor are eliminated. It exposes any attempt to distinguish separate "races" or "peoples" in the contemporary world as artificial and misleading.

3 Bahá'í International Community Statement to the Third United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

Notwithstanding such an incompatibility the largely unlimited right of states to impose immigration restrictions is explicitly and implicitly incorporated into international human rights standards, in derogation of the ideal of universality of human rights. Further, as would be anticipated from the idea of the indivisibility of human rights, this derogation has the practical effect of denial not only of the right of freedom of movement, but is associated with the denial of a wide range of human rights of affected individuals. They are derogations moreover which on their face are inconsistent with the idea of equal human dignity.

The conclusion can also be drawn that progress in achieving fundamental human rights for all without distinction requires a new endeavour within the international human rights system to address the barriers to universal enjoyment of human rights associated with the implicit division of humanity into different juridical classes enjoying different standards of human rights protection vis à vis various holders of governmental power.

Associated with restrictions of freedom of movement, but largely consequent on it, are barriers to free access to national citizenship – to which access to the fullest protection of human rights generally attaches. These barriers moreover go to the very heart of the nation-state and to our exercise of democratic rights within it. In very real ways this issue confronts us with the challenge of questioning the privileges which we enjoy as citizens of wealthy nations, with the power to grant and withhold human rights of our fellow human beings.

Restrictions on International Freedom of Movement

It is estimated that there are some 150 million international migrants around the world. This amounts to two per cent of the global population. It is moreover said that the twenty-first century will be a century of migration.[4]

The idea that the state has (subject to the limited rights of refugees and general non-discrimination between foreigners) an absolute right to control or restrict immigration is axiomatic at the beginning of the twenty-first century. Particularly in western countries, issues of immigration have become increasingly controversial with influential political movements and leaders rising to power through advocacy of greater restrictions on entry to the state and reduction or control of immigration. The grounds for these controls are sometimes founded on arguments about the cultural incompatibility of potential immigrants with the host country, or on economic, environmental or other grounds as to why such immigration is contrary to the "national interest". Public discourse, as reflected in wide circulation mass media often draws explicit or implicit associations between criminality, welfare dependency and other social ills and immigration. The empirical foundation for such associations in this public discourse is often entirely absent – or at best largely speculative. Indeed the drawing of such associations can be seen as more than a little puzzling when drawn in states such as Australia, which are examples of vibrant societies which have emerged almost entirely as a product of human migratory movements.

Be this as it may – rarely is the question raised as to *whether* the state should be able to exercise near absolute control over the desires of individuals and families to move from one part of the globe to another.

The axioms of our time, while widespread, date no further back than the early twentieth century. The nineteenth century indeed was a time of migration on a massive scale – particularly in respect of the movement of Europeans to the Americas and other European colonies. It was also a time which saw the massive movement of colonial peoples within the colonial holdings of the European states. Notably however even in the nineteenth century the colonised were impeded in migrating to the metropolitan centres.[5]

In the nineteenth century it was even possible for respectable argument to be made that a state did not have the right to curtail freedom of movement. In 1892 the Institute of International Law proposed that "the free entrance of aliens into the territory of a civilized state should not be curtailed in a general and permanent manner other than in the interests of public welfare and for the most serious of reason".[6]

Dowty, who writes on this topic, is able to conclude:

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4 International Labour Organisation, International Organisation for Migration, Office of the High Commissioner for Human Rights "International Migration, Racism, Discrimination and Xenophobia" paper to the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, p 1.

5 Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement*, Yale University Press 1987, p 44, 46.

6 Closed Borders, p 63.

> The late nineteenth and early twentieth centuries represent the closest approximation to an open world in modern times. … With immigration restrictions at a minimum, real freedom of international movement was a fact. The right of personal self-determination was reasonably secure for residents of Europe and the Americas, if not for other peoples ruled by them. Passports, which had fallen into disuse in much of the West, were required only in the Ottoman Empire, Russia, Romania, Bulgaria and Bosnia/Herzegovina.[7]

The opening years of the twentieth century up to mid-century saw the collapse of this relative openness to the extent that the closed border has become universal. Two trends can be discerned in this change:

- The growing influence on public policy of racist ideologies seeking to promote racially segregated national communities – including by excluding all regarded as incompatible with the prevailing racially defined national character.

- The influence of increasing world turmoil and economic crises expressed in terms of comprehensive restriction of immigration to small numbers as mass flows of people from affected areas loomed as a possibility.

Australia itself provides an example of long implementation of policies which sought by immigration and other measures (primarily affecting indigenous Australians) to produce a homogenous racial composition in the population. In more recent years control over migration has remained a feature of modern Australia – with increasing emphasis on the *control* and *restriction* of migration.[8]

The United States in the 1920s capped overall migration: reducing to an annual migration quota of 150,000 by 1924. Twenty European states followed the United States lead with migration reduced to a trickle and in particular non-whites being excluded. The same trends became apparent in Latin America.[9]

The International Human Rights System

Universality

The Universal Declaration of Human Rights of course marks a break with early twentieth century trends and policies inimical to the equal respect of human dignity. It, in turn, is of course founded on the commitment of nations, expressed in the United Nations Charter, to promote universal respect for and observance of human rights (at that point not clearly defined).[10]

The ideal of universality of human rights – that all human beings equally enjoy human rights solely by virtue of membership of the human family – is of course a central idea of the human rights movement. In 1993 the World Conference on Human Rights thus stated:

> Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.[11]

Yet even in the Universal Declaration the implications of these universal ideals were limited so far as immigration was concerned. Although a right of free movement within a country and the right to leave a country is recognised, there is no corresponding right of entry into another country. Only refugees are provided with a right to seek and enjoy asylum.[12]

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7 Closed Borders, p 54.

8 See J Chesterman and B Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, 1997, A T Yarwood and M J Knowling, *Race Relations in Australia, A History*, Methuen Australia, 1981.

9 Closed Borders, pp 90-91.

10 United Nations Charter article 55.

11 Vienna Declaration and Program of Action, 1993 World Conference on Human Rights, para 1.

12 It is worth noting that the Universal Declaration itself is a set of *minimum* standards – the absence of recognition of a

Although from the point of view of national and state interest – such restrictions are unsurprising – from the point of view of the universality of human rights they must cause us at least to raise an eyebrow, for the implications are profound. Human rights law is concerned of course with the limiting of the unfettered discretion of governments to treat the individual as they will – if such treatment is inimical to human dignity. Of course in a multi-state world, the dignity and rights of the individual are potentially affected by each of those states – who in aggregate hold the total of governmental power. Seen from this point of view human rights law implicitly establishes and accords disparate treatment to three categories of relationships between the individual and "government" as follows:

(f) the relationship between the individual and the state of which he or she is a citizen;

(g) the relationship between the individual and the state of which he or she is a resident non-citizen *category 2 right*s and

(h) the relationship between the individual and any state of which he or she is neither citizen nor resident. *category 3 rights.*

It is only in relation to the first set of relationships that human rights law seeks to provide a comprehensive set of legal protections.

The second category, while not as comprehensive, is nonetheless well addressed in human rights thinking and jurisprudence. The third category may fairly be described as attracting only very poor and third class rights – and as representing a neglected area of human rights advocacy.

Category 2 Rights

A clear statement of the rights to be accorded in the case of the second category (non-citizen residents) is set out in the 1985 Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live. Article 5 of the Declaration recognises fundamental rights to life, liberty, privacy, equality before the law, marriage, freedom of thought and religion, to retain culture, and to transfer earnings abroad. Rights to leave the country, to freedom of expression to peaceful assembly and to own property are subject to a "reasonable restrictions in a democratic society" clause. A procedural right to non-expulsion is affirmed, as is the right to be free from torture. Certain economic rights are also accorded: the right to safe working conditions, to fair and equal remuneration, to join trade unions and other associations, to health protection, social security, education, rest and leisure, social services.

The Third United Nations World Conference Against Racism 2001 dealt for instance with the issue of racism and xenophobia faced by migrants.

The World Conference notes the problems of "generalized rejection of migrants" connected with racism, xenophobia and negative sentiments towards migrants. It requests states to take steps such as protecting the rights of migrants in accordance with the Universal Declaration, it calls on states to facilitate family reunion, to ensure that immigration laws are free of racial discrimination. The issues addressed are thus principally ones relating to the migrant who has already entered a country, as opposed to the potential migrant. The first World Conference Against Racism in 1978 set considerably higher standards such as recommending that states ensure migrants the right to assemble and establish organizations, that states recognise family reunion as a fundamental right, to consider the extension of franchise at local level for migrants resident for a reasonable period, ensure equality of treatment of migrant workers including right to retirement pension and similar social rights. That World Conference called for the elaboration of an international convention on the rights of immigrants – which was later to be embodied in the International Convention on the Rights of Migrant Workers and their Families.

Neither conference however specifically addresses the question of the rights of those we have identified as being in category 3 – rather they are directed largely to category 2: the resident alien.

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universal right of free movement in the Declaration does not necessarily justify its continued absence as a matter of international human rights policy. Human rights principles have of course continued to be elaborated since the adoption of the Universal Declaration in 1948 in a wide range of areas. One prerequisite to extending the protection of freedom of movement to the international sphere would be a conclusion that this denial is implicated in the significant violation of the basic goals of the human rights system.

An interesting paper jointly presented to the Third World Conference by the International Labour Organisation (ILO), the International Organisation for Migration (IOM) and the United Nations High Commissioner for Human Rights (UNHCHR) presents an interesting perspective.[13] The paper calls for a rights-based approach to international migration. It notes the advances in migrant rights represented by the 1990 Convention and by the establishment of a Special Rapporteur on the Human Rights of Migrants.

In calling for a rights-based approach however the paper limits itself to the violation of rights as a cause of migration and the treatment of migrants (presumably who have already arrived).[14] It notes the universality and indivisibility of human rights and that in principle all human beings are entitled to equal treatment.[15] It notes that the "right to leave" enshrined in the Universal Declaration of Human Rights is

> often thwarted in practice by difficulties of obtaining travel documents and visas to enter any other country. The past two decades have seen a dramatic realignment of international visa and direct airside transit visa regimes. In many parts of the world, such restrictions have cut across traditional bilateral and sub-regional routes limiting the movement of migrant labour and merchant traders where relatively free movement had existed before, sometimes for centuries[16]

It goes on to observe that the problem of increasing irregular migration is linked to the increasingly strict border control measures of many states and the absence of adequate provision for regular migration.[17]

While having outlined the nature of the problem in this manner and identified the need for rights-based solutions, the paper largely limits itself to calling for existing human rights rules to be accorded to migrants. These rules, as we have seen, are of limited applicability to the central discretion which a migrant must face: that of whether they will be admitted across a national boundary.

We may note also the jurisprudence of the international treaty system which demonstrates both the existence of discriminatory treatment of resident non-citizens and the application of human rights standards (where possible) to ensure that as equal as possible rights are attained in this circumstance.[18]

An examination of recent NGO contributions on the question of migrant rights before the United Nations Commission on Human Rights shows a similar pattern. The Centre Europe – Tiers Monde largely address category 2 issues and calls for ratification of the Migrant Workers Convention. Human Rights Advocates, primarily concerned with migrant health, calls for measures to stem migrant flows. The pattern is similar with the submission of the International Catholic Migration Commission.[19] None of these submissions appear to fundamentally examine state discretion in regard of questions of migration regulation.

The NGO statement to the Third World Conference Against Racism, Racial Discrimination, Discrimination and Xenophobia also deals with issues of migration and hints at a questioning of the closure of borders at the level of principle:

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13 International Labour Organisation, International Organisation for Migration, Office of the High Commissioner for Human Rights "International Migration, Racism, Discrimination and Xenophobia" paper to the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001.

14 Ibid p 3.

15 Ibid p 3.

16 Ibid p 5.

17 Ibid.

18 See for instance The Rights of Non-Citizens: Preliminary Report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103 Addendum E/CN.4/Sub.2/2001/20/Add.1 6 June 2001.

19 Written statement* submitted by Centre Europe – Tiers Monde (CETIM), a non-governmental organization in general consultative status E/CN.4/2002/NGO/90 of 31 January 2002. Written statement* submitted by Human Rights Advocates International, a non-governmental organizations in special consultative status E/CN.4/2002/NGO/45 24 January 2002, Written statement* submitted by the International Catholic Migration Commission (ICMC), a non-governmental organization in special consultative status E/CN.4/2002/NGO/90 31 January 2002.

> The restructuring of the global economy facilitates the transnational movement of capital but tries to restrict and control the movement of labour, thereby exacerbating regional economic inequalities and the commodification and de-regularisation of migrant workers, and especially forcing workers into 'flexible' conditions of work.[20]

While dealing with undocumented migrants (in a vein similar to the Migrant Workers Convention – see below), the NGO recommendations (although at their most ambitious calling for voting rights for documented and undocumented migrants) focus largely on category 2 issues (ie questions arising once a migrant has arrived in a receiving state).[21]

Overall it may be noted that in regard of decisions most pertinent between the individual and a state of which she is neither resident nor citizen – those relating to migration – there is little indication of the emergence of a body of thinking in human rights discourse that the discretion of the state ought be limited in any significant respect by the rights of such an individual.

Category 3 Rights

Tables 1-8 to this paper provide a survey of the provisions of the principal human rights instruments examining the extent to which they depart from the ideal of universality in their treatment of rights in the context of three sets of relationships that have been identified above.

One may see that the principal obligation of a state to an individual who is neither a citizen nor resident is that of international cooperation with other states to realise certain economic, social and cultural rights. For instance the duty to work for economic, social and cultural rights for all (art 2.1), to cooperate towards an adequate standard of living for all (art 11.1), to cooperate in pursuit of the right to food (art 11.2) are provided in the International Covenant on Economic, Social and Cultural Rights. Similar rights to such international cooperation are laid down in the United Nations Convention on the Rights of the Child (see art 24.4, 28). These cooperative obligations are an elaboration of the same obligations set down in article 55(a) and (b) of the United Nations Charter. .

We may note also further explicit and implicit reservation of state freedom in regard of freedom of movement and citizenship. The International Covenant on the Elimination of All Forms of Racial Discrimination provides that the Convention does not prohibit discrimination between citizens and non-citizens. Further matters of citizenship, nationalisation or naturalisation remain at the free discretion of the state (subject to the requirement of non-discrimination between non-citizens) (art 1.2, 1.3). This is of course an extraordinary provision in such a Convention. It suggests that a state has virtually no obligations of "non-discrimination" to persons outside the legal and geographical boundaries of the state – notwithstanding the correlation between race and nationality, the fact that historically many states have racially discriminated to influence their ethnic composition and that the very idea of the nation-state is strongly linked to the idea of race and ethnicity. The explicit inclusion of such exemptions of course merely serves to underline that the drafters were well aware of the correlation between race and citizenship. Discrimination against foreigners is given international legal sanction by this Convention.[22]

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol can again be read in this light to allow us to frame the boundaries of the obligation to the absent non-citizen. Those boundaries again can be seen to have been restricted from the time of the Universal Declaration – which created a right to seek and to enjoy in other countries asylum from persecution. The Refugee Convention reduces this to a negative obligation of non-refoulement – rather than a definite right of entry. It also restricts the meaning of persecution to persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion.[23]

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20 WCAR NGO Forum Declaration, Sept 2001, para 155.

21 WCAR NGO Forum Declaration, Sept 2001, para 401-407.

22 The broad ambit of these exclusions are addressed however by the CERD Committee which provides that they are to be read subject to the duties in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (General Comment XI (1993). The two Covenants were of course adopted a year after CERD.

23 Refugee Convention, art 33, art 1 A (2).

The 1985 Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live is explicit in underlining that nothing in the Declaration "shall be interpreted as legitimising the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens" (art 2.1).

A more extensive effort to protect the rights of such individuals is found in the 1990 International Convention on the Rights of All Migrant Workers and Members of Their Families. This Convention is not yet in force and has not been ratified by any developed country.[24] Nonetheless, it contains extensive provisions recognising the rights of both documented and "undocumented" migrants – including providing that a state may "in free exercise of its sovereignty" consider granting political rights to such migrants. This Convention is perhaps the beginning of a trend to address the opening of borders – or at least to recognise the reality of international movement of people – albeit movements outside the law. This approach however suffers from operating on an illegality –a potential migrant would be compelled to commit unlawful acts in order potentially to access rights of residence and ultimately citizenship. Notably the Convention does call for international cooperation towards sound, equitable and humane conditions in connection with migration, paying due regard not only to labour needs but also to the social, economic, cultural and other needs of migrants workers and their families. It leaves unquestioned the assumption of state discretion of near absolute control over migration.

Indivisibility: Examining the Significance of International Freedom of Movement Indivisibility

A second concept of international human rights, that is useful for us to draw on, is that of the indivisibility of human rights. At its heart this idea is founded on the realisation that human rights are interdependent – that the violation of one human right is likely to be associated with the violation of a range of other rights. Thus, States gathered at the 1993 World Conference on Human Rights said:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.[25]

The UN Special Rapporteur on Extreme Poverty for instance states:

> Extreme poverty means denying the enjoyment of all human rights to 1.3 billion people in the world, a majority of them women, thus violating their human dignity. Poverty is therefore the most massive cause of human rights violations in the world. … extreme poverty is thus a violation of all human rights, striking as it does at the two main human rights principles: the equal dignity of all human beings and the principle of non-discrimination. The poverty trap in which the poorest of the poor find themselves shows how human rights are indivisible and interdependent: the right to an adequate standard of living, to housing, to education, to work, to good health, to employment, to the protection of the family, to respect for privacy, to legal status and registration as a citizen, to life and physical integrity, to justice and participation in political, social and cultural life.[26]

Here we are concerned with whether the limitations on international freedom of movement are associated with or have implications for the enjoyment of other human rights. Asking this question of course leads us of course to note the correlation between geography, nationality and residence and the real absence of the enjoyment of human rights.

The following are a familiar indication of the scale of the problem and its linkage to geography:

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24 There were 19 ratifications and 11 signatories of 13 MAY 2002 at Office of the United Nations High Commissioner for Human Rights document "Status Of Ratifications of the Principal International Human Rights Treaties" No western country was either a party or signatory.

25 Vienna Declaration and Program of Action, World Conference on Human Rights, para 4.

26 Human rights and extreme poverty Report submitted by Ms. A.-M. Lizin, independent expert, pursuant to Commission resolution 1998/25, E/CN.4/1999/48 29 January 1999, para 115,116.

- One-fifth of humanity lives in absolute poverty. The General Assembly estimated in 1996 (resolution 51/178) that more than 1.3 billion people in the world, a majority of whom are women, live in absolute poverty, especially in developing countries, and the number of such people continues to increase.

- The World Bank defines extreme poverty as those living on US$1 or less per day. The overwhelming majority of people living on $1 a day or less are located in sub-Saharan Africa, South Asia and China, but there are many tens of millions also in Latin America, the Caribbean and Western Asia. There is also considerable poverty in developed countries and in countries with economies in transition.

- The World Bank estimated in 1998 that more than 3 billion people in the developing world still struggle in grinding poverty.

- Every year nearly 8 million children die from diseases caused by dirty water and poisoned air; 50 million children are mentally or physically damaged because of inadequate nutrition, and 130 million – 80 per cent of them girls – are denied a chance to go to school. Today, 150 million children under the age of five are gravely malnourished; another 260 million suffer from anaemia or other vitamin or mineral deficiencies.[27]

- The Food and Agriculture Organization of the United Nations (FAO) estimates that 826 million people are chronically undernourished. Thirty-four million of these in developed countries, however most of the victims live in Asia – 515 million, or 24 per cent of the total population of the continent. Thirty-four per cent of the Sub-Saharan Africa's population permanently and seriously undernourished, suffering from "extreme hunger", with an average daily intake of 300 calories less than the minimum quantity for survival.[28]

- Global income distribution is also linked to geography with the top one-fifth of countries in 1994 enjoying 92.42 per cent of GDP while the bottom one-fifth generated only 0.07 per cent.[29]

- Education also varies by geography In 1992 the percentage of students of an age to study at universities (or colleges) in the poor countries was 2.78 per cent in the poor countries, 11.29 per cent in the middle income countries and 39.45 per cent in the rich countries. The same gap may be observed in secondary education.[30]

The denial of freedom of movement across international boundaries in these circumstances, from the point of view of the people behind these statistics, can only be seen as a denial of all their human rights. Undoubtedly international migration would be enormous but for the controls that prevent people moving across international boundaries, for the very reason that many would seek to realise their basic human rights by such movement. The closure of international borders to stem such migration is thus implicated in the denial of human dignity and human rights on a scale rivalling the worst abuses of human history.

As we noted above, a duty of cooperation to realise economic, social and cultural rights is set down in international instruments. Despite extensive endeavours in the field of development assistance since the second world war, the extremes we have noted above remain a reality. Undoubtedly there are many complex reasons bearing on this, including questions of governance in the worst affected developing countries and the positive or negative impact of global business activities. In part it is also due to insufficiency of development transfers.

The special Rapporteur on Education notes that global development assistance in 1997 fell below 0.2 per cent of developed country GDP.[31] The Special Rapporteur on Income Distribution (Bengoa) notes the long-term trend

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27 Human rights and extreme poverty Report submitted by Ms. A.-M. Lizin, independent expert, pursuant to Commission resolution 1998/25, E/CN.4/1999/48 29 January 1999.

28 Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler to the 57th Session of the United Nations Commission on Human Rights.

29 The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution: Final report prepared by Mr José Bengoa, Special Rapporteur, E/CN.4/Sub.2/1997/9 30 June 1997.

30 Bengoa, para 63.

31 Progress report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1999/25, E/CN.4/2000/6, 1 February 2000.

after the cold war towards lower development assistance, with developed countries not meeting commitments of according 0.7 per cent GDP contribution.[32] He also provides an interesting analysis of the psychology behind these trends. Development assistance he notes, is driven by a threshold of dramatic suffering and with how fashionable a particular development cause may be.[33] The observation suggests a pattern of international cooperation unable to attain a sufficient degree of long-term coherence. The lack of coherence is also suggested by the estimates of what it would take to address basic human rights. According to the Special Rapporteur on Extreme Poverty, and estimates of the United Nations Development Programme (UNDP), combating extreme poverty requires 40 billion a year for 10 years – enough to provide basic access to education, health, water and sanitation. An additional 40 billion is estimated to be necessary to reach the minimum income to escape extreme poverty. The Special Rapporteur notes that this amount only represents 0.5 per cent of global income.[34]

The Concept of Exclusion

The concept of exclusion is also a useful one for us to draw on in this discussion.

Bengoa defines it thus:

> Exclusion is deeper and more definitive than poverty. Exclusion is the absence of participation, segregation, neglect and being forgotten.[35]

Thus authors note that while we have globalisation and integration proceeding at one level there is also increasingly definite patterns of exclusion where areas of the globe are increasingly marginalised from the global economy. Also the same pattern is manifesting within countries and for particular minority groups who are excluded from the mainstream of society.[36]

Bengoa concludes that

> A framework is thus taking shape of "permanent and persistent violations" of the economic, social and cultural rights of a substantial and increasing majority of the world's population, threatening the solidarity of international humanitarian principles and human rights. The permanent exclusion of parts of the third world leads to exclusion of social sectors and groups.[37]

In regard to international freedom of movement, it is of course not simply a developing country citizenship that will tend to limit this freedom. A coupling of a condition of poverty with such citizenship will make the situation fatal.

This can be seen for instance in the operation of our own migration laws which distinguish between the migrant considered to be able to make an economic contribution and those considered an economic liability. Thus a skilled migrant, perceived as an economic asset, for reasons of property, profession or education has in practice access to migration, whereas the individual in poverty, lacking access to these manifestations of the realisation of human rights, is extremely unlikely to meet the criteria.[38]

Also of interest is how the issue of movement of people is addressed in the context of trade in services. The General Agreement of Trade in Services deals with the movement of natural persons for the purpose of supply in services. Its provisions seek to make possible the movement of persons in connection with the supply of services however the agreement provides that it shall not apply natural persons seeking access to the employment market of a member state, nor to measures regarding citizenship, residence or employment on a

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32 Bengoa, para 49.

33 Bengoa para 51, 68.

34 Lizin, para 64, 65.

35 Bengoa para 66.

36 Bengoa para 68.

37 Bengoa para 68.

38 2002-2003 Migration and Humanitarian Program: A Discussion Paper Revised Edition January 2002 (see pages 14-17 which emphasise "quick" and "significant" contribution to economic well being. An implication of the line of reasoning of the paper is that individuals such as refugees or unskilled migrants do not make a significant economic contribution – a conclusion which does not appear to be borne out by the plain history of Australian migration.

permanent basis. The agreement thus facilitates the movement of people based on the interests of economic actors – while leaving the general pattern of international restrictions untouched. It is of course the poor majorities of poorer nations who are excluded and who would never be able to avail themselves of such provisions.[39]

Questions Pertaining to Democracy

The foregoing perhaps raises profound questions for our practice of democracy – and what it means or should mean to us.

The realities of the global situation, which are well known, face us with a number of questions. Apart from the human rights questions involved which have been explored above, it is dubious that relationships of peace and friendship between national communities can ever be built on such a foundation.

More fundamentally still it goes to the very heart of our own societies who uphold the values of democracy. The barriers erected to prevent free movement of people in the context of massive deprivation of human rights raises the question of whether we are in danger of reducing the democratic state to no more than a geographically bound association of individuals for the advancement of our own interests.

For those societies on the positive side of the distributional ledger, the decisions we make have the power to render or to deny human rights. The concept of stakeholder with which we are familiar suggests that we should pay regard to the views and interests of those affected by our decision-making. In fundamental senses, all members of the human family are part of our body politic. To the extent that we can, our decision-making should give due weight to the interests of humanity as a whole. Such a concept can be seen as merely an extension of the essence of democracy to a wider circle – as democracy has always been concerned with empowering the many to have a say in their own destiny.

The Power of the State Paradigm

The scenario that has been outlined above prompts us also to reflection on the absence of significant initiatives within the international human rights system to promote the right of freedom of movement on an international level and to question the open discretion of states in the area.

It is of course no surprise that the state system itself should find nothing exceptional in the limitation of individual rights consequent upon the assertion and implementation of the discretion of states to close their borders for reasons of "national interest". Such a scenario falls comfortably within the state-centred worldview.

The same cannot be said for a system predicated upon the universality and indivisibility of fundamental rights and upon the equal dignity and worth of all human beings. Human rights of course have always been conceived as being in tension with state power and as limiting governmental authority, if necessary to bring about the realisation of human dignity. The patterns of exclusion referred to above; whose boundaries run along lines of nationality, geography, poverty and race, coupled with the scale of dispossession involved are an affront to such a system.

The power of the state paradigm to shape our perceptions of human rights questions perhaps an important element in the lack of interrogation of the presumption of the state to deny freedom of movement to cross borders.

Another reason might well be advanced – that explicitly and implicitly the prioritisation of our interests as members of a nation is taken as sufficient warrant to disregard the human rights implications for non-nationals.

Both points go to the paradigm that forms the basis of this paper: that of the oneness of humanity.

It is well known that in certain periods of history those espousing democratic values allowed (and indeed saw as unexceptional) practices later to be seen as completely inconsistent with the virtues to which their societies aspired. For instance, the philosophers of Greece accepted the practice of slavery within their society. Similarly the founders of the first modern democracy – who instituted the first modern "Bill of Rights" – also accepted

39 General Agreement on Trade in Services, Annex on the Movement of Natural Persons.

slavery when directed to a particular racial minority and, indeed into living memory, continued to practise systems based on notions of "separate but equal" racial division.

While the comparisons are invidious – the scale of human deprivation involved suggests that the comparison at least warrants our careful thought. Are we similarly the victims of self-imposed assumptions that we will, in due course, find to be offensive to our fundamental values?

Conclusions and Suggestions for Reform

The intention of human rights are that all human beings should in fact be treated with equal dignity and have equal opportunity to realise their human potential. This paper suggests that it is possible to distinguish three categories of rights relationships which represent a significant derogation from these ideals. In particular there is a significantly reduced obligation of the holders of governmental power in regard of the rights and welfare of individuals who are neither citizens nor residents.

Restrictions on international freedom of movement through immigration restrictions (a particular example of this reality) are manifestly implicated in the denial of access to dignity and human rights to many millions who would choose to avail themselves of such a freedom. Currently the international human rights movement has not addressed this question in a significant way.

As the international human rights system has in the past developed new rights and new standards to deal with particular human rights issues – it is open to us to further examine this question. While it is unlikely that states would initiate such a dialogue, civil society and our institutions of learning are in a position to do so and to build over the course of time a set of strategies to foster a right to international freedom of movement. It is also possible that such a discussion may serve as a catalyst bringing new perspectives to the duties of international cooperation, which is the minimum obligation that all states have accepted. As we have seen these issues are interconnected.

It may of course be objected to on the grounds of practicability that to remove barriers to free movement would be to "open the flood gates" and lead to chaos. There are a number of responses to this objection.

Firstly it needs to be recognised that the unconditional removal of barriers is in current conditions impracticable. However, once a right is asserted it is not necessarily immediately implemented – concepts of progressive implementation serve to enable the development of systematic steps to make the realisation of the right possible. The establishment of such a right would moreover serve to create an onus of substantial justification for imposition of barriers.

Furthermore the positing of such a right will open the way to further examine the applicability of human rights to immigration policy. An achievement of the Convention on the Elimination of Racial Discrimination was the prohibition of discrimination between nationalities. Other forms of discrimination between potential migrants (such as on the basis of education or wealth), remain unquestioned. Although less pressing an issue, it would also seem warranted to examine the issue of minimum international standards for the granting of access to national citizenship.

These are areas where the elaboration of international human rights standards would serve the dignity of our fellow human beings.

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Selected International Human Rights Instruments Provisions Relating to Universality of Rights

Table 1: The Universal Declaration of Human Rights

Provisions Related to Universality of Human Rights
Discrimination: Is discrimination on the basis of citizenship prohibited? – 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.'
Freedom of Movement: Non-citizens have a right to enter another country **only** to seek asylum from "persecution" (art 14)
Democratic Rights: The right is restricted to the right to vote in "his country" (art 21)
Public Service: The right is restricted to "his country" (art 21)
Migration (movement across national borders) and Nationality: The right to "leave" a country and the right to "change nationality" given – no universal minimum standard vis a vis states of which the individual is not a citizen (art 13/15)

Table 2: The International Covenant on Civil and Political Rights

Provisions Related to Universality
Discrimination: The Human Rights Committee has found that discrimination on the basis of citizenship is in general prohibited: 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.'[40]
Restricted Freedom of Movement Entrenched: "Everyone lawfully with the territory …" (art 12). 12(3) bans derogation from this right – this provides no rights to a non-citizen who cannot gain lawful entry. **Right to asylum not in Convention**
Right of 'Aliens' to Non-expulsion: procedural right: expulsion only to occur "in accordance with law'; right to be heard; right of review of decision by 'competent authority' (art 13)
Right to Change Nationality: Not in the ICCPR (appears in UDHR)
The right to vote, to take part in the conduct of public affairs, to access to public service: confined to "citizens"

Table 3: International Covenant on Economic Social and Cultural Rights 1966

Provisions Related to Universality
Discrimination: Is discrimination on the basis of citizenship prohibited? – 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.'
International Assistance and Cooperation: An obligation on all states to work for ESC rights for all (art 2.1)
Developing Countries: may determine to what extent they will guarantee economic rights to non-nationals. (art 2.3)
Right to an adequate standard of living: states required to engage in 'international cooperation based on free consent' (art 11.1)
Right of everyone to be free from hunger: states required individually and through international cooperation to pursue improvement in food production and equitable distribution of world food supplies according to need. (art 11.2)

40 A/CONF.189/PC.2/14 Views of Human Rights Committee presented to World Conference Against Racism, para 23, 24: "A number of States make distinctions between citizens and aliens which are not justifiable; for example, they may expressly confer rights on citizens only. As the Committee made clear in paragraph 1 of its General Comment No. 15: 'each State party must ensure the rights in the Covenant to all individuals within its territory and subject to its jurisdiction' (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness." While there are some specific exceptions (e.g. political participation under article 25), aliens must benefit from the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant (General Comments No. 15, para. 2, and No. 27, paras. 4 and 18). Consequently, the general rule is that each one of the rights of the Covenant must be guaranteed, without discrimination between citizens and aliens.

Table 4: International Convention on the Elimination of All Forms of Racial Discrimination 1965

Provisions Related to Universality
'Racial Discrimination' refers to 'any distinction, exclusion, restriction or preference, based on race, colour, descent, or national or ethnic origin. (No reference to other status) (art 1.1)
Discrimination Against Non-citizens allowed: This Convention shall not apply to distinctions, exclusions, restrictions or preferences … **between citizens and non-citizens** (1.2). (1.3)
Freedom of States: matters of nationality, citizenship or naturalisation remain unrestricted by the Convention but all non-citizens must be treated equally in regard of these matters. (1.3)
For Citizens the Convention protects: equal treatment before tribunals, security of person, political rights, freedom of movement and right of residence, nationality, marriage and choice of spouse, right to own property, inheritance, freedom of thought, conscience, opinion and expression, peaceful assembly and association, economic, social and cultural rights
General Recommendation XI (1993): CERD Committee clarifies that: **a. States are required to report fully on legislation on foreigners** **b. CERD must not be interpreted as derogating from the UDHR, ICCPR or ICESCR.**

Table 5: United Nations Convention on the Rights of the Child

Provisions Related to Universality
Discrimination: Is discrimination on the basis of citizenship prohibited? – 'without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or **other status**.'
Criteria for Operation: In all actions … the best interests of the child shall be the primary consideration. (art 3.1)
Nationality: particularly for stateless children (art 7)
Right to Family: children not to be separated from family except where necessary for the best interests of the child. (art 9)
Freedom of Movement: given art 9 'applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification 'shall be dealt with … in a positive, humane and expeditious manner. (art 10.1)
Children who are refugees or seeking asylum: shall receive appropriate protection and humanitarian assistance in the enjoyment of rights in the Convention
International Cooperation: esc rights, right to health, education, sexual exploitation, traffic, (24.4, 28)

Table 6: International Convention on the Rights of All Migrant Workers and Members of Their Families 1990 (No developed country parties, Convention not yet in force)

Provisions Related to Universality
Discrimination: applies to all migrant workers and their families without distinction of any kind … including 'age, economic position, property'
Non applicability: employees of international organizations, workers as part of development programs, investors who take up residence, refugees and stateless persons
Non-expulsion: procedural rights – no collective expulsion, only in accordance with law, right to reasons and to be heard, right to consular assistance (arts 22, 56)
ESC rights: limited social security right recognised, equality of emergency medical treatment, access to education,
Documented migrant workers and their families: more extensive rights recognised: e.g. to leave and return to the state, freedom of movement within the state. (arts 36-56)
Documented migrant workers and their families: democratic rights: a. procedures and institutions through which account may be taken of 'special needs, aspiration and obligations' including freely chosen representatives in these institutions (art 42.1) b. participation in consultation on local affairs (art 42.2) c. 'may enjoy political rights if that State, **in the exercise of its sovereignty,** grants them such rights' (art 42.3)
Family reunification: states free to take measures they deem appropriate 'to facilitate' (art 44.2)
Qualified recognition of the right to free choice of employment (art 52-3)
Undocumented Migrants: A different approach **International Cooperation**: towards 'sound, equitable and humane conditions' in connection with migration, 'paying due regard not only to labour needs, but also to social, economic, cultural and other needs of migrant workers and their families'. (art 64) **Regularisation:** no rights as such to regularisation – but steps to ensure the situation does not persist. If the state chooses to regularise the state to have regard to length of stay, employment and family situation. (art 69)

Table 7: 1951 Convention Relating to the Status of Refugees and 1967 Protocol

(For countries parties to international human rights conventions articles 7, 8, 13, 15, 17, 18, 19, 21, 22 should no longer have application: refugees should have applicable universal rights.)

The Convention does not derogate from other rights granted by the "contracting parties".. (Art 5)
Definition of refugee: grounds of persecution confined to 'race, religion, nationality, membership of a particular social group or political opinion,' but 'colour, sex, language, property, disability, birth or **other status**.' not included.
Naturalisation of refugees shall be expedited. (art 34)
Refugees in general entitled to the same treatment as aliens (art 7)
Rights of aliens in regard of property (art 13) but refugees immune from exceptional property measures affecting other aliens (art 8)
Right of association – most favourable as for other foreigners (art 15)
Right to work – most favourable as for other foreigners (17, 18,19)
Right to housing – as for aliens (21)
Right to secondary and higher education – as for aliens (22)
Unlawful entry – no penalties for refugees coming 'directly' from the country of persecution, including no restriction of movement (31)
No expulsion of lawful refugees except by due process of law, no expulsion at all of refugees to territories of persecution (32/33) (CAT art 3 creates non-refoulement obligation in respect of torture)
Limited duty on states of cooperation with UNHCR (35)

Panel 8: The Year of International Law in Review

The Year of International Law in Review: An Australian Perspective

Bill Campbell*

The program for the 10th Annual meeting of ANZSIL is indicative of just how busy the year has been since the last ANZSIL Conference. Significant issues and events involving international law that have arisen for Australia and, for the Attorney-General's Department, indeed include matters relating to the independence of East Timor, especially the negotiation of the Timor Sea Treaty, the aftermath of September 11 (and that will be dealt with tomorrow) the Tampa and the so-called Pacific Solution and the International Criminal Court.

Tempting though it may be to re-canvass or anticipate the prior and future discussion of these issues at this Conference, I will not do so. Instead, I will address a number of other international law issues in which my own Department has been involved. These are:

- the new Australian declarations concerning dispute settlement under the United Nations Conventionon the Law of the Sea (UNCLOS) and the revised declaration of acceptance of jurisdiction of the International Court of Justice;
- progress on the submission to the United Nations Commission on the Limits of the Continental Shelf on Australia's extended continental shelf;
- maritime delimitation negotiations with New Zealand;
- human rights communications;
- some developments in the United Nations Commission on International Trade Law (or UNCITRAL); and finally
- some developments in the International Institute for the Unification of Private Law (UNIDROIT).

ICJ and UNCLOS declarations

As you are probably aware, Australia lodged declarations concerning dispute settlement under UNCLOS and a declaration revising its acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ).

Under Article 287.1 of UNCLOS, Australia has accepted the International Tribunal for the Law of the Sea (ITLOS) and the ICJ as means for the settlement of disputes concerning the interpretation and application of the Convention. This means that if Australia has a dispute with another country under UNCLOS and that country also accepts ITLOS or the ICJ, then ITLOS or the ICJ, as the case may be, will be the forum for dispute settlement. The position remains that if the other country with which Australia has a dispute has not accepted either of those bodies, the relevant forum for dispute settlement will be the default mechanism of a tribunal established under Annex VII of the Treaty.

Under Article 298.1(a) of UNCLOS, it is open to a country to exclude specified types of dispute from the dispute settlement mechanisms of the Convention. Australia has excluded 'disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles'. That wording is taken from Article 298.1(a) itself. As of March 2002, 29 States had nominated their preferred forum for dispute settlement under UNCLOS and 11 have excepted maritime boundary disputes including Italy and Portugal.

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* First Assistant Secretary, Office of International Law, Attorney-General's Department. The views expressed in this paper are my own and do not necessarily represent those of the Attorney-General's Department. I would like to thank Susan Downing, Joshua Brien, Sama Payman and John Atwood for their contributions in relation to UNCITRAL and UNIDROIT.

The second associated declaration concerning Australia's acceptance of the 'compulsory jurisdiction' of the ICJ has received more attention. The declaration is made under the Optional Clause – that is, Article 36.2 of the ICJ Statute. The new declaration contains four qualifications to the acceptance of ICJ jurisdiction by Australia, one of which was in the previous declaration to acceptance of ICJ jurisdiction. The qualification that is retained is that Australia does not accept the jurisdiction of the ICJ where it has agreed with the other relevant State or States to other peaceful means of dispute settlement – for example, where it has agreed under a treaty that a dispute under that treaty will be resolved by an arbitral tribunal established under that treaty.

A new qualification that complements the declaration made under Article 298.1(a) of UNCLOS is that Australia will not accept the jurisdiction of the court in relation to maritime boundary disputes between Australia and another State, or disputes concerning the exploitation of a maritime area in dispute or a maritime area adjacent to an area in dispute.

The effect of this clause, in conjunction with the declaration made under UNCLOS, is to preclude compulsory dispute settlement over Australia's maritime boundaries. It would still be possible to establish a conciliation commission under UNCLOS, though the findings of that commission would not be binding. The view expressed by the Australian Government is that maritime boundaries are best settled by negotiation and not through compulsory dispute settlement. Australia has boundaries with seven other countries – being Indonesia, East Timor, Papua New Guinea, the Solomon Islands, France, New Zealand and Norway – the latter being one of the three countries with whom we have a potential maritime boundary delimitation in Antarctica. The others are New Zealand and France.

The final two qualifications are where another country has only accepted the compulsory jurisdiction of the court for a particular purpose or has accepted the compulsory jurisdiction of the court for a period of less than one year. Such qualifications have been made by a number of other countries, including the United Kingdom and New Zealand. They ensure that those countries taking an action against Australia pursuant to the Optional Clause have the same long-term acceptance of the jurisdiction of the court.

A number of criticisms have been made of the Australian declarations. First, it is said that they represent a negative message about Australia's acceptance of the ICJ as a recognised forum for peaceful settlement of disputes. I would make two comments in relation to that criticism. First, Australia is one of only 61 countries out of 189 members of the United Nations that accept the compulsory jurisdiction of the Court. Secondly, Australia continues to accept the jurisdiction of the Court on the wide range of matters not covered by the exceptions in the new declaration.

The second principal criticism relates in part to timing. It has been suggested that the action was taken in March for the purpose of precluding compulsory dispute settlement of the maritime boundaries between Australia and East Timor. In particular, at the recent Senate Estimates hearing, we were asked a question whether the offer by PetroTimor, a Portuguese company with alleged interests in the Timor Sea, to fund an ICJ action by East Timor precipitated the making of the declarations or whether it was just coincidental. The answer is that it was coincidental.

That said, the declarations would preclude compulsory dispute settlement of all Australia's maritime boundaries, including those with East Timor. I note suggestions from commentators, including legal representatives of PetroTimor, that the declarations may not be effective for a period of time because of inadequate notice. The advice available to the Australian Government is that the declarations were effective from the date upon which they were lodged. I should add, in this respect, that all countries with which Australia has maritime boundaries, were notified through diplomatic channels of the lodgment of the declarations immediately they were made.

A third criticism is that they were not subjected to the Australian Parliamentary treaty processes prior to their lodgment. Those processes contain exceptions in relation to sensitive and urgent treaties. Obviously, there was sensitivity associated with the declarations. That is, prior publicity about the lodgment of the declarations might have led other States to take an action against Australia prior to the declaration being lodged. In saying this, I have no particular country in mind.

Progress on submission to the Commission on the Limits of the Continental Shelf

Under UNCLOS, where a State claims a continental shelf extending beyond 200 nautical miles from its territorial sea baseline, it must make a submission justifying those extended areas of continental shelf to the Commission on the Limits of the Continental Shelf. Originally, the claim had to be made within ten years of entry into force of UNCLOS for the State. In Australia's case, this would be in November 2004. However, the Conference of the Parties to UNCLOS recently purported to extend the time by five years – that is, until November 2009. It is Australia's current intention to meet the original 2004 date and matters are on track to do so. Australia has a number of areas of extended continental shelf, most of which are based on the so-called Hedberg line, with some areas being justified on the basis of the sedimentary thickness formula. In both of those cases, it has been necessary to carry out extensive vessel surveys in order to gain the data to support Australia's claim. The data gained is extremely detailed, as is the process of its interpretation. Also, quite detailed legal questions have arisen in the interpretation and application of the data. Those legal questions concern the definition of the extended continental shelf under Article 76 of UNCLOS and also in relation to the guidelines issued by the Commission on the Limits of the Continental Shelf.

I have four short additional points on this matter. First, the Commission has recently received its first submission from the Russian Federation and a number of adjacent States have made comments on, or objections to, that submission.

Secondly, areas of extended continental shelf exist adjacent to Australia that are also claimed by other countries. It is a matter for consideration whether those areas should be the subjects of a joint submission or whether they should be left until the boundaries relating to those extended areas are settled.

Thirdly, an Australian, Dr Phil Symonds of Geoscience Australia, has just been elected to a term on the Commission. In this respect, I note that a New Zealander, Ian Lamont, is just completing a term on the Commission.

Fourthly, Australia has collected data in relation to the extended continental shelf off the Australian Antarctic Territory to put it in a position of making a claim for extended continental shelf in that area should it wish to do so.

Maritime delimitation negotiations with New Zealand

Australia and New Zealand are negotiating the maritime boundaries between the two countries. The first area is the extended continental shelf beyond 200 nautical miles between Lord Howe Island and New Zealand. The second area is the continental shelf and exclusive economic zone delimitation between Three Kings Island to the north of New Zealand and Norfolk Island. The third area is the continental shelf and exclusive economic zone between Macquarie Island (which forms part of Tasmania) and Campbell and Auckland Islands (which form part of New Zealand). A further round of negotiations is to be held in July 2002.

Human rights communications

This is an update on the position relating to communications by individuals alleging non-compliance by Australia with the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and the Convention the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

ICCPR

Since 1 July 2001, 10 communications have been lodged concerning Australia under the ICCPR. Issues raised include migration matters, alleged retrospective application of the criminal law, the work for the dole scheme and fair trial. In that same period, the Human Rights Committee expressed views on the merits unfavourable to Australia in one matter and rejected another communication on admissibility grounds. There are 22 current communications involving Australia under the ICCPR. Submissions have been made by Australia in 17 of those matters and we are awaiting the views of the Committee. Australia is yet to make submissions in the five remaining matters. One prominent communication was that concerning the mandatory sentencing laws in the

Northern Territory. Given the change in Northern Territory law, both the authors and Australia have asked for the communication to be withdrawn.

CAT

All of the communications lodged under CAT relate to the removal of persons from Australia where it is alleged that the person will be subjected to torture in the place to which they will be returned. The only communication received since 1 July last year was received last week. In the same period, the Committee found on the merits that there was no breach of the Convention by Australia in three cases. Australia has lodged its submissions in the five other communications involving Australia and is awaiting the views of the Committee on those communications.

CERD

There are no outstanding communications under the CERD.

UNCITRAL

Since its formation in 1966, UNCITRAL has undertaken a number of projects aimed at unifying and modernising the law of international commercial arbitration. This includes the adoption in 1986 of the UNCITRAL Model Law on International Commercial Arbitration. The Model Law provides an internationally agreed legal framework for the conduct of international commercial arbitration. The *International Arbitration Act 1974* gives the Model Law the force of law in Australia.

Following a review of international developments, UNCITRAL decided in 1999 to establish a Working Group to consider and discuss proposals for the further improvement and harmonisation of international commercial dispute resolution. The Working Group has focused on updating the provisions of the UNCITRAL Model Law, the rules and principles that complement the Model Law and on developing a Model Law on international commercial conciliation.

The Working Group on Arbitration has met regularly since it commenced work on the project in March 2000. Australia has attended those meetings. In November 2001 it adopted a draft Model Law on International Commercial Conciliation. The draft Model Law deals with a range of issues that are central to the effectiveness of international commercial conciliation, and includes provisions on such matters as the commencement and conduct of conciliation, the appointment of conciliators, the disclosure of information, admissibility of evidence in other proceedings, and the enforcement of settlement agreements entered into as a result of a conciliation. The draft Model Law on International Commercial Conciliation will be reviewed and considered for adoption at the annual session of the Commission, which commences on 17 June 2002.

Work is also continuing on revising aspects of the Model Law on International Commercial Arbitration, focusing upon promoting a broad and liberal understanding of the requirement of the written form for arbitration agreements and on developing rules on the enforcement of interim measures of protection in arbitration.

UNCITRAL Working Group III (Transport Law)

The United Nations Commission on International Trade Law Working Group III on Transport Law met in New York for its Ninth Session from 15-26 April 2002. The Working Group, consisting of the representatives from over 40 countries, is preparing a draft instrument on the carriage of goods by sea. There was widespread support within the Working Group for a new instrument which updated the existing international law on the carriage of goods by sea and which reflected modern shipping practices.

The text being considered was drafted by the International Maritime Committee (the ‘CMI’) and would establish a multimodal (‘door-to-door’) liability regime rather than a port-to-port regime. The meeting agreed in principle to the scope of the draft instrument being multimodal in nature although it was recognised that this might be more difficult to achieve. As well as being multimodal, the lengthy text covers a range of complex issues including the obligations and liability of both carriers and shippers, freight, transport documents including electronic commerce, and rights of suit.

The Working Group commenced with a broad exchange of views on the general policies reflected in the instrument and then moved to an article-by-article analysis of the text. It was agreed that the focus should be on seven themes. These were: sphere of application; electronic communication; liability of the carrier; rights and obligations of parties to the contract of carriage; right of control; transfer of contractual rights; and judicial exercise of those rights emanating from the contract.

The tenth meeting of the Working Group is scheduled to be held from 16-20 September 2002 in Vienna.

UNIDROIT

In November 2001, a diplomatic conference held in Cape Town adopted the Convention on International Interests in Mobile Equipment. The conference was co-sponsored by UNIDROIT and the International Civil Aviation Organisation (ICAO). The objective of the Convention is to overcome the difficulties associated with financing equipment that is both high value, and which moves from jurisdiction to jurisdiction (this complicates enforcement of finance contracts, thus increasing both the risk and cost of financing). The Convention creates the concept of an 'international interest' in mobile equipment: these interests will be able to be registered on an international registry, and registration will generally afford priority over any interests arising under domestic legal systems. The Convention is not yet in force.

The same diplomatic conference adopted a protocol, which applies the Convention to 'aircraft equipment' (aircraft frames and engines). UNIDROIT is currently developing additional protocols dealing with railway equipment and space assets.

A preliminary draft of a Protocol on Matters Specific to Space Assets (the 'Space Assets Protocol') has been prepared at the request of the President of UNIDROIT by the Space Working Group, comprising representatives of the manufacturers, financiers and users of space assets, as well as interested International Organisations. In addition to the work undertaken by the Space Working Group, the draft Space Assets Protocol was added as a new single item for discussion amongst experts to the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS) at its 40th Session in April 2001. The Legal Subcommittee agreed to establish an ad hoc consultative mechanism to review the issues relating to this draft Protocol. Australia attended both ad hoc meetings in Paris and Rome in September 2001 and January 2002 respectively. The conclusions reached by the consultative mechanism was presented to the Legal Subcommittee at its 41st Session this year and appear to have gone some way in influencing the amendments to the draft text to be presented to Governments later this year. The Governing Council of UNIDROIT has authorised its Secretariat to transmit the latest draft Space Assets Protocol to member Governments and to convene a UNIDROIT Committee of Governmental Experts to consider the draft Protocol later this year. Those member States of UNCOPUOS that are not also members of UNIDROIT will be invited to participate in the work of this Committee. The Draft Space Assets Protocol will continue to remain as an item under consideration on the agenda of the Legal Subcommittee.

The Year of International Law in Review: A New Zealand Perspective

Julian Ludbrook*

When I addressed the Conference last year, I focused on the importance of the international legal framework for a country like New Zealand. The relevance of that international framework has been underlined by the events of 11 September last year, which have cast a long shadow not only in terms of the horrific nature and scale of the attacks themselves but also ultimately in terms of some of the flow-on issues which they have raised for the international legal system.

That system is heavily geared to regulating relations between states on the basis that states within their borders are sovereign and have exclusive responsibility for carrying out the international obligations which they assume.

What then of a situation where non-state actors target another state and its people? For the notion of self-defence in the Charter was built on responding to attacks from other states.

How is the right of self-defence to be exercised in relation to attacks by non-state actors sheltering or hiding in the territory of another state? And threatening to carry out other similar attacks at some future unpredictable time and place?

How are acts of terrorism to be defined, going beyond the scope of existing international conventions?

What is the status of persons detained as part of the international response in Afghanistan to track down and punish those responsible for such attacks, or for sheltering them?

Events since 11 September do not provide all the answers. But they have seen the taking shape at least of some of the answers.

First, was the affirmation by the UN General Assembly and Security Council of states' right of self-defence in responding to such attacks. This right of self-defence has been the basis on which the coalition forces working together as part of Operation Enduring Freedom have sought to bring Al Qaeda groups in Afghanistan to justice for their suspected involvement in and responsibility for the attacks.

What we have seen is an evolution of the right of self-defence to deal with a situation where the attacks in question are perpetrated by non-state actors and where action is felt to be warranted in order to bring to justice those believed to have been involved in the planning of the attacks and also likely, due to the nature of the attacks and of the organisation to which they belong, to be possibly intending to and capable of mounting further similar attacks.

Significantly, also, action was considered warranted in the territory of another state, Afghanistan, because of the failure of the authorities there to respond to earlier Security Council sanctions resolutions calling on them to cease providing sanctuary and training for international terrorists and to turn over Osama bin Laden to face justice for earlier attacks in which he was implicated.

A second major development was the Security Council Resolution (1373) implementing mandatory measures on all member states as part of a global effort to combat terrorism. Unlike earlier sanctions resolutions targeted at dealing with a particular situation of conflict, and removed once the reason for their adoption has been overcome, these measures were framed broadly and required states to take a wide range of measures to combat terrorism generally and for all-time.

This has left member states with the task of interpreting what is required by the resolution and to find an appropriate balance between the State's powers to combat terrorism and the individuals' right to respect for their civil liberties. For whereas new international legal instruments are generally the result of extended and careful negotiation, UNSC 1373 was crafted under tight timeframes to respond quickly to a driving need. And some of the issues which it dealt with have been ones bedevilling international negotiators for some time.

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The most obvious of these is the actual definition of a "terrorist act". For earlier international conventions had sought only to encompass acts which were international in character. And the act was defined specifically by reference to the nature of the act covered (eg hijacking, hostage-taking). But the resolution called on states to take measures against the financing of all "terrorist" acts. Yet there is not yet any international consensus on what constitutes "terrorism", going further than existing anti-terrorism conventions.

We, like Australia, concluded that our legislation needed to encompass the financing of acts of terrorism, the main focus of the resolution, wherever committed, and not be limited only to those having an international dimension. In part, for us, because the resolution appeared to require this. And in part because there was no real logic to proscribing only the financing of acts where these had an international character. But how then do you distinguish an act undertaken for a political purpose to intimidate a population or induce a government to do something from other forms of domestic political protest or domestic strike action?

And where you are freezing the assets of suspected terrorists absent of a conviction of some kind, how do you draw the balance between having mechanisms able to cut in quickly to prevent a terrorist moving his funds out of the country and his or her rights as an individual to have due process and scope for judicial review? And in relation to such review, how do you protect the highly classified information on which the freezing may be based, while safeguarding the affected person's general right to know the nature, strength and veracity of the case against him?

These have not been easy issues. But we hope that we have in our draft legislation, currently before our House awaiting the committee stages of its second reading, found an appropriate balance.

Our main changes to implement the requirements of UNSC 1373 were effected through amendment of the legislation which was already before the House aimed at implementing the Terrorist Financing and Bombings Conventions to give effect to the financing related as well as participation elements of the resolution. A second piece of legislation is currently being drafted to pick up other elements of the resolution not covered by those first amendments (eg harbouring a terrorist, infecting animals with disease, sabotaging consumables, hoaxes). But it is worth mentioning that we do not propose to create a new criminal offence of terrorism. For it is not our usual practice to define criminal offences by reference to purpose or motive. Instead, we intend to make the terrorist intent behind the criminal offence committed an aggravating factor for purposes of sentencing.

The response to the events have also raised interesting issues of international humanitarian law. It is I think generally accepted that the armed conflict involving coalition forces and Al Qaeda/Taliban forces in Afghanistan is an international conflict. But difficult issues do arise as to the status of the Al Qaeda and Taliban forces and the protections to which they may be entitled under the Geneva Conventions. Are they entitled to treatment as prisoners of war? Or if not prisoners of war, not being lawful combatants as defined by the Convention, what forms of treatment are required to be accorded to them? And at what point will the conflict actually cease to be an armed conflict such that the Conventions or their Additional Protocols would cease to apply?

The reassuring feature is that all states with forces in Afghanistan appear to be assessing their actions in theatre against the broad standards and principles of the Geneva Conventions, including importantly the requirement to treat detainees humanely, notwithstanding the difficult issues that can arise as to their particular status. But we will all need to continue to keep in focus the application of international humanitarian law, and the cross-over to international human rights law where the protections of the Conventions may not apply, in new and evolving situations such as those confronted post-11 September so that we can continue to work to ensure that the appropriate protections are afforded.

The above issues are all ones spawned by the 11 September attacks. But there are several other developments during the last year that also warrant mention. One relates to the threat posed by people traffickers seeking to bring illegal migrants to New Zealand.

While this has been a problem of more direct concern to Australia, we realise that we also face a threat from those who might see New Zealand as an alternative destination. We have therefore moved ahead with the preparation of legislation to impose serious penalties to deter people smugglers as part of legislation to implement our obligations under the Convention against Transnational Organised Crime and its Migrant and Trafficking Protocols. This legislation was enacted on Wednesday of this week.

We have also actively supported regional efforts to combat people smuggling and to find durable solutions to refugee protection problems. For this purpose, we are leading one of two Working Groups established at the Bali Conference, our one looking at international and regional co-operation. We are also contributing to the UNHCR's current efforts to finalise an Agenda for Protection, which is designed to provoke reflection and action to revitalize the 1951 Refugee Convention framework. The Agenda for Protection responds to the concern that the existing regime is not always adequately equipped to face the many challenges of today's global refugee problems, and offers potential solutions to issues like secondary movements, abuse of the asylum system, and repatriation or return of those who do not require protection.

Terrorism and transnational crime all underline the growing problems faced by states in combating the actions of non-state actors operating across borders.

While the Rome Statute of the International Criminal Court does not address these particular forms of criminal activity unless they take place on such a scale as to fall within the international crimes covered by the Statute, we nevertheless welcome its rapid attainment of the necessary number of ratifications to permit it to enter into force. The willingness of a significant number of states to accept the role of the Court shows a healthy commitment to the international legal system and the role that a separate court can play at the international level to ensure that non-state actors at the individual level can be held to account for particularly serious forms of international crimes. We hope that the concerns which the United States has expressed will prove unfounded and that the Court, like the Tribunals in the former Yugoslavia and Rwanda, will prove their independence and impartiality in carrying out their important functions.

We see the ICC as a valuable addition to the framework of judicial legal bodies promoting the rule of law and facilitating the peaceful settlement of disputes. We see the International Court of Justice as another foundation stone to the international legal system.

And we continue to rely heavily on the contribution which the WTO dispute settlement mechanisms can make to the settlement of disputes in the trade law area. We remain very involved in the use of the WTO process for resolution of our complaint against Canada's dairy export subsidy measures, and are in fact expecting a decision regarding the consistency of Canada's compliance with its WTO obligations in this area in the next week. We are also a third party in the dispute brought by the US against Japan regarding restrictions on apples imports. In addition, on 13 June we had dispute settlement consultations in Geneva with the US on its steel safeguard measure. A number of other countries are already pursuing dispute settlement against the US in relation to this matter.

In concluding, there are a couple of other areas of action which I would flag in passing. First, we are engaged in Maritime Delimitation negotiations with Australia. New Zealand's Exclusive Economic Zone and continental shelf overlap with those of Australia, requiring delimitation of a maritime boundary in three areas.

The negotiations were initiated following a decision by the then Joint Prime Ministerial Taskforce on Bilateral Economic Relations at the 1999 meeting that New Zealand and Australia will conclude an agreement by no later than 2003 on the delimitation of their maritime zones. Two rounds of discussions have taken place so far.

Australia has recently modified its acceptance of the jurisdiction of the International Court of Justice, and has also made a declaration in respect of the dispute settlement provisions under the United Nations Convention on the Law of the Sea. These decisions appear intended to preclude recourse by other states to compulsory dispute settlement processes to resolve disputes with Australia in respect of the delimitation of maritime boundaries or the exploitation of resources in maritime areas subject to delimitation. It was, of course, never New Zealand's expectation that our boundary delimitation exercise would end up subject to compulsory dispute settlement procedures, and we look forward to continuing the good progress which has already been made.

Finally, I should mention that New Zealand is hoping to ratify the Kyoto Protocol prior to or at the World Summit on Sustainable Development in late August. The Protocol has been examined under our international treaty examination process and a Bill implementing our essential obligations under it was introduced in Parliament late last month.

We see the Protocol as a very important instrument through which the international community can seriously begin to address the issue of environmental degradation through climate change, a problem that threatens to strike particularly a number of our low-lying neighbours in the region. While there will be economic costs for our economies in taking action to combat climate change, unless we pull together to do so, we face the prospect of passing on to future generations the environmental problems which we helped to create but are unwilling adequately to address.

Conclusion

The international community has in the last twelve months proven itself resilient in responding quickly and effectively to the challenges of the 11 September attacks and in launching a new development trade round. There are however still many challenges facing us in the period ahead. We hope that the international community, and the international legal system which continues to evolve to support it, will prove itself equally robust and brave over time in addressing these new challenges.

Panel 9: 11 September: International and National Responses

Terrorism and the Right of Self Defence

Kevin Boreham*

This paper will discuss:

- Whether the terrorist acts of 11 September were "armed attacks" within the meaning of Article 51 of the United Nations Charter.
- Whether the terrorist acts therefore triggered the United States right of self-defence under Article 51.
- Whether a new norm of international law has emerged that any terrorist attack triggers the right to self-defence under Article 51.
- Whether the military action by the United States in Afghanistan and elsewhere, which has followed the ousting of the Taliban from authority in Afghanistan, is a valid exercise of the right to self-defence.
- What is the status under international law of the United States declarations that it will pursue pre-emptive military action against threats of terrorism and states which may possess weapons of mass destruction?

Were the 9/11 terrorist acts "armed attacks" under Article 51?

There is no doubt that the 9/11 attacks were armed attacks for the purposes of Article 51. This is shown by the declaration to this effect by the United States, by the prior declaration of hostilities by the Al-Qaeda organisation, by the declaration by the allies of the United States that the right of collective self-defence had been triggered, and by the Security Council's endorsement to this effect in a Resolution adopted under Chapter VII of the Charter. Article 51 states *inter alia* that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.[1]

The International Court of Justice made the only judicial interpretation of the terms of Article 51 in its decision in the *Nicaragua* case.[2] The Court stated "that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked".[3]

President Bush stated in his address to the Joint Session of Congress after the September 11 attacks that they had been an "act of war".[4] President Bush said that "a collection of loosely affiliated terrorist organizations known as Al-Qaeda" had attacked the United States. He said:

> They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole [in Yemen in 2000].[5]

The responsibility of Al-Qaeda and Osama Bin Laden for the terrorist attacks of September 11 is convincingly demonstrated by the British Government document on responsibility for the terrorist attacks.[6] So it is important to recall that the terrorist attacks took place in pursuance of the declaration of war in the statement of the World

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* Faculty of Law, Australian National University.

1 Charter of the United Nations, ATS-CD 1945 No.1.

2 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14.

3 Ibid at 104.

4 Address to Joint Session of Congress, 20 September 2000.

5 Address to Joint Session of Congress, 20 September 2000.

6 "Responsibility for the Terrorist Atrocities in the United States", 11 September 2001, HMG, 4 October 2001.

Islamic Front for Jihad against the Jews and the Crusaders of 23 February 1998, which was signed by Osama Bin Laden. The statement said that:

> All these crimes and sins committed by the Americans are a clear declaration of war on Allah, his messenger, and Muslims. … Jihad is an individual duty if the enemy destroys the Muslim countries. … We … call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah's order to kill the Americans and plunder their money wherever and whenever they find it.

The United Nations Security Council under Article 39 of the Charter "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression". In its Resolution 1368(2001) of 12 September 2001, using Chapter VII language, the Council stated that:

> Recognizing the inherent right of individual or collective self-defence in accordance with the Charter [the Security Council], 1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington (D.C.) and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security …

The allies of the United States acted promptly and explicitly to recognize the terrorist acts of 9/11 as armed attacks which triggered the relevant operational responses under the North Atlantic Treaty (Article 5)[7] and the ANZUS Treaty (Article IV).[8] The Organisation of American States (OAS) invoked the parallel Article of the Inter-American Treaty of Mutual Assistance.[9]

The State which was the victim of the attack formed the view that the terrorist acts of September 11 were an armed attack by people who had effectively declared war against the United States. The principal allies of the United States formed the same view. It is reasonable to assess also that the terms of Security Council Resolution 1368 by recognising the right to self-defence and bringing the terrorist attacks within Chapter VII of the Charter indicated that it had formed the same view, although its indirect expression presents problems for the clarity of the mandate of the US for the war on terror. Sean Murphy in the *Harvard International Law Journal* also concluded that September 11 was an armed attack within the meaning of Article 51.[10]

Does any terrorist attack trigger the Article 51 right of self-defence?

Does this mean that any terrorist act triggers the right to self-defence in Article 51? Op para 1 of UNSCR 1368 seems to say exactly that. But while it would be merely arid to contest the recognition of the 9/11 terrorist acts as armed attacks, it is not inconsequential to ask whether one resolution of the Security Council has given implied approval to the decision by any country which believes it has been a victim of a terrorist attack to exercise its rights under Article 51.

The ICJ in the *Nicaragua* case interpreted the term armed attack in Article 51 by reference to the Definition of Aggression adopted by the UN General Assembly which states that: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[11] Article 3 of the Definition includes among its list of acts of aggression at (Article 3(g)), to which the ICJ referred in the *Nicaragua* case:

> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

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7 Statement by the North Atlantic Council, NATO Press Release (2001) 124, 12 September 2001.

8 Statement by the Prime Minister of Australia, 14 September 2001.

9 Sean D. Murphy, "Terrorism and the Concept of Armed Attack" (2002) 43 *Harvard International Law Journal* 41 at 49.

10 Ibid at 51.

11 UNGA Resolution 3314(XXIX).

Article 4 states that:

> The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

However, Article 4 operates only to extend the list of acts of aggression in Article 3 which is subject to the definition of aggression in Article 1.

Ian Brownlie in his classic analysis of the use of force by States concludes that direct attack by one State upon another is the only situation which equates to armed attack in the Article 51 context, and that "indirect aggression" cannot qualify.[12]

The decisions of North Atlantic Treaty Organization (NATO), the OAS and the Australian Government in relation to the 9/11 attacks may suggest customary international law has evolved to include terrorist attacks as "armed attacks".

As international law stands an armed attack appears to be confined to an attack by or on behalf of a State. It is by no means certain that a judicial interpretation of the words "armed attack" in Article 51 would extend it to terrorist acts by non-State bodies. The definition of aggression for the purposes of the Statute of the International Criminal Court has not yet been agreed.[13]

It is worth noting however that the Coordinator for the Crime of Aggression for the Preparatory Commission for the International Criminal Court reported to its Eight Session in 2001 that:

> The text accepts two basic principles, which seem to enjoy widespread support: the principle under which the crime of aggression is committed by political or military leaders of a State; and the principle that the planning, preparation or ordering of aggression should be criminalized only when an act of aggression takes place.[14]

The difficulties in defining terrorism for the purposes of the proposed international treaty on terrorism also suggest some caution on this point.[15] It may be relevant that the General Assembly in its Resolution on the 9/11 attacks, unlike the Security Council, did not use the term "attacks", except in the heading of the Resolution, instead referring to "acts of terrorism".[16] The United States itself does not appear to acknowledge the creation of any new norm of international law which would bring any terrorist act within the terms of Article 51, as judged by its efforts post 9/11 to restrain India, successfully, and Israel, unsuccessfully, from exercising what they believe to be their right of self-defence in response to terrorist acts.[17] (President Bush's latest statements on Israel and Palestine seem to acknowledge that Israel has been exercising its right of self-defence.)[18]

Michael Byers' view is that prior to September 11 the right of self-defence did not extend to responses to terrorist attacks but that "the right of self-defence now includes military responses against States which actively support or willingly harbour terrorist groups who have already attacked the responding State".[19] But is acquiescence in the scope of the right of self-defence of the one global superpower under extraordinary circumstances enough to show that that scope is a new norm of customary international law, particularly when the United States does not appear to believe that such a norm extends to the acceptable use of force by other countries and there is no generally accepted definition of a terrorist act?

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12 Ian Brownlie, *International Law and the Use of Force by States* (1963) at 278-9.

13 UN Document PCNICC/2001/Rev.1

14 Ibid.

15 UNGA Document A/AC.252/2002/CRP.1 and Add.1.

16 UNGA Document A/RES/56/1.

17 Michelle Goldberg, "An Uneasy Alliance", *Salon.com*, 5 June 2002.

18 *New York Times*, 11 June 2002.

19 Michael Byers, "Terrorism, the Use of Force and International Law after 11 September", (2002) 51 *International and Comparative Law Quarterly* 401at 408-9.

Are the post 9/11 actions by the United States and its allies a valid exercise of the right of self-defence within the terms of Article 51?

The United States asserts that the actions of the coalition in the war against terror are within the Article 51 right of individual and collective self-defence.

Article 5 of the NATO Treaty explicitly refers to such attacks as giving rise to the right of individual or collective self-defence under Article 51 of the Charter. The wording of Article IV of the ANZUS Treaty clearly implies a link to the terms of Article 51.

In the *Nicaragua* case the ICJ drew attention to the fact that the United States had made no report to the Security Council of its measures in alleged discharge of the right of collective self-defence. The Court commented that:

> this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of self-defence as consecrated by Article 51 of the Charter.[20]

In respect of the war against terror, the United States has discharged its obligation to report to the Council, advising the Council on 7 October that:

> In accordance with Article 51 of the Charter of the United Nations, … the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.[21]

The ICJ's comment on the lack of the discharge of the reporting obligation presumably indicates that this is a necessary, but possibly not sufficient, condition for the valid exercise of the right of self-defence under Article 51. At any rate, the United States' current action cannot be criticized on these grounds. Moreover, as there has been no formal objection by any member of the Security Council to the United States' assertion of its rights under Article 51 it has presumably been accepted.

Jonathan Charney has argued that:

> Any state that seeks to invoke the right of self-defence should be required to furnish the international community with credible evidence that it has suffered an attack, that the entity against which the right of self-defence is exercised was the source of the attack, that the attack or threat of attack is continuing, and that the use of force is necessary to protect the state from further injury.[22]

However, Thomas Franck has contradicted this view by arguing that as the right of self-defence is acknowledged as an "inherent right" in Article 51, it cannot be conditional on any evidentiary process.[23] This seems to be correct: if the right of self-defence is "inherent" in customary international law it can only be limited by the traditional constraints until the Charter limitations operate.

Limitations on the exercise of the right of self-defence

The conditions for the exercise of the right of self-defence under customary international law and under the UN Charter are the requirements of necessity[24] and proportionality,[25] and the express limitations in Article 51 of the Charter.

Article 51 appears to state that the inherent right of self-defence exists:

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20 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Merits, Judgment, I.C.J. Reports 1986, p.14 at 121.

21 UNSC Document S/2001/946.

22 Jonathan Charney, "The Use of Force Against Terrorism and International Law" (2001) 95 *AJIL* 835 at 836.

23 Thomas Franck, "Terrorism and the Right of Self-Defence" (2001) 95 *AJIL* 839 at 840.

24 Ian Brownlie, *International Law and the Use of Force by States* (1963) at 43.

25 Ibid at 261-264.

> until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[26]

The United States justified and described its military action in Afghanistan as follows:

> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organisation have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organisation as a base of operation. … United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.[27]

In the *Nicaragua* case, the ICJ did not define the requirements of necessity and proportionality but they can be inferred from its application of these criteria to the facts of the dispute.[28]

In the Nicaragua-US dispute, the United States stated that its actions against Nicaragua were justified by the support by the Nicaraguan regime for the leftist insurgency in El Salvador. The Court said that the US measures against Nicaragua:

> were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed … and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity.

Applying this test, the United States justification for its action in Afghanistan passes the test of necessity. Clearly, the United States as a result of the armed attack on the United States of September 11 by Al-Qaeda, reasonably believed that it was necessary in its self-defence to end the safe haven and operational base of Al-Qaeda in Afghanistan.

There are two issues in the Court's application of the proportionality test to the US actions against Nicaragua which are highly relevant to the US war on terror. Firstly, the Court indicated that the test of proportionality included a time limitation. It said that "on this point [of proportionality] the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua [on El Salvador] could reasonably be contemplated".[29]

Applying this test to the United States action in Afghanistan, and considering the justification stated by the United States to the Security Council for it, the United States probably exhausted the proportionality criterion once it had expelled Al-Qaeda from its base of operations in Afghanistan. President Bush said in his State of the Union address on 29 January that: "our nation has ... captured, arrested, and rid the world of thousands of terrorists, [and] destroyed Afghanistan's terrorist training camps." The President said "America and Afghanistan are now allies against terror."[30]

Secondly, the Court considered the extent of the US military action against the Nicaraguan Government and its support for the Contra rebels. The Court found that:

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26 Charter of the United Nations, ATS-CD 1945 No.1.

27 UNSC Document S/2001/946.

28 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986,p. 14 at 122.

29 Ibid at 122-123.

30 Ibid.

> an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition [in El Salvador]."[31] However, the Court said that it could not "regard the United States activities, ie those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations etc., as satisfying that criterion [of proportionality]. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these … United States activities … could not have been proportionate to that aid.[32]

It is instructive to compare the Court's assessment of the minimal level of Nicaraguan support for the El Salvador insurrection with the assessment in the British Government paper of the organic link between Al-Qaeda and the Taliban regime:

> Osama Bin Laden has provided the Taliban régime with troops, arms and money to fight the [opposition] Northern Alliance. He is closely involved with Taliban military training, planning and operations. … Omar [the Taliban spiritual leader] has provided Bin Laden with a safe haven in which to operate, and has allowed him to establish terrorist training camps in Afghanistan. … In return for active Al- Qaeda support, the Taliban allow Al-Qaeda to operate freely, including planning, training and preparing for terrorist activity. [33]

This obviously raises the issue of state responsibility on the part of the Taliban for the acts of terrorists whom they were harbouring. Cherif Bastioni writing in the *Harvard International Law Journal* concludes "a country such as Afghanistan that has given such a group a base of operations is also responsible for the actions of that group".[34] Thomas Franck comes to the same conclusion.[35] Michael Byers doubts that this is a generally correct application of state responsibility but acknowledges that the apparent endorsement by the Taliban of the terrorist acts "may further have engaged their legal responsibility".[36]

In 1999 the Security Council imposed sanctions on the Taliban because of its provision of sanctuary for Osama Bin Laden and Al-Qaeda.[37] It seems reasonable to infer that the Council was impliedly assigning state responsibility to the Taliban for Al-Qaeda's activities. However, was the overthrow of the Taliban regime a justified exercise of the right of self-defence?

The ICJ considered in the *Nicaragua* case whether "there was a general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified".[38] That Court found that "that no such right of general intervention, in support of an opposition within another State, exists in contemporary international law".[39]

The American role in the fall of the Taliban and the victory of the United Front for the Salvation of Afghanistan (usually referred to as the Northern Alliance) was clearly significant up to the Taliban's flight from Kandahar.[40] It may be suggested that the Council has given *ex post facto* endorsement to the United States military action in Afghanistan, including the overthrow of the Taliban, and to its continuation. But it is noteworthy that neither Resolution 1378(2001), the first Security Council Resolution on Afghanistan after September 11, nor Resolution

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31 Ibid at 119.

32 Ibid at 122.

33 "Responsibility for the Terrorist Atrocities in the United States", 11 September 2001, HMG, 4 October 2001.

34 M Cherif Bastioni, "Legal Control of International Terrorism: A Policy-Oriented Assessment", (2002) 43 Harvard International Law Journal 83 at 100.

35 Thomas Franck, "Terrorism and the Right of Self-Defence" (2001) 95 *AJIL* 839 at 841.

36 Michael Byers, "Terrorism, the Use of Force and International Law after 11 September", (2002) 51 *International and Comparative Law Quarterly* 401 at 409.

37 UNSC Document S/RES/1267 (1999).

38 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America*), Merits, Judgment, I.C.J. Reports 1986,p. 14 at 108.

39 Ibid at 109-110.

40 "GI's Had Crucial Role in Battle for Kandahar", *New York Times*, 15 December 2001.

1383 (2001) which endorsed the Bonn Agreement on the establishment of the Interim Authority in Afghanistan nor Resolution 1386 (2001) which authorized the setting up of the British-led International Security Assistance Force in Kabul and its surrounding areas referred at all to the American military campaign or to the continued presence of US and other coalition forces in Afghanistan. (Nor have any subsequent Security Council Resolutions on Afghanistan.)[41] Resolution 1378 only referred to "the efforts of the Afghan people to replace the Taliban regime". However, an assertion that the American role in the overthrow of the Taliban was not a legitimate exercise of the Article 51 right of self-defence, and therefore contrary to international law, is negated by three factors. Firstly, previous UNSCR's had previously indicated that the Council did not regard the Taliban as a legitimate Government: UNSCR 1267 of 15 October 1999 referred to "the Afghan faction known as the Taliban" and to "the territory under its control". Secondly, the Council had made long-standing demands that the Taliban close training camps in Afghanistan and extradite Osama Bin Laden. UNSCR 1267 stated that the Council:

> 1. Insists that the Afghan faction known as the Taliban … cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;
>
> 2. Demands that the Taliban turn over Osama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.[42]

UNSCR 1267 imposed sanctions on the Taliban and Al-Qaeda. The Council repeated the demands in that resolution in December 2000 and July 2001.[43] All the above resolutions were passed under Chapter VII of the Charter. So the US military action in Afghanistan could not be said to resemble its action against the Government of Nicaragua 20 years ago. It took place against a Government whose legitimacy the Security Council had specifically questioned, and followed a series of Chapter VII UNSCR's, not only those post-September 11, which made clear the demands of the Council in respect of the Taliban's links with Al-Qaeda and Osama Bin Laden.

Thirdly, the principle of effectiveness strongly suggests that any questioning of the fall of the Taliban would fail because of the strength of the contrary facts. The Taliban is no longer in power and the Security Council has approved the arrangements to succeed it. The American military campaign was not contrary to international law because it succeeded.

Is the continuing US war on terror still a valid exercise of the Article 51 right of self-defence?

Since the time limitation implied by the ICJ in the *Nicaragua* case has now passed, it must be considered whether the United States' right of self-defence now comes up against the Charter limitation in Article 51 which acknowledges the right of self-defence "until the Security Council has taken measures necessary to maintain international peace and security". That provision must now apply; otherwise the condition set out in Article 51 would be empty of meaning. Brownlie's analysis of the Charter provisions on use of force, based on the San Francisco *travaux preparatoires* and the views of other learned commentators, is that:

> any use of force was to be authorised by the Organisation and any proviso, implied or expressed, as to self-defence, was understood to be an exceptional right, a privilege. The whole object of the Charter was to render unilateral use of force, even in self-defence, subject to control by the Organisation.[44]

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41 UNSC Documents S/RES/1390 (2002), 28 January 2002; S/RES/1401 (2002), 28 March 2002; S/RES/1413 (2002), 23 May 2002.

42 UNSC Document S/RES/1267 (1999).

43 UNSC Documents S/RES/1333 (2000), 19 December 2000; S/RES/1363 (2001), 30 July 2001.

44 Ian Brownlie, *International Law and the Use of Force by States* (1963) at 273.

The NATO Treaty (Article 5) and the ANZUS Treaty (Article IV) which have been invoked in support of the United States both specifically acknowledge that:

> Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.[45]

Thomas Franck has argued after September 11 that Article 51 does not constrain the right of self-defence, and that "a victim of armed attack retains its autonomous right of self-defence at least until further collective measures authorised by the Council have had the effect of restoring international peace and security".[46] It is difficult to reconcile this unilateralist interpretation of Article 51 with the evident intention of the drafters of the Charter. Perhaps it shows how far we have retreated from the perceived need for a well-regulated international system of international peace and security which inspired the drafters of 1945.

It is clear that the United States sees its Article 51 right of self-defence as open-ended in respect of the war on terror. The report of the United States to the Security Council states that "we may find that our self-defence requires further actions with respect to other organizations and other States".[47] Resolution 1368 in fact declared that the Council:

> Expresses its [ie the Council's] readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.[48]

It is necessary to read the preamble of UNSCR 1368 together with the first operative paragraph to derive a Council mandate for the US action. This shows very skilful drafting under extreme pressure but it is a worryingly vague mandate for the US action. One should however note Franck's possibly correct view that because the right to self-defence is described as an "inherent right" it is not subject to "a licence to be granted by decision of the Security Council".[49] But it must still be subject to the Article 51 limitations.

The Resolution did not extend an open-ended mandate to the United States, to be exercised unilaterally. The Security Council has not therefore given any authorization to the continued US military operations in Afghanistan or to the continuation of the war on terror anywhere else.

Clearly it is difficult to set time frames and benchmarks for a war against terror, an enemy whose capacities and intentions are unknowable. But the United States has created a problem for itself in respect of its exercise of the Article 51 right of self-defence by asserting that it has turned Afghanistan, the object of its exercise of the right, into an ally. It can't have it both ways.

Why hasn't the United States sought a continuing Security Council mandate? In the post September 11 atmosphere it is unlikely that the United States would have any difficulty obtaining a prompt and broad mandate for coalition operations.

It is highly unlikely that the Security Council would even contemplate the United Nations taking over direction of the war on terrorism. It has become accepted since the débâcles of the UN missions in Somalia and the former Yugoslavia ten years ago that the only viable model for a UN enforcement operation is a coalition led by one nation with a Security Council mandate.[50] The reason for the US not seeking such a mandate can only be a concern that the mandate would not be stated broadly enough, or that the Council would thereby concede an

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45 Security Treaty between Australia, New Zealand and the United States of America [ANZUS], Article IV, ATS 1952 No.2.

46 Thomas Franck, "Terrorism and the Right of Self-Defence" (2001) 95 *AJIL* 839 at 841.

47 UNSC Document S/2001/946, 7 October 2001.

48 UNSC Document S.RES.1368(2001) op. para. 5.

49 Thomas Franck, "Terrorism and the Right of Self-Defence" (2001) 95 AJIL 839 at 840.

50 Gareth Evans, *Cooperating for Peace* (1993) at 160-163; Thomas Franck, "When, if ever, may States Deploy Military Force Without Prior Security Council Authorisation?" (2001) 5 *Wash.UJL & Pcy* 51 at 53-55.

implied authority to amend the mandate in future. In this respect, the US has completely reversed its policy in the Gulf War of securing an explicit Security Council mandate for its military operations.[51]

Whatever the reason for the US reluctance to obtain a Security Council mandate, the lack of one, given the clear terms of Article 51, does not grant open-ended access by the US to the right of self-defence. The war on terror therefore proceeds on the basis of clever drafting and a convenient fiction that the Afghan people themselves rose up and overthrew the Taliban.

What is the mandate for continuing United States military action?

It is necessary to recall that military action of any sort breaches the prohibition on the use of force in Article 2.4 of the Charter which the ICJ in the *Nicaragua* case noted "is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law" [or *jus cogens*].[52]

The United States report to the Security Council said that "We may find that our self-defence requires further actions with respect to other organizations and other States".[53] Given the clear limitation of the right of self-defence in Article 51, this foreshadowed need is not enough to give rise to a continuing mandate. Jonathan Charney has written that: "Military actions by the United States outside Afghanistan would be problematical if their objective is to suppress international terrorist groups generally and not to defend the United States from future attacks by those responsible for the events of September 11."[54]

It is important before concluding on a note critical of the United States to acknowledge that its bellicosity and unilateralism are more than matched by its adversary in the war on terror. In one of his post 9/11 video appearances Osama Bin Laden said:

> Under no circumstances should any Muslim or same person resort to the United Nations. The United Nations is nothing but a tool of crime.

In the same video Osama, after denouncing the "crusader Australian forces … [which landed] on Indonesian shores to separate East Timor, which is part of the Islamic world", said that the "crusades" against Muslims in Bosnia, Chechnya, Kashmir, East Timor and Somalia were "links in a long series of conspiracies, a war of annihilation in the true sense of the word. … Fear God, O Muslims and rise to support your religion."[55]

It is clear however that the US does not have an open-ended mandate for the war on terror. This is particularly important in relation to statements which make it clear that the United States will take active military action beyond the immediate response to the September 11 attacks, and that it will take action against States which provide materials for and weapons of mass destruction to terrorists.

Recently President Bush and Vice-President Cheney have made it clear that the United States will make pre-emptive strikes. President Bush said on 1 June that:

> We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. … our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary.[56]

Vice-President Cheney, referring to these remarks, said subsequently that:

> wars are not won on the defensive. We must take the battle to the enemy – and, where necessary, preempt grave threats to our country before they materialize.[57]

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51 UNSCR 678(1990) of 29 November 1990.

52 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America*), Merits, Judgment, I.C.J. Reports 1986,p. 14 at 100.

53 UNSC Document S/2001/946 of 7 October 2001.

54 Jonathan Charney, "The Use of Force Against Terrorism and International Law" (2001) 95 *AJIL* 835 at 835.

55 BBC News Online, 3 November 2001.

56 Remarks by the President at 2002 Graduation Exercise of the United States Military Academy, 1 June 2002.

Commenting on this speech, the BBC noted that it "was the latest in a series by top administration officials promoting what is emerging as a new doctrine of the Bush administration – that the US must be prepared to take pre-emptive action against new security threats".[58] The Article 51 exemption from the prohibition on the use of force does not extend to pre-emptive action. In the *Nicaragua* case the ICJ said that:

> reliance is placed by the parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue.[59]

Brownlie cites overwhelming authority from jurists on the phrase "if an armed attack occurs against a member of the United Nations" in Article 51 to support the view that "the ordinary meaning of the phrase precludes action which is preventive in character" and concludes that "the view that Article 51 does not permit anticipatory action is correct".[60]

The United States has made a number of statements suggesting that the pre-emptive strategy will include action against States which may provide materials for nuclear, biological and chemical weapons to terrorists.[61] The Court made it clear that in the facts of the *Nicaragua* case, where the United States relied on alleged support by Nicaragua for the insurgency in El Salvador that the concept of "armed attack" did not include "assistance to rebels in the form of the provision of weapons or logistical or other support".[62] Therefore, the threat by other States, putative or actual, to provide weapons to terrorists, would not constitute an armed attack for the purposes of the unilateral right of self-defence in Article 51, although it would be a basis for Security Council action under Chapter VII. It is merely arid and contrary to the principle of effectiveness to cast doubt on the international legality of what the United States has done to date in the war on terror. It is also necessary to remember that what it has done has been in response to an armed attack which probably qualifies as a Crime against Humanity in the terms of the Statute of the International Criminal Court. But the United States has gone beyond the limits of tolerance of the use of force both under customary international law and the UN Charter. This has made it more difficult to restrain other States who believe they have a right to strike back at terrorists and weakened the international legal prohibitions on the use of force.[63]

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57 Vice-President's Remarks to the National Association of Home Builders, 6 June 2002.

58 BBC News, 7 June 2002.

59 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14 at 103.

60 Ian Brownlie, *International Law and the Use of Force by States* (1963) at 275, 278.

61 "Bush to Formalize a Defense Policy of Hitting First", *New York Times*, 17 June 2002.

62 Ibid at 104.

63 Jonathan Charney, "The Use of Force Against Terrorism and International Law" (2001) 95 AJIL 835 at 837; Michael Byers, "Terrorism, the Use of Force and International Law after 11 September", (2002) 51 *International and Comparative Law Quarterly* 401at 414.

International Law and Terrorism: A New Zealand Perspective

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In the aftermath of the horrific terrorist attacks in New York and Washington DC on 11 September 2001, one of the prevailing issues on the minds of the United Nations and the international community as a whole has been counter-terrorism. Within that generic subject exist two dominant questions: what is (or should be) the international law on terrorism; and how should perpetrators of these crimes be dealt with? There are twelve conventions and protocols on terrorism, although the ratification process has not been completed for all these documents. India had, approximately a year before the World Trade Centre attack, submitted a comprehensive convention on international terrorism. This has been the subject of much recent discussion and saw a flurry of activity and debate within the Ad Hoc General Assembly Committee on Terrorism and the specialist Security Council Counter-Terrorism Committee. In terms of the prosecution of terrorists, the United States has controversially established military tribunals for this purpose. Much criticism has been directed at the United States on this account, particularly given its current stance against the creation of an International Criminal Court.

Introduction

In the aftermath of the horrific terrorist attacks in New York and Washington DC on 11 September 2001, one of the prevailing issues on the minds of the United Nations and the international community as a whole has been counter-terrorism. Within that generic subject exist three dominant questions. The first of these is: What is (or should be) the international law on terrorism? By way of background, there are twelve conventions and protocols on terrorism, although the ratification process has not been completed for all these documents. India had, approximately a year before the World Trade Centre attack, submitted a comprehensive convention on international terrorism. This has been the subject of much recent discussion and saw a flurry of activity and debate within the Ad Hoc General Assembly Committee on Terrorism and the specialist Security Council Counter-Terrorism Committee. I will be focussing in this paper on the steps already taken by the UN and recent developments in the "fight against terrorism". I think it is also important to examine New Zealand's domestic law on counter-terrorism and some of the issues involved in this. To that end, this paper will briefly examine some pieces of existing counter-terrorist legislation; and then look at NZ's report to the United National Security Council and finally at the question of counter-terrorism versus human rights – i.e., what, if any, limitations might be placed on human rights in the pursuit of what has become known as the "war against terrorism?

The second of the dominant questions posed in the international context is: How should perpetrators of these crimes be dealt with? The United States has controversially established military tribunals for this purpose. Much criticism has been directed at the United States on this account, particularly given its current stance against the creation of an International Criminal Court. Some brief reflections will be made on this point. Finally, an issue that has been raised by many relates to the US Military Operation in Afghanistan, although this is a matter outside the intended scope of this paper.

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International Law on Terrorism

What is or should be the international law on terrorism?

Problems with Defining Terrorism

The United Nations Terrorism Prevention Branch describes terrorism as a unique form of crime. Terrorist acts often contain elements of warfare, politics and propaganda. For security reasons and due to lack of popular support, terrorist organisations are usually small, making detection and infiltration difficult. Although the goals of terrorists are sometimes shared by wider constituencies, their methods are generally abhorred. The Branch's description certainly well describes the events of 11 September 2001.

One of the fundamental obstacles facing the fight against terrorism is the inability of the international community to achieve consensus on a global definition of terrorism. The Executive Director of the International Policy Institute for Counter-Terrorism, Boaz Ganor, has emphasised the point, saying that UN Security Council Resolutions can only have an effective impact once all States agree on what type of acts constitute terrorism.

How is terrorism to be defined?

The Draft League of Nations Convention 1937 had provided that terrorism consisted of:

> All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.

However, the convention was never adopted due to dissent over the definition. There have been suggestions that terrorism be defined as the peacetime equivalent of war crimes. In a Report to the UN Crime Branch, Schmidt proposed taking the already agreed upon definition of war crimes (comprising deliberate attacks on civilians, hostage taking and the killing of prisoners) and extending it to peacetime. Terrorism would then simply be defined as the "peacetime equivalents of war crimes". Again, however, this did not gain acceptance. Schmidt appears to have been more successful in gaining acceptance of a more complex definition of terrorism, as identified by the UN Office for Drug Control and Crime Prevention (ODCCP):

> A anxiety-inspiring method of repeated violent action, employed by a (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat – and violence-based communication processes between terrorist (organisation), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on what the intimidation, coercion, or propaganda is primarily sought.

What might be observed is that the common thread throughout the various definitions proposed is that the direct (or "physical") targets of a terrorist act are not the primary targets (usually a Government or Organisation) for the purpose of persuading or dissuading that primary target to do (or from doing) something.

Why has there been a lack of consensus?

The sticking point, it seems, is not so much with the technical wording of what physical conduct amounts to a terrorist act. The problem appears to lie with the purpose of the conduct. For instance, does a bombing carried out by a rebel group, which is directed towards the destabilisation of fascist authorities (the Pol Pot Regime, for example), amount to a terrorist act or an act of "Freedom Fighters"? The point I would make is that this is not just a cliché. To give a couple of very striking examples, it will be known by most that the United States keeps a list of the most wanted terrorists (this is maintained by the Federal Bureau of Investigation and may be accessed by internet: www.fbi.gov/mostwant/terrorists/fugitives.htm. That list featured, at one time, Yassir Arafat and Nelson Mandella – both of whom were subsequently awarded the Nobel Peace Prize: clearly evidence that this is a highly political and controversial issue.

A number of States argue that a subjective analysis and definition of such conduct (by examining the purpose of the conduct) should therefore be made. The United Nations Office for Drug Control and Crime Prevention (ODCCP) reports that Arab States such as Libya, Syria and Iran have all campaigned for a definition that excludes acts of "freedom fighters" from the international definition of terrorism by employing the argument that a justified goal may be pursued by any available means.

Current Status of International Law on Terrorism

Following the September 11 attacks, the United Nations was quick to defend its position and issued a UN Press Release, 19 September 2001 stating that it has long been active in the fight against international terrorism. This is correct in substance, since the organisation has, from as early as 1963, been a catalyst for the creation of a number of agreements providing the basic legal means to counter international terrorism, from the seizure of the aircraft to the financing of terrorism.

The phenomenon of terrorism became an international concern in the 1960s when a series of aircraft hijackings hit the headlines in the 1960s. Additionally, when the 1972 Munich Olympic Games were disrupted by a Palestinian group's attempt to take Israeli athletes hostage, the then Secretary-General of the UN, Kurt Waldheim, asked that the issue be placed on the General Assembly's agenda. In the heated debate that followed, the Assembly assigned the issue to the its Legal Committee, which subsequently proposed several conventions on terrorism. There has been some success in the formulation of a definition within the comprehensive convention. I will come back to this in a moment.

Existing conventions

There are now 12 conventions and protocols on terrorism, although the ratification process has not been completed for all these documents. The UN Conventions on Terrorism are:

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963

   This applies to acts affecting in-flight safety; it authorises the aircraft commander to impose reasonable measures, including restraint, on any person he or she has believes has committed or is about to commit such an act, when necessary to protect the safety of the aircraft; and requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.

2. Convention for the Suppression of Unlawful Seizure of Aircraft 1970

   The treaty makes it an offence for any person on board an aircraft in flight [to] "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so; it requires parties to the convention to make hijackings punishable by "severe penalties"; it requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and also requires parties to assist each other in connection with criminal proceedings brought under the convention.

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971

   This convention makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts; as before, it requires parties to the convention to make offences punishable by "severe penalties"; and again requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.

4. Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents 1973

   Internationally protected persons are defined as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organisation who is entitled to special protection from attack under international law [these people being popular terrorist targets]; the convention requires each party to criminalise and make punishable "by appropriate penalties which take into account their grave nature," the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice".

5. International Convention against the Taking of Hostages 1979

   "Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a … State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage" commits the offence of taking of hostage within the meaning of this Convention.

6. Convention on the Physical Protection of Nuclear Material 1980

The Convention criminalises the unlawful possession, use, transfer, etc., of nuclear material, the theft of nuclear material, and threats to use nuclear material (to cause death or serious injury to any person or substantial property damage).

7. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988

The Protocol extends the provisions of the Montreal Convention (see Convention No. 3 above – relating to the safety of civil aviation) to encompass terrorist acts at airports serving international civil aviation.

8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988

Here, the treaty establishes a legal regime applicable to international maritime navigation that is similar to the regimes established against international aviation; i.e., it makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.

9. Protocol for the Suppression of Unlawful Act against the Safety of Fixed Platforms Located on the Continental Shelf 1988

Again by way of extension, this Protocol establishes a legal regime applicable to fixed platforms on the continental shelf (similar to the regimes established against international aviation).

10. Convention on the Marking of Plastic Explosives for the Purpose of Identification 1991

This is designed to control and limit the used of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am 103 bombing); parties are obligated in their respective territories to ensure effective control over "unmarked" plastic explosive, i.e., those that do not contain one of the detection agents described in the Technical Annex to the treaty; and generally speaking, each party must, among other things:

- take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives;
- prevent the movement of unmarked plastic explosives into or out of its territory;
- ensure that all stocks of such unmarked explosives not held by the military or police are destroyed or consumed, marked, or rendered permanently ineffective within three years;
- take necessary measures to ensure that unmarked plastic explosives held by the military or police, are destroyed or consumed, marked, or rendered permanently ineffective within fifteen years; and
- ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date-of-entry into force of the convention for that state.

11. International Convention for the Suppression of Terrorist Bombing 1997

As the name suggests, this creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

12. International Convention for the Suppression of the Financing of Terrorism 1999

Of the 12 conventions, this is the most controversial. It requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, though groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running; it commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts; and provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis. Bank secrecy will no longer be justification for refusing to cooperate.

An evident question at this point might be: Why hasn't this worked? Surely 12 conventions on terrorism are enough? There are, however, various problems with the existing convention system. Firstly, the conventions are specific "operational" conventions and, subsequently have limited application to those particular operational contexts. Further, they do not adequately deal with the issue of prosecution and extradition, because – again –

that is not their focus. There is a lack of signatory/ratifying States and, along with that, there has been a lack of domestic implementation and, more importantly, domestic enforcement of the treaties.

Customary international law norms

It should also be noted that international law on terrorism is not restricted to the 12 Conventions listed. For example, the Geneva Conventions of 1949 (which is widely accepted as representing customary international law norms, and is therefore binding upon all States) prohibits violence to life, in particular murder, mutilation, cruel treatment and torture, and the taking of hostages. Being customary international law, it automatically has force of law within domestic jurisdictions.

By way of specific example, Article 13(2) of the Optional Protocol states that:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

United Nations General Assembly

In December 1994, the UN General Assembly adopted the Declaration on Measures to Eliminate International Terrorism. The Declaration was based on the notion of peace and security and the principle of refraining from the threat or use of force in international relations. The Declaration pronounced that terrorism constitutes a grave violation of the purpose and principles of the United Nations. While it did not purport to define "terrorism", it did say that criminal acts intended or calculated to provoke a state of terror in the general public for political purposes are in any circumstances unjustifiable. It called on States to refrain from organising, instigating, assisting or participating in terrorist acts, and from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.

In particular, States were directed that, in order to fulfil this obligation, they must refrain from facilitating terrorist activities. Paragraph 5(a) appears to indicate that a State must be proactive in doing so, obliging States to take appropriate practical measures to ensure that their territory is not used for terrorist installations or training camps, or for the preparation or organisation of terrorist acts. Paragraph 5(b) also refers to the obligation to apprehend and prosecute or extradite perpetrators of terrorist acts.

The practical observation to make is that, although compelling and strongly worded, this is a Declaration only and therefore does not have the same weight as a Convention, nor does it have signatories that are bound by its content. Indeed, Art 10 of the UN Charter specifically provides that Resolutions and Declarations of the United Nations General Assembly are recommendatory only.

It is clear through reading minutes of recent UN General Assembly Meetings that there are now calls for the United Nations to engage its full potential to identify and attempt to eradicate the roots of terrorism. India's representative has pointed out that, integral to the efforts to end terrorism and prevent armed conflict, is the need to deny to the perpetrators of such conduct access to arms and ammunition. A first step towards this has been the adoption of a Programme of Action by the United Nations Conference on the Illicit Trade in Small Arms. While this is a significant first step, it must be urgently and fully implemented.

As with so many international agendas, the answer lies not only in the adoption of proper mechanisms to regulate these issues, but most importantly in a commitment to effectively implement such measures.

United Nations Security Council

On the day after the abhorrent attacks, the United Nations Security Council adopted Resolution 1368, through which it unequivocally condemned the terrorist attacks and expressed that it regarded them as a threat to international peace and security. It called on all States to urgently work together to bring justice to the perpetrators, organisers and sponsors of the terrorist attacks.

UNSC Resolution 1373 was later adopted, through which the UNSC determined that all States will prevent and suppress the financing of terrorist acts, including the criminalisation of such financing and the freezing of funds and financial assets. It also requires countries to cooperate on extradition matters and the sharing of information about terrorist networks. As a decision made under Chapter VII of the UN Charter, compliance with the latter Resolution is mandatory under international law – by virtue of Art 25 of the Charter.

Both documents resolve that States are to deny safe haven to those who finance, plan, support or commit terrorist acts. This is akin to codification of the Declaration on Measures to Eliminate International Terrorism, which issued a statement of intent to that effect. The documents stress that those responsible for aiding, supporting or harbouring such perpetrators will be held accountable, although they do not specify how such accountability would be measured. An indication might be taken, however, from the preambles to the Resolutions which recognise the inherent right of self-defence through which it seems implicit that the Security Council envisages the use of force.

Not atypically, the Resolutions raise more questions than they answer. Foremost, how is the United Nations to achieve the aims enunciated? The UN Security Council has itself characterised Resolution 1368 as "an ambitious text", with the President of the Council indicating that lengthy and considered meetings of the Council would need to be convened. And in this regard, and being fair to the Security Council, Resolution 1373 should be seen as a "work in progress". Of note, paragraph 6 of Resolution 1373 calls upon UN members:

> to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the [SC Counter-Terrorist] Committee, on the steps they have taken to implement this resolution

New Zealand's Report will be discussed later. The point to be made at this stage is that the Security Council clearly foresees a continuing process of dialog between it and States for the later implementation of either a comprehensive convention or a more detailed and elaborate resolution on the subject.

A Comprehensive Convention?

As indicated, India has proposed that there be a comprehensive convention against terrorism, and there is much merit in this. Likewise, Kofi Annan has called for an extensive coalition to combat terrorism and has predicted that such a campaign will be a long one and must involve all countries. He has followed the Indian proposal and has indicated that the General Assembly will take steps to draft a comprehensive antiterrorism treaty encompassing all current conventions.

I have already mentioned the fact that the UNGA adopted the Declaration on Measures to Eliminate International Terrorism in 1994. At the end of 1996, it established an Ad Hoc Committee – known as the Ad Hoc Committee Established by General Assembly Resolution 51/210. The Committee was primarily tasked with work on conventions for the suppression of terrorist bombings and financing of terrorist operations and, thereafter, to address means of developing a comprehensive legal framework dealing with international terrorism (paragraph 9).

India's Draft Comprehensive Convention on International Terrorism (2000) was referred to the Ad Hoc Committee. The short answer is that, as yet, a comprehensive convention has not been established and is likely to be some time away. My own fear is that, as time moves on from Sep 11, and the world community becomes absorbed with other pressing issues that will undoubtedly arise, then the likelihood of a sustained motivation to agree on a comprehensive convention weakens.

Arising from the latest report of the Ad Hoc Committee on a comprehensive convention (1 Feb 2002), the following points and following hurdles can be identified [the report title is *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 on a Draft Comprehensive Convention on International Terrorism*, A/AC.252/2002/CPR.1 and Add.1]:

- The principle aims of the Draft Comprehensive Convention are:
  - PRIMARILY: to define terrorism; to require, or at least urge, members to implement domestic legislation which ensures jurisdiction over terrorist conduct and will facilitate cooperation between nations in combating terrorism; and to ensure that States party do not grant asylum to any person involved in a terrorist attack.
  - ALSO: to address issues of liability, extradition and custody; and to oblige States to assist in the investigation of criminal or extradition proceedings.
- Due to the lack of unanimity on various issues, and the range of issues involved, the Committee concluded that finalising a comprehensive international treaty on terrorism would depend primarily on agreement on who would be entitled to exclusion from the treaty's scope, and on what grounds.

- Otherwise, the majority of the 27 articles of the Draft Convention were preliminarily agreed upon at the Committee's last two sessions.
- One of the sticking points was, as expected, definitions. Not just in terms of defining what amounts to a terrorist act (Draft Art 2), but also with regard to the wording of Draft Art 18 – concerning:
    - acts of "armed forces" or "parties" to a conflict (this being relevant to the proposed limited exemptions from jurisdiction and/or liability under the Convention);
    - whether "foreign occupation" should be included within that category of exemptions; and
    - whether the activities of military forces should be "governed" or "in conformity" with international law.

    Draft Art 18 was described by the Chairman of the Committee as the crux of the convention.
- Hinging on those definitions was a lack of consensus on a preamble.

The latter problems might, at first instance, appear to be an example of legal pedantics. They are not however, in my view, very surprising. The existing 12 Conventions on terrorism do contain definitions of terrorism, but (as pointed out by the Committee) those are "operational definitions" of terrorist conduct within specific spheres rather than a "global definition". Each treaty has dealt exclusively with a particular manifestation of terrorist activity, whether it be hostage-taking or financing. The Draft Comprehensive Convention, on the other hand, seeks to advance international cooperation to combat terrorism as a whole and to fill in the gaps left by the existing sectoral treaties.

This leads to my next question: how are the existing treaties to relate with the comprehensive treaty? Certainly, it seems clear that the Draft Comprehensive Convention is meant to be an additional treaty, rather than a substitute. What is not clear is whether there is to be a hierarchy between it and the existing 12, or any future, conventions.

Note that the Committee established a special Working Party to continue work in the area. The Working Party is to meet in October 2002.

Also of relevance, in terms of achieving a comprehensive framework, are various factors identified by the ODCCP (UN Office for Drug Control and Crime Prevention) that should be borne in mind as possible counter-terrorist measures. The list is comprehensive and includes action through political, economic, educational, military and intelligence means.

New Zealand's domestic law

Within this part of the paper, I wish to approach my review of the topic in two parts: the law pre the September 11 attacks; and developments since the attacks.

Established law

Again, we can examine this within various sub-topics:

The first question one might pose is: How does NZ law deal with those that commit terrorist acts? In this regard, NZ law has not regarded terrorism as being a unique crime attracting special rules. The approach that underlies our existing legislation is, in my view, one that sees terrorism as something that is not constant, but is committed through a series of acts which may (and often do) vary according to the specific scenario. And that is quite true. A terrorist act will vary according to the target(s) and objective(s) of the terrorist network concerned. Generally speaking therefore, NZ law contains very limited additional powers but is more focused on the fact that the series of acts making up a terrorist "attack" will each, by themselves, constitute a criminal offence under existing NZ law and that can be dealt with as such – e.g., murder, unlawful possession of weapons or explosives, willful damage, endangering public safety, interference with transport, sabotage, etc – which are all offences that have existed under NZ law for a ling period and that are applicable to us just as much as to terrorists.

Those facing such charges will be subject to the "rule of law" and "due process". They will be treated in the same manner as any other criminal offender – although the fact that the perpetrators committed the criminal acts in pursuit of terrorist objectives is very likely to be seen as an aggravating feature when it comes to sentencing such offenders.

Next we might ask: How does NZ law deal with the prevention/detection of terrorist conduct within its borders? There are various measures permitted under NZ law to give effect to the prevention, detection and reaction to terrorist conduct. There are also various items of relevant legislation and I do not propose to review them all, but I would make the following observations:

Three pieces of legislation that impact on this area, in particular the investigation and conclusion of the various crimes that might be committed in the course of terrorist activities, are the Mutual Assistance in Crime Matters Act 1992, the Crimes Act 1961, s257 (relating to money laundering) and the Proceeds of Crimes Act 1991. They are very useful tools through which agencies can investigate and trace the conduct of terrorist operations. The further point I would make is that these mechanisms have been recently enhanced through the establishment of the International Criminal Court. I say this because, each member State of the Court becomes a member by signing up to the Rome Statute of the International Criminal Court and adopting domestic legislation to give effect to the obligations under that treaty. In NZ's case, this was through the International Crimes and International Criminal Court Act 2000.

Part 9 of the Rome Statute deals with international cooperation and judicial assistance. This is seen as central to the effective functioning of the ICC and the aims of the Statute as set out in its Preamble. Notably, the ICC will have the ability to make requests of non-States Party also, although the effectiveness of such requests will rely on the receiving State's discretion – see Article 87(5).

> *ICC: Requests for Assistance*
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> Pivotal to that cooperative feature, is a system through which the ICC will be able to make requests of New Zealand and other States party for assistance in various aspects of its functions, from investigation to imprisonment of convicted criminals. That system and the mechanics for implementation of it comprise the bulk of the ICICC Act, including reciprocal mechanisms through which New Zealand will be able to request assistance of the Court – Parts 3 to 10 of the Act. Where a request is made, it and any supporting documents are required to be kept confidential, except to the extent necessary to comply with the request (section 29). Section 28 of the Act requires the Attorney-General or Minister of Justice to consult with the ICC if there are or may be any difficulties in complying with any request for assistance.
>
> A failure to comply with a request for assistance will give the Court the express right to inform the Assembly of States Party, or the Security Council, of such a failure (Article 87). The sole exception to this is found in both the Rome Statute and the ICICC Act – allowing a request for assistance to be denied where, in the opinion of the Attorney-General, compliance with such a request would prejudice New Zealand's national security (sections 157 to 163). While this is a universal exception available to all States Party, it is one that has already met criticism, given that there is no indication within the Rome Statute that the ICC would be able to question an assertion of national security. This would appear to give exceptional latitude to States Party, including New Zealand.
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> *ICC: Prosecution of alleged criminals*
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> Consistent with the idea of "complementarity" between the Court and its States Party, it should be noted that the ICC itself is to be a venue of last resort. As a State Party, New Zealand will be accepting the burden, or "duty" in light of the objectives set out in the preamble to the Rome Statute, of exercising its criminal jurisdiction over those who may be in New Zealand and are responsible for the commission of international crimes. In fact, the Rome Statute gives the Court the ability to act only where national systems that have jurisdictions are not willing or able to investigate or prosecute these crimes and makes it clear that the primary responsibility for trying international crimes lies with the States, whose duty it is to exercise their international criminal jurisdiction (Article 19). Because the ICICC Act creates the specific offences mentioned, New Zealand will be able, and expected, to bring proceedings in the New Zealand courts for prosecution of serious international criminals.
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> *ICC: Arrest and surrender of an accused person*

The Act provides for the arrest of persons accused or convicted of an international crime. Once arrested, a person is eligible to be surrendered to the International Court if either the person consents, or a warrant for arrest or a judgment of conviction is produced to the District Court in New Zealand. The District Court will then have the authority to issue a warrant for detention, following which the Minster of Justice will need to determine whether to make an immediate or postponed surrender to the ICC. These provisions are to apply whether or not the person is a New Zealand citizen. In other words, New Zealand citizens can, on arrest or conviction, be removed from New Zealand under the procedures set out in Part 4 of the Act. These provisions are based on comparable provisions in the Extradition Act 1999 and the International War Crimes Tribunal Act 1995.

It is expressly provided in the Act that, as a general rule, a request for surrender cannot be refused on the ground that the person in question was, at the time of the alleged offending, in an official position or was working in an official capacity.

ICC: Investigations

There will be a general obligation on the part of New Zealand to cooperate fully with requests by the ICC to assist with, or indeed carry out, investigations. While the ICC and its prosecutorial staff will themselves be able to sit in New Zealand and conduct investigations it is likely that the starting point will be for the Court to make requests for assistance according to the location of the accused person(s), witness(es), site(s) or information.

The types of request listed in the Rome Statute and ICICC Act vary widely, reflecting the cooperative emphasis of the code of justice to be created. Within the framework of investigations, they are to include: the taking of evidence, including testimony under oath, and the production of evidence, expert opinion, and reports required by the ICC; the execution of searches and seizures; the protection of victims and witnesses and the preservation of evidence; matters pertaining to the identification and location of persons or items; the questioning of persons being investigated or prosecuted; the examination of places or sites; the exhumation and examination of graves; the identification, tracing and freezing, or seizure of proceeds, property and assets, and instruments of crime for the purpose of eventual forfeiture.

ICC: Imprisonment of convicted international criminals

Within the umbrella of international co-operation, Article 103 of the Rome Statute provides the ICC with the ability to designate New Zealand as the State in which a sentence of imprisonment is to be served for a convicted international criminal, with mandatory life imprisonment if the particular offence involves murder. This hinges on the proviso that New Zealand indicates to the ICC its willingness to accept sentenced persons. This is reflected within the ICICC Act, which creates mechanisms through which New Zealand can agree to hold a convicted international criminal in custody for the duration or part of that prisoner's sentence, the maximum sentence being one of life imprisonment. Having said that, the Act creates no mandatory requirement for New Zealand to do so, an unqualified discretion resting with the Minister of Justice.

The next item of existing domestic legislation that I want to (briefly) look at is the International Terrorism (Emergency Powers) Act 1987. This was created in direct response to the Rainbow Warrior incident, in the realisation that NZ was not safe from terrorist activity. The Act allows NZ to respond to a terrorist attack by calling on the military to assist civil authorities (civil defence and the police). This seems entirely reasonable. A little more controversial is the extension of police powers under section 9 and 10 of the Act: e.g., requiring the evacuation of premises, the authority to seize, requisition and even destroy nearby private buildings and property, restrict public access to an area, requisition vehicles and equipment and intercept private telephone conversations and intercept communications if the officer believes that the exercise of such powers will facilitate the preservation of life. These powers are also able to be extended to military personnel when used in accordance with and at the request of, a Police officer.

More controversial again is section 14 of the Act which allows the Prime Minister to restrict or prohibit the publication or broadcasting of the identity (or any information capable of identifying) of any person involved in dealing with an international terrorist emergency, as well as restricting or prohibiting information on any piece of equipment used to deal with the emergency that could prejudice measures used to resolve an international

terrorist emergency. In effect these powers could be used for a ban on all media for up to twenty-one days. This is a substantial imposition on both civil liberties and freedom of speech. There is no similar provision in any other Western democratic nation. However, there may well be difficulties in invoking this provision, since it only applies to media within NZ and would therefore be undermined by any media reports abroad.

A "terrorist emergency" is defined as:

> **Section 2 Interpretation**
>
> International terrorist emergency" means a situation in which any person is threatening, causing, or attempting to cause—
>
> (a) The death of, or serious injury or serious harm to, any person or persons; or
>
> (b) The destruction of, or serious damage or serious injury to,—
>
> (i) Any premises, building, erection, structure, installation, or road; or
>
> (ii) Any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle; or
>
> (iii) Any natural feature which is of such beauty, uniqueness, or scientific, economic, or cultural importance that its preservation from destruction, damage or injury is in the national interest; or
>
> (iv) Any chattel of any kind which is of significant historical, archaeological, scientific, cultural, literary, or artistic value or importance; or
>
> (v) Any animal—
>
> in order to coerce, deter, or intimidate—
>
> (c) The Government of New Zealand, or any agency of the Government of New Zealand; or
>
> (d) The Government of any other country, or any agency of the Government of any other country; or
>
> (e) Any body or group of persons, whether inside or outside New Zealand,—
>
> for the purpose of furthering, outside New Zealand, any political aim.

There are a couple of things to note about this. Although, at first instance, this seems to be a detailed definition, it is in fact relatively broad. Effectively, most criminal conduct accompanied with a suspicion that there are coercive or intimidatory elements will satisfy the definition – and thereby invoke the powers we have discussed. This appears to be based on the assumption that terrorists will be operating to further political aims outside New Zealand (see the last part of the definition). In other words, if a bombing (or other criminal act) was committed with the aim of changing the NZ Government's policy/conduct within NZ, this would not give rise to an "international terrorist emergency". The reasoning must be that this would be "national" rather than "international" – although it is not clear why the State should have emergency powers to deal with international terrorists and not domestic ones.

Developments since September 11, 2001

As discussed, paragraph 6 of Resolution 1373 requires States to report to the Security Council on steps taken to implement the Resolution. Pursuant to that provision, the SC Counter-Terrorism Committee issued a list of questions to member States regarding implementation measures adopted. New Zealand's Report to the Counter-Terrorism Committee (28 September 2001, S/2001/1269) in response to those questions was presented to the Security Council at the beginning of this year. The following aspects of the Report are worth mentioning:

> New Zealand will be in full compliance with the most recent terrorism convention, the International Convention for the Suppression of the Financing of Terrorism once the Terrorism Suppression Bill is passed into law. In that regard:
>
> - The Bill was introduced in early 2001 and is expected to be passed into law by mid 2002.
> - In the meantime, the NZ Government has implemented the relevant obligations by passing the United Nations (Terrorism Suppression and Afghanistan Measures) Regulations 2001 made under the United Nations Act 1946.
> - Following UNSC Res 1373, the unusual step of adding new substantive provisions to the Bill was made for the purpose of implementing the financing provisions of Resolution 1373.

A second Bill is to be introduced during the course of 2002 to give effect to the remaining legislative obligations under Resolution 1373. It will add further provisions to the Terrorism Suppression Bill and amend other legislation such as the Crimes Act 1961 and the Immigration Act 1987. Again, by way of interim measure, these obligations are being given effect to through regulations.

NZ is currently party to 8 of the 12 conventions on terrorism.

- It is not party to the International Convention for the Suppression of the Financing of Terrorism or the International Convention for the Suppression of Terrorist Bombings, but will become party to these once the Terrorism Suppression Bill is passed into law.
- It is also not party to the Convention on the Physical Protection of Nuclear Material and the Convention on the Marking of Plastic Explosives for the Purpose of Identification. It will become party to these once the proposed second Bill is passed into law.

Note the Terrorism Suppression Bill definition of a "terrorist act":

- Conduct that constitutes and offence under any of the 12 terrorism conventions [(sections 4(1) and 5(1)(b)) – e.g., the funding of terrorist organisations];
- Conduct that, during armed conflict, is intended to cause death or serious injury to non-military persons with the aim of compelling a government or organisation to do or abstaining from doing anything [(sections 4(1) and 5(1)(c))– e.g., "human shields"];
- Conduct that is intended to advance an ideological, political, or religious cause AND intended to induce terror in a civilian population; or compel a Government/organisation to do or abstain from doing something AND intended to cause death or serious injury; or a serious risk to the health or safety of a population; or destruction or serious damage to property of significant value or importance [section 5, very broad and could include various conduct].

Where a terrorist act has been committed, special powers are to be given to the authorities to investigate such conduct and appropriate property.

The Bill also contains various provisions relating to a prohibition against the financing of terrorist organisations. This has been particularly controversial, again because people disagree on whether certain groups are to be labeled "terrorists" (e.g., Camel Tigers).

Human Rights & Counter-Terrorism

The words of the UN Secretary-General, Kofi Annan, 18 November 1999, when addressing the issue of terrorism before the General Assembly of the United Nations (UN) are no less relevant today. He said:

> We are all determined to fight terrorism and to do our utmost to banish it from the face of the earth. But the force we use to fight it should always be proportional and focused on the actual terrorists. We cannot and must not fight them by using their own methods – by inflicting indiscriminate violence and terror on innocent civilians, including children.

His comments focus on the more physical aspects of countering terrorism. They are just as relevant, however, to the issue of striking a balance between counter-terrorism and the protection of civil liberties. In the context of the September 11 attacks, this is an issue that has been raised concerning the apprehension and investigation of suspected terrorists within the United States. At an early stage, questions were raised about the detention and questioning of suspects by US authorities. More recently, there have been numerous allegations of Afghani prisoners being unlawfully detained, without being charged, at the US military base at Guantanamo Bay in Cuba.

So, the question that arises is this: What abrogation of human rights (due process in particular), if any, should be tolerated in the implementation of counter terrorism?

New Zealand and Canada

The starting point is to acknowledge that civil and political rights are not absolute. In some circumstances, rights and freedoms must be qualified in order to achieve other democratic objectives. For example, freedom of expression does not carry with it the right to incite violence, defame others or engage in commercial fraud.

This qualified guarantee is effected through Section 5 of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides that:

> 5. Justified Limitations – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Similarly, the International Covenant on Civil and Political Rights (ICCPR) recognises through its preamble and Art 4 that rights are not absolute. As will be appreciated, the preamble to the NZBORA is the domestic vehicle through which New Zealand's ICCPR obligations are implemented.

Art 1 of the Canadian Charter of Rights and Freedoms, upon which our section 5 NZBORA is based, provides that:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Justified limitations

In discussing the application of section 5 of the NZBORA, three main points need to be made.

To start with, the onus of proving that section 5 applies rests on the person seeking to uphold the limitation which would, in this case, be the State. Furthermore, as is apparent from the wording of sections 5, the limitation must be "prescribed by law". These requirements were accepted and applied in New Zealand by the Indecent Publications Tribunal in *Re "Penthouse (US)" Vol 19 No 5 and others* 1 NZBORR 429, where policies based on statutory criteria were held to satisfy the test. The test was also reaffirmed by the European Court in the case of *Silver v UK* [1983] 5 EHRR 347. In that case, the Court found that while the Prison Act and Prison Rules met the criterion of adequate accessibility, unpublished orders and instructions did not.

Finally, the limitation must be "reasonable ... [and] demonstrably justified in a free and democratic society". The substantive test for determining whether or not a limitation is reasonable and justified is a fairly detailed one. As summarised by the Supreme Court of Canada in *R v. Oakes* [1986] 26 DLR (4th) 200 …for a limit to be reasonable and demonstrably justified in a free and democratic society:

> (i) the objective sought to be achieved by the limitation at hand must relate to concerns which are pressing and substantial in a free and democratic society; and
>
> (ii) the means utilised must be proportional or appropriate to the objective. In this connection there are three aspects:
>
> 1. the limiting measures must be carefully designed or rationally connected to the objective;
> 2. they must impair the right or freedom as little as possible;
> 3. their effects must not so severely trench on individual or group rights that the objective of the limitation, albeit important, is nevertheless outweighed by the restriction of the right or freedom concerned.

Pressing and substantial objective

In looking at this first limb of the *Oakes* test, we are asking: Is the objective (counter-terrorism) one that is pressing and substantial in a free and democratic society? Logically, we would tend to say "yes". But, there is no case law on point. However, a useful analogy can be found in the context of military discipline.

In most western democratic societies (where the rule of law is recognised), the armed forces of those societies are governed by internal disciplinary rules and procedures that civilian members of society are not subject to. In the case of New Zealand, this is through the Armed Forces Discipline Act 1971 and Defence Force Orders (Discipline). The idea is that an Armed Force must be disciplined so that it may execute its ultimate function of combat. At the same time, it must also be disciplined to maintain order within the service so that it does not abuse its power and threaten the very society it is designed to protect. On that basis, various additional rules apply to soldiers, some of which are said to infringe civil and political rights.

The question in that context is whether those limitations are justifiable. The first question is whether the objectives that are being sought to achieved by the objectives are sufficiently pressing and substantial objectives

in a free and democratic society. The military argues yes: in that the limitations that such the military disciplinary system imposes on its personnel are designed to maintain discipline and, with it, the operational effectiveness of the military.

Under this first limb of the *Oakes* test, case law has shown that the objectives of a military justice system are sufficiently important and relate to pressing and substantial concerns in a free and democratic society. The distinct nature and importance of discipline within the military has been recognised by the Supreme Court of Canada. For example, in *MacKay v Rippon* [1978] 1 FC 233, 235-236, Cattanach J commented:

> Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concentrated action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.
>
> This was quoted with approval by Lamer CJ in *Genereux v R* 1 SCR 259, 292.

Precedent exists, therefore, for the idea that at least some abrogation of due process rights can be tolerated in order to achieve important democratic objectives such as military discipline. It is not a large or illogical step to conclude that a similar approach would be taken when considering the objective of countering terrorism. The first limb of the *Oakes* test doesn't appear to pose any real difficulties. In fact, if we consider various statements of the UN SC and GA, it appears that such a link has already been made.

One of the more recent official discussions on the interrelationship between counter-terrorism and human rights is Resolution 54/164 (Human Rights and Terrorism, UNGA Res 54/164, 24 February 2000). It bears some persuasive value, in my view, due to the fact that it preceded the Sep 11 attacks and cannot therefore be criticised as being a knee-jerk reaction to that event. Within its preamble, the Resolution affirms that it is guided by the Charter of the UN and the Universal Declaration of Human Rights and the International Covenants on Human Rights. It reaffirmed the position (as adopted at the World Conference on Human Rights of 1993) that terrorism is aimed at the destruction of human rights, fundamental freedoms and democracy and gave examples of the latter, including the right to life and the creating of an environment that destroys the right of people to live in freedom from fear. Of particular importance to this paper, it condemns terrorist conduct as:

> activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States.

Adopting that categorisation of terrorism and applying it to the *Oakes* test, I think you will all agree that the objective of countering terrorism is one that relates to "concerns which are pressing and substantial in a free and democratic society".

Proportional means

The second limb of the test requires the particular means used to implement the objective in question to be proportional to the objective [not using a sledge hammer to squash an ant]. As discussed, *R v Oakes* (above) refers to three aspects:

1. the limiting measures must be carefully designed or rationally connected to the objective;
2. they must impair the right or freedom as little as possible;
3. their effects must not so severely trench on individual or group rights that the objective of the limitation, albeit important, is nevertheless outweighed by the restriction of the right or freedom concerned.

It is within the second limb of the test that the difficulty lies in setting down any broad "defence" for counter-terrorism. Although untested, some would argue (see *Public Submissions to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, 2002, Parliamentary Library) that provisions within the Terrorism Suppression Bill go beyond proportional means. As indicated, this is untested and I suspect that much will depend on the specific limitation in question, how it is put in place, and the particular circumstances of the case.

Prosecution

A further key aspect of the fight against terrorism, one that is reflected throughout the ODCCP Classification of Counter-Terrorism Measures, is prosecution. This is an enormous topic in itself and I would have liked to discuss it in more depth, but cannot do so due to time constraints. Two issues I would like to touch on, however, relate to the US Military Tribunals and the soon-to-be-established International Criminal Court.

US Military Tribunals

One question that arises in this context is this: Does the US have criminal jurisdiction over the perpetrators of this attack if, for example, they were outside the territorial jurisdiction of the State?

This is where the principle of universality would come into play. Universality provides that a State can assume criminal jurisdiction over an individual who violates a law deemed to be of great significance to the world community – i.e., crimes that are regarded as being serious enough to adversely affect the relations of nations, or abhorrent to all civilized nations. The rationale is that such criminals are to be regarded as *hostis humani generis* and that their offending constitutes a crime against all nations so that s/he may be tried and punished by any State which establishes control over them, regardless of nationality or where the crime was committed.

In view of the statements and condemnations made through the United Nations to which I have already referred, it seems clear that universal jurisdiction would apply.

Further support can be taken from comparisons that may be made between terrorism and "crimes against humanity", the latter being a clearly recognised category of crime to which universal jurisdiction is attached. Recognition of crimes against humanity is said to have been the greatest legacy of the Nuremberg Tribunal. The Tribunal recognised that there could be crimes so grave that they transcended national boundaries and would be viewed as crimes against civilisation. The definition of "crimes against humanity" given by the Nuremberg Tribunal is wider than that of "war crimes". Under the London Charter for the Nuremberg Tribunal crimes against humanity were defined as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with [crimes against the peace or war crimes] within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated

Alternatively one might categorise terrorism (depending on its scale) as a "war crime", which is also a crime attracting universal jurisdiction. Brigadier General Barnes (US), former Assistant Judge Advocate General to the US Army, has reasoned that the World Trade Centre attack is more closely aligned with a situation of armed conflict than a problem of civilian criminal law enforcement (Washington Institute Policy Forum paper, Barnes J.B., *Terrorists, Military Tribunals and the Constitution*, 6 December 2001). He believes that the current situation resides in a 'grey zone' between crime in the ordinary sense and war as classically understood and that the closest analogy is that of a crime committed by "unlawful belligerents within the context of an armed conflict" (a war crime).

Either way, it seems clear that the US can take jurisdiction. Whether it should is another, more controversial, issue. For what it's worth, I do not think that it should, although I suspect that part of the motivation behind establishment of the Military Tribunals (rather than a request for establishment of an International Tribunal) is an attempt to act consistently with its opposition to the International Criminal Court.

The International Criminal Court

Longer term, how should perpetrators of international terrorism be dealt with? The following provisions of the Draft Comprehensive Convention on International Terrorism are of relevance:

- Art 2 proposes to make it an offence to commit an act of terrorism.
- Art 4 will require States to establish the latter offence within domestic legislation, thus ensuring that jurisdiction and extradition issues will not present problems in the prosecution of terrorists.
- Art 5 further requires States to ensure that domestic legislation does not allow any defence of a political, philosophical, ideological, racial, ethnic, religious or similar nature. To that extent, the Draft

Convention does not tolerate the subjective element of a definition of terrorism (as previously discussed).

- Art 6 also requires specific steps to be taken to ensure jurisdiction.
- Of relevance to immigration and refugee matters, Art 7 requires parties to take appropriate measures to ensure that asylum is not granted to any person in respect of whom there are reasonable grounds indicating their involvement in any Art 2 offence.

The soon to be established International Criminal Court (ICC) may also hold a solution. On 17 July 1998, the Statute of the International Criminal Court in Rome (the Rome Statute) was adopted. It was heralded as a landmark in the development of the international legal system. As soon as 60 States have ratified the Rome Statute, the Court will be established as the first permanent international institution charged with applying and enforcing current international criminal law. As at 1 March 2002, 54 States ratified the Statute (NZ was the seventh State to do so).

It is suggested that the attacks on America emphasise the need for an International Criminal Court. This was a point made by a number of non-governmental organisations at an early stage following the atrocities, including the Coalition for an International Criminal Court and the Asian Forum for Human Rights and Development: see Asian Human Rights Commission Release, 12 September 2001. The Rome Statute lays down mechanisms for bringing perpetrators to justice, either within their own country or before the International Criminal Court itself. The ICC will have the ability to impose a range of potential penalties, including a maximum term of imprisonment of 30 years or a term of life imprisonment where this would be justified by the "extreme gravity of the crime and the individual circumstances of the convicted person" (Article 77(1))(b)).

An early criticism of the Rome Statute was the relatively limited class of crimes to come within the jurisdiction of the Court: Scott Davidson "the Rome Statute of the International Criminal Court" (1998) 4 HRLP 152, 156. The crimes specified to be within the ICC's jurisdiction are, in essence, the "Nuremberg list" (genocide, war crimes, crimes against humanity and aggression). More broadly, Article 5 provides that this jurisdiction is limited to "the most serious crimes of concern to the international community as a whole". On that basis, also considered for conclusion within the list during the drafting of the Statute was the crime of terrorism, but agreement could not be reached in this area. The author suspects that this is largely due to the controversy associated with the definition of "terrorism", as already alluded to.

However, does the Rome Statute need to include a specific crime of terrorism? Geoffrey Robertson points out, for example, that the existing definition of "crimes against humanity" and "war crimes" adequately cover terrorist conduct (The Guardian, 19 September 2001). As defined by the Rome Statute, crimes against humanity include systematic attacks directed against a civilian population involving acts of multiple murder. Terrorist conduct, whether taking the definition provided by the UN TSB or considering the recent US attacks, would clearly fall within that definition. Some countries might argue that the offence of "crimes against humanity" only applies to the conduct of States and not of non-governmental terrorist groups. That does not, however, appear to be the position of United Nations. In a press release on 25 September 2001, the UN High Commissioner for Human Rights expressly identified the recent terrorist attacks as "crimes against humanity".

Conclusion

Counter-terrorism presents varied and difficult public policy and legal issues. There must first be consensus on a global definition of terrorism, which presents great difficulty given the position taken by a number of members of the United Nations regarding the conduct of "freedom fighters". A parallel hurdle is filling the gaps left by the existing conventions on terrorism and ensuring global acceptance and implementation of those conventions. Considerable work is being done on that front by both the UN General Assembly and Security Council. Politics will likely play a very important role in the question of accession and implementation. New Zealand, at least, appears to be well on the way. In addition, and this is more by way of a warning than a perceived hurdle, the international community will need to be careful in defining the line between the war against terrorism and the continued protection of individual rights and freedoms, although it seems clear that mechanisms exist through which justifiable limitations can be assessed and put in place. The final, and equally important, hurdle will be in ensuring that we are sufficiently equipped to deal with the effective and just prosecution of alleged terrorists.

New Zealand's Legislative Response to the Attacks on 11 September 2001

Treasa Dunworth*

> Let us beware of falling, in our turn, into the trap of thinking our aim is so vital that even the worst of means can be used to reach it. That way, instead of preventing terrorism, I fear we would encourage it. Instead, let us ensure that our security measures are firmly founded in law. In defending the rule of law, we must ourselves be bound by law. As for justice, it must indeed be both the means and the end of our struggle against terrorism.
>
> Kofi Annan[1]

A. Introduction

This paper discusses the proposed legislative response in New Zealand to the attacks which happened in New York, Washington and Pennsylvania on 11 September last year. The discussion necessarily takes place in a much broader context in which a range of questions are being considered: how does/should the international legal system respond to terrorism? What role does the use of force have in the equation and if there is one, on what basis (self defence or SC mandated?) Are our rules about use of force, enshrined in the Charter since the end of WWII now being replaced in the light of the NATO war in Yugoslavia in 1999 and this new "war on terror" being waged in Afghanistan and further afield?

These are critical issues but the focus of this paper is much narrower. Here, I consider some central aspects of the proposed anti-terror legislation in New Zealand and discuss those in the light of New Zealand's international obligations. Accordingly, I start by providing a short overview of the way in which the Bill in its present form has come about. I then identify two problematic aspects of the Bill as it currently stands: the definition of 'terrorist act' and the procedure by which terrorist entities are to be so designated. The legislation has been justified on the basis of Security Council Resolutions 1373 (28 September 2001) and accordingly, my paper considers the content of that Resolution. Finally, I offer some observations about the legislation in the light of those Resolutions and in the light of New Zealand's other, and continuing, international obligations.

B. Historical overview

The Bill started life innocuously enough when it was presented to the House in April 2001 as the Terrorism (Bombings and Financing) Bill.[2] The purpose of the Bill was to implement in New Zealand the obligations which would arise under two international treaties: the International Convention for the Suppression of Terrorist Bombings (the Bombings Convention) and the International Convention for the Suppression of the Financing of Terrorism, (the Financing Convention).

The two treaties had been negotiated long before the events of last year triggered by the hijackings in September. They were the latest in a long line of treaties dealing with specific aspects of terrorism. Internationally, there have been efforts to draft a comprehensive treaty on terrorism, but as yet, agreement has not been reached.[3] Thus, these two treaties represented the latest incremental steps in dealing with terrorism. The primary obligation under the Bombings Convention was to create an offence of "terrorist bombing" and to

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1 SG/SM/8196, HR/CN/989, 12 April 2002 "Human Rights must not be sacrified to counter terrorism", statement made before the Commission on Human Rights in Geneva by Secretary-General Kofi Annan.

2 Terrorism (Bombings and Financing) Bill 2001, 121-1 tabled on 17 April 2001.

3 This issue is discussed at length in Alex Conte, "International Law and Terrorism A New Zealand Perspective" paper presented to this Conference.

legislate for the extradite or prosecute rule.[4] The Financing Convention requires its States Parties to create an offence of the financing of terrorism and again encapsulates the prosecute or extradite rule and incorporates provisions on mutual assistance matters.

At the time, the intention was to pass the Bill through the House and then to ratify the Financing Convention, which New Zealand had signed on 7 September 2000 and accede to the Bombings Convention. The treaties themselves had been presented to Parliament on 15 November 2000 in accordance with Standing Orders 384 and 385. The Foreign Affairs, Defence and Trade Committee presented its report to the House on 30 November noting it had nothing to bring to the attention of the House. In September 2001, the Bill was still with the Foreign Affairs, Defence and Trade Committee and was about to be reported back to Parliament. No submissions had been received on the Bill as it had then stood.[5]

In response to the Security Council Resolutions dealing with the attacks in the United States in September 2001, the government decided to amend the Bill as it then stood. When Resolution 1373 was passed, the decision was taken to make amendments to the Bill, without allowing for public submissions. Indeed, initially, the amended Bill was not publicly available.[6] However, in the face of fierce public opposition (or, as the Select Committee preferred to explain it, "public interest in the bill"), this position was quickly reversed, the amendments were made public and submissions were invited.[7] The Committee reported to Parliament on 3 March 2002, recommending a number of significant changes to the Bill. However, there was serious dissent within the Select Committee and in fact, Keith Locke (Alliance) sought, but was refused permission to table his "shadow report".[8] The Bill now awaits its second reading.[9]

C. Overview of the Bill

Running to 43 clauses, the Bill is certainly less extensive than its UK, USA or Canadian counterparts. Nevertheless, a thorough analysis of all of its provisions are beyond the scope of this paper and an overview of only two aspects will be considered here: the proposed definition of terrorist act (Clause 5 of the amended Bill), the procedure for designating terrorists (Clauses 17A-Z of the amended Bill).

(a) 'terrorist act'

Clause 5 of the Bill defines terrorist act as falling into any one of three possible categories. The first, and unproblematic in terms of a definition, is that contained in Clause 5(1)(b), which is that a terrorist act is one which is an "act against a specified terrorism convention". These are listed in Schedule 3 of the Act and include various specific terrorism conventions, such as the Bombings Convention, Suppression of Unlawful Seizure of Aircraft, and so on.

The second category of terrorist acts in Clause 5 is a terrorist act in armed conflict.[10] That term is further defined in Clause 4(1) and means an act which occurs in a situation of internal armed conflict, the purpose of which is to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act and with intention to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities.

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4 Articles 4 and 8 respectively.

5 Foreign Affairs, Defence and Trade Committee, "Interim report on the terrorism (Bombings and Financing) Bill", 8 November 2001 at 2.

6 "Govt limits say on anti-terrorism bill" *New Zealand Herald*, 31 October 2001, A6

7 Foreign Affairs, Defence and Trade Committee, "Report on the Terrorism (Bombings and Financing) Bill" March 2002 at 2.

8 Parliamentary Debates, 26 March 2002.

9 A point of clarification: the original name of the bill was the Terrorism (Bombings and Financing) Bill. One of the proposals by the Select Committee is to amend the name of the bill to the Terrorism Suppression Bill. However, for now, formally the name of the Bill remains unchanged.

10 Clause 5(1)(c).

The third category of terrorist acts in Clause 5 has caused the most concern among commentators and human rights activists. There are three legs to the definition. The first is that the act must be carried out for the purpose of "advancing an ideological, political, or religious cause". (Clause 5(2)). The second is that there must be an intention "to induce terror in a civilian population" (5(2)(a)) *or* "to unduly compel or to force a government or an international organisation to do or abstain from doing any act" (5(2)(b)). Finally, there must be an intention to cause one or more of five outcomes, which are set out in subsection 3. These are:

> (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):
>
> (b) a serious risk to the health or safety of a population:
>
> (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
>
> (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
>
> (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

Subsection (5) operates as a limit on all three categories of terrorist act. That subsection provides as follows:

> (5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person –
>
> (a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or
>
> (b) intends to cause an outcome specified in subsection (3).

A number of differences are apparent from the first proposal issued by the Select Committee for submissions. First, there was no requirement of inducing terror, but instead it was enough to "intimidate a population". Second, the standard in Clause 5(2)(a) has been raised to "unduly" compel. A third difference is the quite significant changes to the outcomes listed in subsection (3). Subsection (d) has been amended from simply requiring "serious interference with, or serious disruption to, an infrastructure facility in any country" and now reads "if likely to endanger human life". Similarly, (e) has been changed from "serious damage or serious disruption to the national economy of any country" to a much more specific and higher threshold. Finally, the savings in subclause (5) is phrased entirely differently.

The definition of 'terrorist act' becomes significant in the Bill for two reasons. First, because it feeds into the offences in clauses 9 (financing of terrorism) and 10 (dealing with property) and second, because of the consequences of being designated a terrorist.[11]

(b) designation procedure

The Bill envisages a system whereby the Prime Minister may designate an entity as a terrorist entity on an interim basis. This interim designation continues for a period of 30 days unless earlier revoked or it is made final.[12] Essentially, the Prime Minister has the power to make an interim designation if the Prime Minister has "good cause to suspect that the entity[13] has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts."[14] Prior to making the interim designation, the Prime Minister must consult with the Attorney-General[15] and the Minister of Foreign Affairs.[16]

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11 The details of Clauses 9 & 10 are not considered in this paper but they also raised concerns in the course of submissions particularly in relation to the mens rea requirements.

12 Clause 17B(e).

13 'entity' is defined in Clause 4 as "a person, group, trust, partnership, or fund, or an unincorporated association or organisation'. Thus, a single person can be a terrorist entity.

14 Clause 17A(1). This is the version as recommended by the Select Committee. The first proposal had no 'knowingly' threshold.

15 In the first version of the amended Bill, there was no requirement to consult with the Attorney-General.

Final designation is made by the Prime Minister if the Prime Minister "believes on reasonable grounds" that an entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts."[17] Final designation may be made even where there is or has been no interim designation in place.[18] Prior to the designation, the Prime Minister must consult with the Attorney-General.[19] Final designation continues for three years, unless earlier revoked.

In making either an interim or a final designation, the Prime Minister "may take into account any relevant information, including classified security information."[20] "Classified security information" is defined in Clause 17L as information about threat to security etc "that, in the opinion of the head of the specified agency, cannot be divulged to the entity in question". In other words, those being designated may not necessarily know on what basis that designation is being made. By virtue of Clause 17K, if the Security Council (or Committee established by it) acting under Chapter VII resolves that an entity is a terrorist entity then, "in the absence of evidence to the contrary", that is sufficient evidence on which to base a designation.

A number of procedural requirements are imposed on both types of designation.[21] Further, both designations are subject to judicial review.[22] This is a significant amendment from the first proposal which specifically excluded any right of judicial review in respect of designations made on the basis of classified security information.[23] As mentioned earlier, final designation remains in force for three years, unless earlier revoked. Before the expiry of that time, the Attorney General may apply to the High Court for three year extensions.

There are a number of consequences of designation, which primarily involve suspension of property rights. Ultimately, the Attorney General can apply to the High Court for an order that property is forfeited to the Crown.

D. The Security Council Resolutions

In response to the hijackings, the United Nations Security Council passed three resolutions: 1368(2001) on 12 September, 1373(2001) on 28 September and 1378(2001) on 14 November 2001.[24] Although all three resolutions are cited in support of various anti-terrorist measures that have been adopted since September, Resolution 1373(2001) has become the main justification for anti-terrorist legislation around the world. No doubt the Resolution will be the subject of detailed analysis among international lawyers for some time to come, in particular as to whether and if so to what extent and on what basis, the Council authorised the use of force in Afghanistan.[25] However, the Resolution must also be examined in the light of assertions in New Zealand and elsewhere that it *requires* anti-terrorism legislation in the terms proposed.

Much has been made of the fact that the Security Council, in passing all three Resolutions, was acting pursuant to its powers under Chapter VII of the United Nations Charter. For example the Committee on Foreign Affairs,

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16 Clause 17A(4).

17 Clause 17C(1). This is the version as recommended by the Select Committee. The first proposal had no 'knowingly' threshold.

18 Clause 17D(a).

19 Clause 17C(4). In the first proposal, consultation was with the Minister of Foreign Affairs.

20 Clause 17I. It's Clause 17E in the original amended Bill. 'classified security information' is further defined in Clause 17K of the current text.

21 Clause 17B. Such as the designation must be made in writing and must be publicly notified "as soon as practicable" after the designation and advise the Leader of the Opposition.

22 Clause 17LA.

23 Clause 17O(2)&(3) of the first proposal. There was limited rights for review by the Inspector General, which could then be appealed on a point of law to the Court of Appeal with its consent. See Clauses 17N-U of the original amendments.

24 Available at: http://www.un.org/Docs/scres/2002/sc2002.htm.

25 See for example, Carsten Stahn, "Security Council Resolutions 1368(2001) and 1373(2001): What They Say and What They Do Not Say" available at www.ejil.org/forum_WTC

Defence and Trade, in releasing the amended Bill for submissions, noted that the "resolution was adopted by the Security Council acting under its powers under Chapter VII of the UN Charter and, as such, is binding on all members of the United Nations" (*Interim report*, 8 November 2001, p 2). Article 25 of the UN Charter provides that the "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

It is both politically and legally significant that the Security Council has acted under Chapter VII. Its legal significance lies in the fact that a resolution under Chapter VII paves the way for a subsequent authorisation to use force. It is also significant because it is binding on Member States. It is politically significant because by acting under Chapter VII, the Security Council determines that a threat to international peace and security exists and thus, its subsequent decisions ought to be dealt with as a matter of priority.

That states are expected to deal with the matters raised by the Resolution as a matter of priority is also evident from the text itself. The seventh preambular paragraph calls on states:

> ... to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism

In paragraph 1(c), the Council decides that all states shall:

> Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; ...

In paragraph 3(d), the Council calls upon all states to:

> Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999

Finally, in paragraph 6, the Council establishes a Committee to monitor implementation of the resolution and calls upon all states to report to the Committee:

> no later than 90 days from the date of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution

Thus, the sense of immediacy cannot be denied. However, the urgency claimed by the government, such that the normal legislative safeguards are being overridden, is seriously over-stated. Although the government retracted from its initial position that there should not be public submissions at all, the speed with which the process has been undertaken is completely inappropriate given the enormity of the powers being conferred on the Prime Minister. Contrary to the Select Committee's assertion that the three-week timeframe for written public submissions constituted an appropriate balance between competing interests, such a short period of time is not appropriate in the light of the proposals. In any event, the Resolution itself does not support such an approach. The wording of paragraph 6 in particular indicates, not that states are expected to have all actions completed within the specified 90 day period, but that states should report on those steps that have been taken within that time. The reference to a future timetable supports this interpretation as it suggests that anti-terrorist measures would continue to be developed.

At the time the Resolution was passed, the implementing legislation for both the Financing Convention and Bombing Convention had completed all parliamentary procedures. Thus, it would have been entirely appropriate to fast track that legislation, which would have allowed New Zealand to ratify the Financing Convention and accede to the Bombings Convention. As it is now, those unproblematic provisions have been caught up in the wider debate, thereby preventing New Zealand from taking these more mundane but necessary steps. Further, a thorough review of the actual requirements of the Resolution and existing legislation could have been commenced immediately.

As mentioned earlier, one of the most contentious aspects of the Terrorism Bill is the way in which 'terrorist act' is defined in Clause 5. The Resolution itself, while it uses the term 'terrorist act', does not offer a definition. This is not surprising given that the international community has been attempting to agree on a definition for some time without success. In fact, the lack of agreement on a definition has been a key obstacle to concluding

an international treaty on terrorism.[26] Thus, contrary to the implications in the reports of the Select Committee, the Bill is not adopting an internationally agreed formulation or understanding of the term 'terrorist act'. Instead, the Bill appears to be modelled on Canadian and United States' legislation – which are also the subject of intense domestic criticism.

Although understandable, the lack of a definition in the Resolution is problematic. While it may be acceptable for a political body such as the Security Council to draft such a general text, the requirements of clarity and precision in domestic legislation demand a translation from political rhetoric to legal precision. It is precisely the difficulty, if not the impossibility, of such an exercise that makes it imperative to draft such legislation cautiously and with all deference to normal parliamentary safeguards.

Much of the Resolution recalls existing international legal obligations and calls upon member states to work together to combat terrorism. Paragraphs 1, 2 and 3 set out the specific actions that states are to take in complying with the Resolution. A close analysis of those provisions reveals that many of the requirements are already provided for in existing treaties. For example, operative paragraph 1 of the Resolution requires all states to prevent and suppress the financing of terrorist acts; criminalise funding of terrorist acts; freeze funds and assets of terrorist persons or entities and prohibit the making available of funds or financial services to terrorist persons or entities. A great deal of this is already provided for in the Financing Convention and, in New Zealand, would have been covered under the original legislation.

There are aspects of the Resolution, including operative paragraph 1 which do constitute new obligations. One example is the very broad scope of the directive in paragraph 1(c) whereby states are required to:

> Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

It seems very likely that legislative amendment is required if the obligation is to be implemented in New Zealand law. However, given its obvious complexity and sweeping terms, legislation should not be attempted without proper consultation and procedures.

In the face of such sweeping requirements (and there are other similar examples in the Resolution), consideration must also be given to the legality of the Resolution itself. As a sovereign state, New Zealand must take into account its existing international obligations in honouring its obligations under the United Nations Charter. Thus, protections offered by virtue of a range of international human rights treaties would need to be taken into account and honoured in putting in place any domestic system implementing this provision. To adopt any other view would be to suggest that the Security Council has the authority to act outside the law. While it is arguable (though not clear) that there is no means to review or challenge the legality of the acts of the Security Council and that therefore acts of the Council cannot be considered illegal, the better and more generally accepted view is that the Council must operate within international law. Thus, it can neither authorise illegal action nor be used as a justification for such unlawful action. This view is borne out by the terms of the Resolution itself. The preambular paragraph refers to the need to take action "through all lawful means". There are a number of references in the operational text to the need to act in conformity with international and domestic law (in particular paras. 3(b), 3(f) and 3(g)).

E. Conclusions

The New Zealand experience with the anti-terrorist legislation demonstrates that the international treaty examination process that continues to evolve, offers no iron-clad guarantees of more democratic international lawmaking. The amendments to the Terrorism Suppression Bill came about on account of a Security Council Resolution, and so there was never any question that the Resolution fell within the Standing Orders. Yet New Zealand is bound to implement its terms. Thus, a Security Council resolution has far more potential than a treaty, particularly one that is not yet ratified, to intrude on internal lawmaking. This is not to suggest that New

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26 There is a range of treaties in force related to specific aspects of terrorism, but no single comprehensive text. For more detail, see Alex Conte, supra at note 4.

Zealand should not meet its obligations under the UN Charter, but rather to point out that a treaty examination process, no matter how formalised and expansive, is no panacea.

The process by which the Bill has come about demonstrates that our more traditional legislative checks and balances will thus continue to be important. If New Zealand is seriously interested in being the "good international citizen" then the obvious starting point is to work within our existing international and domestic obligations. Or, to return to the quote which opens this paper 'in defending the rule of law, we must ourselves be bound by law'.

Australia's Legislative Response to September 11: Australia's Counter-Terrorism Legislative Package

Sue McIntosh*

Introduction

Following the September 11 terrorist attacks in the United States Mr Robert Cornall, the Secretary of the Attorney-General's Department, was tasked with the responsibility of conducting a high level review of Australia's security and counter-terrorism arrangements.

In addition on 28 September 2001, the United Nations Security Council adopted Resolution 1373 which called upon all States to become parties as soon as possible to the international conventions and protocols relating to terrorism. This resolution followed on from Resolution 1368 of 12 September 2001. Resolution 1368 called on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular 1269 of 19 October 1999. Resolution 1269 called for States to implement fully terrorist conventions to which they were parties, encourage States to give priority to considering adhering to those conventions to which they were not parties and encouraging the speedy adoption of pending conventions.

Two of the Bills in the package, the Suppression of Terrorist Financing Bill and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill, implement 2 of the remaining 3 terrorism conventions that Australia had not yet implemented. A list of the terrorism conventions and the domestic legislation implementing the conventions is at Attachment A.

The Bills in the package are:

- Security Legislation Amendment (Terrorism) Bill 2002;
- Suppression of the Financing of Terrorism Bill 2002;
- Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002;
- Telecommunications Interception Amendment Bill 2002;
- Border Security Legislation Amendment Bill 2002; and
- Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

The Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002 has already been passed by the Australian Parliament.

The Bills were referred to the Senate Legal and Constitutional Legislation Committee. The Committee reported on the Bills other than the ASIO Bill on 8 May and the Attorney-General issued a press release on 4 June outlining the Government's proposed response to the Committee's recommendations. The Committee's recommendations and Attorney-General's press release are at Attachment B.

The ASIO Bill was referred to both the Parliamentary Joint Committee on ASIO, ASIS and DSD and the Senate Legal and Constitutional Legislation Committee. The Parliamentary Joint Committee reported on 5 June and the Senate Committee is expected to report shortly. The recommendations of the Parliamentary Joint Committee are at Attachment C.

In addition to the Commonwealth's legislative package, work has begun on augmenting Australia's capacity to deal with terrorism in cooperation with the States and Territories. An outline of that work is at Attachment D.

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Discussion of the Bills that make up the package

Security Legislation Amendment (Terrorism) Bill 2002

This Bill is the key to the package. It:

- creates a new offence of terrorism and a range of related offences all of which have a maximum penalty of life imprisonment;
- modernises Australia's treason offence; and
- creates a regime for the Attorney-General to proscribe organisation that have terrorist links and to make membership or other specified links with such an organisation an offence.

Terrorism offences

Broadly, the Bill defines 'terrorist act' as an act or threat of action done with the intention of advancing a political, religious or ideological cause. The act or threat of action must also: involve serious harm to a person; endanger a person's life, involve serious harm to property, create a serious risk to the health or safety of the public; or seriously interfere with, disrupt or destroy an electronic system.

The terrorism offences created by the Bill are:

(i) engaging in a terrorist act;

(ii) providing or receiving training for a terrorist act;

(iii) directing organisations concerned with a terrorist act;

(iv) possessing things connected with a terrorist act;

(v) collecting or making documents likely to facilitate a terrorist act; and

(vi) acts in preparation for, or planning, a terrorist act.

With the exception of the offence of engaging in a terrorist act, it is not necessary for a terrorist act to actually occur for a person to be prosecuted for a terrorism offence.

In the Bill as introduced, the onus of proof has been reversed for the offences dealing with training for a terrorist act, possessing things connected with a terrorist act and collecting or making documents likely to facilitate a terrorist act.

The effect of this is that the defendant would bear the burden of proving that weapons training they received was not connected with the preparation for, the engagement of a person in or assistance in a terrorist act.

Treason

The Bill modernises and broadens the existing Australian treason offence. The amendments are designed to ensure that the offence of treason reflects the realities of modern conflict.

The existing offence is outdated in a number of respects, most notably relying on a formal declaration of war before the treason offence can apply. However, modern conflicts do not necessarily involve a declared war against a proclaimed enemy.

A new limb has been added to the treason offence under which it will be treason to engage in conduct that assists by any means whatever, with the intent to assist, another country or an organisation that is engaged in armed hostilities with the Australian Defence Force. This broadens the existing treason offence by ensuring that it applies not only when Australia is "at war" but also when Australia is engaged in armed hostilities that do not constitute a formally declared war.

It also removes the need for an enemy to be proclaimed and makes it clear that hostilities can involve a foreign organisation rather than a foreign country. This will ensure the offence covers situations where Australian forces are in conflict with a regime that is not a recognised government, or with non-government groups such as terrorist organisations. The maximum penalty for treason remains life imprisonment.

Proscribed organisations

The Bill also contains provisions to allow the Attorney-General to declare one or more organisations to be proscribed organisations.

Once an organisation has been proscribed, it will be an offence to:

(i) direct the activities of a proscribed organisation;

(ii) directly or indirectly receive funds or make funds available to the organisation;

(iii) be a member of the organisation;

(iv) provide training to, or train with, the organisation;

(v) assist the organisation.

To proscribe an organisation the Attorney-General must be satisfied on reasonable grounds that the organisation:

- has a specified terrorist connection; or
- has endangered or is likely to endanger the security or integrity of the Commonwealth or another country.

Declarations will have to be notified in the government gazette and major newspapers. Defences to a prosecution under the new provisions will be available. For example, it will be a defence if the defendant proves a lack of any personal knowledge or recklessness as to the organisation's activities.

Similarly, it will be a defence if the defendant proves that he or she took immediate steps to terminate membership of a proscribed organisation as soon as practicable after it was proscribed.

Suppression of the Financing of Terrorism Bill 2002

Financing is integral to organised terrorist activity and influences both the extent and the seriousness of those activities. The terrorist acts of 11 September 2001 were carried out by a well-financed and highly organised terrorist network.

The measures in the Suppression of the Financing of Terrorism Bill will operate to prevent the movement of funds for terrorist purposes. It will ensure that law enforcement authorities are able to detect and prevent transactions relating to terrorist activity. The Bill will also enhance the exchange of financial transaction reports information with other countries.

The measures in the Bill implement obligations under United Nations Security Council Resolution 1373 and the International Convention for the Suppression of the Financing of Terrorism. The Bill creates a new offence directed at persons who provide or collect funds and are reckless as to whether those funds will be used to facilitate a terrorist act. The maximum penalty for the offence will be imprisonment for life. The offence implements Article 2 of the Convention and paragraph 1(b) of the Security Council Resolution.

The Bill will also amend the *Financial Transactions Reports Act 1988* to require financial institutions, insurers, securities dealers, trustees and other cash dealers to report suspected terrorist-related transactions to the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC). Cash dealers are currently required to report other types of suspicious transactions.

The procedures for the disclosure of financial transaction reports information to foreign countries will be significantly streamlined by enabling AUSTRAC, the Australian Security Intelligence Organisation and the Australian Federal Police to disclose information directly to foreign countries and foreign law enforcement and intelligence agencies. Conditions governing disclosure will safeguard privacy and confidentiality and ensure that the information is used only for proper purposes. In addition, the Bill will introduce offences for using or dealing with the assets of persons and entities involved in terrorist activities and making assets available to those persons or entities. A maximum penalty of 5 years imprisonment will apply to the offences, which implement Security Council Resolution 1373.

Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002

One highly visible form of terrorist activity is terrorist bombings. The international community has taken action with regard to terrorist bombing in the form of the International Convention for the Suppression of Terrorist Bombings. The Convention seeks to enhance international cooperation in devising and adopting effective practical measures for the prevention of acts of terrorism and the prosecution and punishment of their perpetrators.

The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 will enable Australia to accede to the Convention.

The Bill establishes offences which make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss.

'Explosive or other lethal device' is defined broadly, adopting the definition in the Convention. An explosive or lethal advice includes an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage. This means that the Bill will apply not only to bombings in the conventional sense, but also to acts such as the attacks on the World Trade Centre and the Pentagon on 11 September 2001.

To reflect the severity of these offences, they will attract a maximum penalty of life imprisonment.

Telecommunications Interception Amendment Bill 2002

To further assist in the investigation of terrorist offences, the Telecommunications Interception Amendment Bill 2002, in part, provides that telecommunications interception warrants may be sought in relation to the investigation of terrorist offences.

Under the *Telecommunications Interception Act 1979*, interception warrants may be issued to declared law enforcement agencies in connection with the investigation of class 1 or class 2 offences. Class 1 offences currently include murder, kidnapping and equivalent offences.

The Bill amends the Interception Act to expressly include the new terrorist offences as Class 1 offences. The amendments recognise offences involving terrorism as falling within the most serious class of offences for which interception warrants are available.

Border Security Legislation Amendment Bill 2002

A further element of the package involves the protection of Australia's borders. The Border Security Legislation Amendment Bill 2002 contains amendments to a range of Customs activities that contribute to the security of Australia's borders.

The amendments deal with border surveillance, the movement of people, the movement of goods and the controls Customs has in place to monitor this activity. The Bill contains a number of amendments to existing legislation, some of which are more significant than others for present purposes.

Some of the more significant proposals include a requirement for international airline operators to allow Customs access to information about passengers in their computerised reservation systems. This will help Customs to better identify high risk passengers who need further assessment on arrival. Penalties will apply where shipping companies and airlines do not comply with all the reporting requirements.

In keeping with the need to closely monitor activities at airports these amendments will also provide Customs with the authority to obtain information about people who work in the secure and restricted areas of international airports. Employers will be required to provide Customs with details, such as name, address and date and place of birth, of new employees commencing work in these areas. Authorities who issue aviation security identification will also be required to provide details when these identities are issued or renewed.

To assist with monitoring the movement of goods across our borders it is proposed to make reporting of in-transit goods that pass through Australian ports or airports mandatory. The amendments will also provide a power to seize, under warrant, in-transit cargo which is connected with a terrorist act or prejudices Australia's defence or national security or international peace and security.

Collectively, these amendments will allow Customs to make a more significant contribution to protecting Australia's borders.

Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002

Terrorist activity doesn't just involve large scale activities such as bombings. It can also include small scale activities designed to disrupt the normal life of a community.

The Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002 received the Royal Assent on 4 April 2002. The Act introduces new offences directed at the use of postal and similar services to perpetrate hoaxes, make threats and send dangerous articles. This is aimed directly at those who attempt to cause disruption and spread fear by sending dangerous (or apparently dangerous) articles through the post. The sending of anthrax powder and substances designed to look like anthrax powder through the post in the period immediately after September 11 is an example of this.

The new offences modernise the existing law dealing with misuse of the post and increase the penalties available to properly reflect the seriousness of the conduct involved. The amendments also ensure that the offences cover the use of all postal and other like services. Services which are covered include commercial courier services and parcel and packet carrying services.

The new anti-hoax offence carries a maximum penalty of 10 years imprisonment. Using a postal or similar service to make threats is punishable by 10 years imprisonment in the case of a threat to kill, and 7 years for a threat to cause serious harm. A penalty of 10 years imprisonment applies to the sending of dangerous articles.

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

Of course, in order for new terrorism offences to be successfully prosecuted, terrorist activities have to be identified and investigated. The Australian Security Intelligence Organisation Legislation Amendment Bill 2002 is designed to enhance the investigative powers of the Australian Intelligence Security Organisation (ASIO).

The Bill will empower ASIO to seek a warrant which allows the detention and questioning of persons who may have information important in relation to terrorism offences. This extends to persons who are not themselves engaged in terrorist activities, but who may have relevant information.

With the permission of the Attorney-General, ASIO will be able to seek a warrant from a 'prescribed authority' to detain and question a person for a period of up to 48 hours. A 'prescribed authority' will either be a Federal Magistrate or a senior legal member of the Administrative Appeals Tribunal. Questioning will take place before the prescribed authority in accordance with the conditions of the warrant. Persons detained will be held by the police in accordance with the conditions of the warrant.

Under the proposed legislation, it will be an offence:

(i) not to appear before a prescribed authority;

(ii) to fail to give information requested in accordance with that warrant;

(iii) to knowingly make a materially false or misleading statement in purported compliance with a warrant; or

(iv) to fail to produce any record or thing requested in accordance with the warrant, unless the person can prove that he or she does not have the record or thing.

These offences will attract a maximum penalty of 5 years imprisonment.

A person may not refuse to answer a question or produce a record or thing on the ground that it might incriminate them. Anything said or any record or thing produced may be used in evidence in a proceeding for a terrorism offence, or an offence relating to failing to comply with the warrant.

With these significant new powers comes the need to ensure that safeguards are in place to protect against the abuse of the powers. The Bill includes a number of safeguards. Here are some of the more significant ones:

- The Director-General of Security must seek the consent of the Attorney-General to seek a warrant from a prescribed authority. The Attorney-General will only give his consent if satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important to a terrorism offence and that reliance by ASIO on other methods of collecting the intelligence would be ineffective.
- A prescribed authority may only issue a warrant if satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important to a terrorism offence.
- Any questioning must take place before a prescribed authority.
- An interpreter must be made available if necessary.
- The terms of the warrant may allow the person to make contact with others, including a legal adviser.

- When a person first appears before a prescribed authority, the prescribed authority must explain what the warrant authorises ASIO to do, the period the warrant is to be in force and the possibility of facing criminal sanctions if the person does not cooperate. The prescribed authority must also explain to the person their right to communicate with the Inspector-General of Intelligence and Security or the Ombudsman if they wish to complain about ASIO or the Australian Federal Police.
- Any person taken into custody or detained must be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.
- ASIO is required to video make a recording of any appearance before a prescribed authority or any other matter that the prescribed authority directs.
- The Attorney-General will receive a report from ASIO on each warrant.

Attachment A

International Instruments Concerning Terrorism to which Australia is a Party & Domestic Implementing Legislation

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963)

Convention entered into force on 4 December 1969. Convention deposited with the International Civil Aviation Organization (ICAO).

Australia did not sign Convention, but deposited an instrument of accession on 22 June 1970 with an effective date of 20 September 1970.

Convention obligations implemented under the *Crimes (Aviation) Act 1991*.

2. Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970)

Convention entered into force on 14 October 1971.

Convention deposited with ICAO.

Australia signed the Convention on 15 June 1971.

Australia ratified the Convention on 9 November 1972.

Implemented under the *Crimes (Aviation) Act 1991*, covering the hijacking of a civilian aircraft.

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971)

Convention entered into force on 26 January 1973.

Convention deposited with ICAO.

Australia signed the Convention on 12 October 1972.

Australia ratified the Convention on 12 July 1973.

Implemented under the *Crimes (Aviation) Act 1991*, covering attacks against a person on board a civilian aircraft in flight or against the aircraft itself which would endanger the aircraft.

4. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 1988)

Supplementary Protocol to above Convention.

Protocol entered into force on 6 August 1989.

Protocol deposited with ICAO.

Australia did not sign the Protocol, but deposited an instrument of accession on 23 October 1990, with an effective date of 22 November 1990.

Implemented under the *Crimes (Aviation) Act 1991*, covering attacks against a person at an international airport which causes or is likely to cause serious injury or death, or attacks against the facilities of or aircraft located at an international airport, which endanger or is likely to endanger safety at that airport.

5. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 1988)

Convention entered into force on 1 March 1992.

Convention deposited with the International Maritime Organization (IMO).

Australia did not sign Convention, but deposited an instrument of accession on 19 February 1993, with an effective date of 20 May 1993.

Implemented under the *Crimes (Ships and Fixed Platforms) Act 1992*, covering the hijacking of a civilian ship, or attacks against a person on board a ship or the ship itself in a manner likely to endanger the safe navigation of that ship; or deliberately endangering shipping generally through sabotage or misinformation.

6. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 1988)

Supplementary Protocol to above Convention.

Protocol entered into force on 1 March 1992.

Protocol deposited with the IMO.

Australia did not sign Convention, but deposited an instrument of accession on 19 February 1993, with an effective date of 20 May 1993.

Implemented under the *Crimes (Ships and Fixed Platforms) Act 1992*, covering the hijacking of a fixed platform, or attacks against a person on board a fixed platform or the fixed platform itself in a manner which is likely to endanger its safety.

7. Convention on the Physical Protection of Nuclear Material (Vienna, 1980)

Convention entered into force on 8 February 1987.

Convention deposited with the International Atomic Energy Agency (IAEA).

Australia signed Convention on 22 February 1984.

Australia ratified the Convention on 22 October 1987.

Implemented under the *Nuclear Non-Proliferation (Safeguards) Act 1987*, covering the mishandling nuclear material in a way likely to cause death or serious injury to any person or substantial damage to property, obtaining nuclear material illegally, or threatening to use nuclear material to cause death or serious injury to any person or substantial property damage.

8. International Convention against the Taking of Hostages (New York, 1979)

Convention entered into force on 3 June 1983.

Convention deposited with the United Nations.

Australia did not sign the Convention, but deposited an instrument of accession on 21 May 1990.

Implemented under the *Crimes (Hostages) Act 1989*, covering the taking of hostages in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

9. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 1973)

Convention entered into force on 20 February 1977.

Convention deposited with the United Nations.

Australia signed the Convention on 30 December 1974.

Australia ratified the Convention on 20 June 1977.

Implemented under the *Crimes (Internationally Protected Persons) Act 1976*, covering attacks upon the person or official premises or the means of transport of an internationally protected person likely to endanger his life, person or liberty (ie, head of State or Government, a visiting Minister for Foreign Affairs, as well as members of his family who accompany the person, any representative or official of a State or any official or other agent of an international organisation of an intergovernmental character).

International Instruments to which Australia is not a Party

10. International Convention for the Suppression of the Financing of Terrorism (New York, 1999)

Convention has not yet entered into force.

Convention deposited with the United Nations.

Australia signed the Convention on 15 October 2001.

Convention open for signature until 31 December 2001.

The Convention will be implemented by the Suppression of the Financing of Terrorism Bill 2002.

11. International Convention for the Marking of Plastic Explosives for the Purposes of Detection (Montreal, 1991)

Convention entered into force on 21 June 1998.

Convention deposited with ICAO.

Australia has not signed or acceded to this Convention.

12. International Convention for the Suppression of Terrorist Bombings (New York, 1997)

Convention entered into force on 23 May 2001.

Convention deposited with the United Nations.

Australia did not sign this Convention, however accession is currently being progressed.

This Convention will be implemented by the Criminal Code Amendment (Terrorist Bombings) Bill 2002.

NB – the Convention on the Safety of United Nations and Associated Personnel has not been formally included on this list as it is not strictly counter-terrorist in nature. This is consistent with the approach adopted by the United Nations Secretary General who maintains a list of twelve counter-terrorism Conventions, exactly as above. This Convention is deposited with the United Nations and entered into force on 15 January 1999. Australia signed the Convention on 22 December 1995 and ratified it on 4 December 2000.

Attachment B

Senate Legal and Constitutional Legislation Committee

Inquiry into the Security Legislation Amendment (Terrorism) Bill and Related Bills

RECOMMENDATIONS

Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]

Recommendation 1

The Committee recommends that proposed section 80.1 in the Bill be amended so that the terms "conduct that assists by any means whatever" and "engaged in armed hostilities" are defined, in order to ensure that the humanitarian activities of aid agencies are not caught within the ambit of the offence of treason.

Recommendation 2

The Committee recommends that the definition of "terrorist act" in proposed section 100.1 in the Bill be amended to include a third element, namely that the action or threat of action is designed to influence government by undue intimidation or undue coercion, or to unduly intimidate the public or a section of the public.

Recommendation 3

The Committee recommends that:

(i) the Bill be amended to remove proposed sections 101.2(2), 101.4(2) and 101.5(2), which impose absolute liability in respect of certain elements of those offences; and

(ii) the offences in proposed sections 101.2(1), 101.4(1) and 101.5(1) be amended to provide that they are committed if the person knew or was reckless as to the required element in 101.2(1)(b), 101.4(1)(b) and 101.5(1)(b).

Recommendation 4

The Committee recommends:

(i) that proposed Division 102 in the Bill in relation to the proscription of organisations with a terrorist connection not be agreed to; and

(ii) that the Attorney-General review the proscription provisions with a view to developing a statutory procedure which:
- does not vest a broad and effectively unreviewable discretion in a member of the Executive;
- restricts the proposed ground under which an organisation may be proscribed if it has endangered or is likely to endanger the "security or integrity" of the Commonwealth or any country, by defining "integrity" as meaning "territorial integrity";
- provides detailed procedures for revocation, including giving a proscribed organisation the right to apply for review of that decision;
- provides for adequate judicial review of the grounds for declarations of proscription;
- more appropriately identifies and defines the proposed offences in relation to proscribed organisations, particularly in relation to the offence of "assisting" such an organisation; and
- does not create offences with elements of strict liability, given the very high proposed penalties.

Telecommunications Interception Legislation Amendment Bill 2002

Recommendation 5

The Committee recommends that the Attorney-General review the current law on access to stored communications of delayed messages services with a view to amending the Telecommunications Interception Legislation Amendment Bill 2002 so that the accessing of such data requires a telecommunication interception warrant.

Suppression of the Financing of Terrorism Bill 2002

Recommendation 6

The Committee recommends that proposed section 103.1 in the Suppression of the Financing of Terrorism Bill 2002 be amended so that the financing of terrorism offence includes an element of intent.

Recommendation 7

The Committee recommends that:

(a) provision be made, either by way of an amendment to the Suppression of the Financing of Terrorism Bill 2002 or under regulations, that before any decision is taken to freeze assets in respect of a proscribed person or entity, the Australian Federal Police set an appropriate course of action in consultation with the relevant financial institution or institutions before any asset is frozen; and

(b) once action has been taken to freeze an asset, the owner of assets must be advised in writing as soon as possible and their rights and obligations explained.

4 June 2002 56/02

Counter-terrorism Package

The Government has finalised its amendments to the counter-terrorism package of legislation following the report of the Senate Legal and Constitutional Legislation Committee.

This very important legislation will provide our security and law enforcement agencies with the tools they need to combat terrorism.

The horrifying events in the United States last September drew Australia, and the rest of the world, into a new and largely unpredictable security environment.

It is crucial that we are able to identify, prevent and, if necessary, punish those who would harm, or threaten to harm, to our families, our friends and our communities.

In developing this legislation, the Government has been conscious of the need to protect our community from the threat of terrorism without unfairly or unnecessarily encroaching on the individual rights and liberties that are fundamental to our democratic system. We think the legislation does just that.

It is important that we get this legislation right. The amendments reflect extensive and considered deliberation of the legislation by the Senate Legal and Constitutional Affairs Committee and discussions with Coalition members and senators.

The counter-terrorism package considered by the Committee is comprised of the Security Legislation Amendment (Terrorism) Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Suppression of the Financing of Terrorism Bill 2002; Border Security Legislation Amendment Bill 2002; and the Telecommunications Interception Legislation Amendment Bill 2002. On the whole the Committee's recommendations are reflected in the proposed Government amendments.

The Government's amendments include:

- Amending the definition of 'terrorist act' to include the additional element of intended intimidation or coercion;
- Removing the limited reversal of the onus of proof, which requires the defendant to disprove fault, from the offences of possessing a 'thing' connected with a terrorist act and collecting or making a document connected with a terrorist act, and the maximum penalty for these offences being lowered to 15 years' imprisonment;
- Replacing the reverse onus terrorist training offence with three different levels of offence carrying different fault elements of negligence, recklessness and knowledge and carrying graduated penalties from 10 to 25 years' imprisonment;

- Replacing the existing 'proscribed organisation' provisions with a new definition of 'terrorist organisation' as:
    - an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act; or
    - an organisation that the Security Council of the United Nations has decided is an international terrorist organisation, and a regulation has been made listing an organisation as such; or
    - an organisation that is listed by regulation as a terrorist organisation, based on evidence of the organisation's terrorist activities.

An organisation would only be treated as a terrorist organisation for the purpose of the latter two limbs of the definition once the parliamentary disallowance period has passed. Regulations made under these two limbs will sunset two years after they are made unless the regulations are remade.

- Adding a new section detailing offences relating to terrorist organisations, carrying graduated penalties for negligence, recklessness and knowledge. These offences cover activities including directing the activities of terrorist organisations, recruiting for them, training with them or supporting their activities. In the case of membership of an organisation, only the 'knowledge' offence would be available. Further, a person can only be found guilty of being a member of a terrorist organisation if the prosecution first proves in a court that the organisation is a terrorist organisation in accordance with the first limb of the definition (see above). The prosecution will not be able to rely on a regulation made under either the second or third limbs of the definition in prosecuting people alleged only to be members of a terrorist organisation. The membership offence will also be subject to the defence that the person took all reasonable steps to cease to be a member as soon as practicable after the person knew the organisation was a terrorist organisation;
- Providing for a review of the terrorism package of legislation by the Parliamentary Joint Committee on ASIO after three years;
- Amending the treason offence to include a defence that a person's conduct relates to the provision of humanitarian aid;
- Ensuring that it is clear that the fault element of intention in the financing of terrorism offence is fully explained as applying to the provision or collection of funds;
- Provide for regulations setting out procedures for the freezing of assets and for notifying those whose assets are frozen; and
- Excluding the financing of terrorism offences from the definition of "political offence" in the *Extradition Act 1988* and, by reference, the *Mutual Assistance in Criminal Matters Act 1987* to implement Article 14 of the International Convention for the Suppression of the Financing of Terrorism.

The Government will not be adopting the Senate Committee's recommendations in relation to the *Telecommunications (Interception) Act 1979* provisions but will review these issues as part of the ongoing review of that act by the Interception Consultative Committee.

The current Bill clarifies the existing law in relation to access to stored data by means other than an interception warrant.

Contrary to suggestions by some critics, the proposed change does not allow law enforcement agencies to read e-mails and SMS messages at whim. Rather, it recognises that an interception warrant is not appropriate for a situation in which no interception is necessary and that other lawful means, such as a search warrant would be more useful.

We have emerged from this consultative process with a strong and effective package of legislation. I thank the members of the Senate Committee and the Government for their contribution to that process.

We will be discussing these amendments with the Opposition and I look forward to their support of these Bills, which strengthen Australia's ability to deter and protect against terrorism.

It is expected that the counter-terrorism package will be debated by the Senate during this sitting period.

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Attachment C

Parliamentary Joint Committee on ASIO, ASIS and DSD Inquiry into the ASIO Legislation Amendment (Terrorism) Bill 2002

RECOMMENDATIONS

Recommendations 1 & 2 – Prescribed Authority

The Committee recommended that the Bill be amended to provide for:

- Federal Magistrates and Federal Judges to issue all warrants, except where detention is to exceed 96 hours, in which case warrants could only be issued by Federal Judges;
- legally qualified members of the AAT undertake all other duties of the prescribed authority, excluding the power to issue warrants; and
- a regulation making power to allow the Attorney-General to nominate an authority that can issue a warrant under the Bill.

Recommendation 3 – Maximum period of detention

The Committee recommended that the maximum period of detention of a person be no more than seven days (168 hours), and at the expiry of that period a person must be released or charged.

Recommendation 4 – Consent from Minister before obtaining additional warrants

The Committee recommended that the Director-General of ASIO must seek consent from the Minister prior to requesting a further warrant.

Recommendation 5 – insertion of 'immediately' in proposed section 34D

The Committee recommended that the word 'immediately' be inserted into subsection 34D(2)(b)(I), so that it is clear on the face of legislation that a person must be immediately brought before a prescribed authority.

Recommendation 6 – Access to a panel of lawyers

The Committee recommended that the Bill be amended to:

- provide for legal representation for persons who are the subject of a warrant; and
- include a framework whereby a panel of senior lawyers who were security cleared, would sit in on the entire proceedings of the prescribed authority and represent a person at further hearings which seek to extend detention.

Recommendation 7 – Development of protocols

The Committee recommended that the Bill require protocols be developed to govern custody, detention, and the interview process and that the protocols be developed in consultation with the Inspector-General of Intelligence and Security, the AFP and the Administrative Appeals Tribunal, and be approved by the Attorney-General.

The Committee also thought that the Bill should require the Committee to be briefed on the protocols and the protocols be tabled in Parliament.

Recommendation 8 – Protection against self incrimination

The Committee recommended that the bill be amended to provide protection against self-incrimination for the provision of information.

Recommendation 9 – Penalties for actions of officials

The Committee noted that the Bill contained protections against the misuse of power by ASIO officers but that there were no mechanism to enforce them.

The Committee also recommended that penalty clauses apply to officials who do not comply with the provisions of the Bill, and in particular, proposed section 34J which requires a detained person to be treated with humanity.

Recommendation 10 – Detention of children

The Committee recommended that the Bill be amended to ensure that no person under the age of eighteen may be questioned or detained.

Recommendation 11 – Warrant statistics in ASIO annual report

The Committee recommended that ASIO include in its unclassified Annual Report, the total number of warrants issued under proposed section 34C and a breakdown of warrants issued for detention and warrants issued for questioning.

Recommendation 12 – Sunset Clause

The Committee recommended that the Bill be amended to include a sunset clause that would terminate the legislation three years from the date of commencement.

Recommendation 13 – Director-General to advise Inspector-General

The Committee recommended that the Director-General of ASIO advise the Inspector-General of Intelligence and Security of the details of a warrant when the Director General seeks the Minister's consent to request a warrant.

Recommendation 14 – Inspector-General's power to suspend interview

The Committee recommended that:

- the *Inspector-General of Intelligence and Security Act 1986* be amended to provide a power to the Inspector-General to suspend an interview being conducted under the warrant procedures in the Bill on the basis of non-compliance with the law, or an impropriety occurring; and
- the Inspector-General be required to immediately report the nature of such cases to the Committee.

Recommendation 15 – Judicial Review

The Committee recommended that the Bill be amended to include a requirement that a prescribed authority advise a person that they have the right to seek judicial review after 24 hours of detention and at every time a subsequent warrant is sought.

Attachment D

Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime

In addition to the Commonwealth's legislative package, work has begun on augmenting Australia's capacity to deal with terrorism in cooperation with the States and Territories.

At a meeting on 5 April 2002, the Prime Minister and State and Territory Leaders agreed that a new national framework is needed to meet the new challenges of combating terrorism and multi-jurisdictional crime. In relation to terrorism, the Leaders agreed:

1. The Commonwealth will have responsibility for 'national terrorist situations', to include attacks on Commonwealth targets, multi-jurisdictional attacks, threats against civil aviation and those involving chemical, biological, radiological and nuclear materials.

2. The Commonwealth will consult and seek the agreement of affected States and Territories before a national terrorist situation is declared and States and Territories agree not to withhold unreasonably such agreement.

3. To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.

4. That all jurisdictions will review their legislation and counter-terrorism arrangements to make sure that they are sufficiently strong.

5. That the Commonwealth and States and Territories will continue to:

   (i) improve Australia's anti-terrorist intelligence capacity and to develop effective means for sharing intelligence;

   (ii) significantly upgrade the central coordination capacity so that the operational arms of the Commonwealth and the States and Territories can obtain the information and strategic advice necessary to respond rapidly and effectively.

6. The existing Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV) will also be reconstituted as the National Counter-Terrorism Committee with a broader mandate to cover prevention and consequence management issues and with Ministerial oversight arrangements.

Panel 10: International Law Post 11 September: Cracks in the Wall or New Beginnings

International Law Post 11 September

Kenneth Keith*

Could I suggest that the emphasis on particular disasters, however evil and shocking, and on metaphors like cracks in a wall which might mean liberation (say in 1989) or a terrible flood (say in the Netherlands) are not always helpful. We can get swept along and fail to give adequate or even any attention to more permanent features of the landscape.

Taking a hint from a most valuable recent paper by Hilary Charlesworth in the *Modern Law Review*, I would like to move away, for a moment at least, from seeing international law as a discipline of crisis to seeing it as a regular, even mundane discipline, a discipline of housekeeping if you like. I will then focus on one or two aspects of 11 September and the related events and conclude with comments on legal method and perspective on those matters.

First then on international law as a mundane discipline, from the point of view of a working judge. I mention three cases, the judgment in one of which is to be given tomorrow (as the parties know). They are cases about the routine movement of people and goods in and out of New Zealand. Each day, on my rough figuring, about 10,000 people fly in and out of New Zealand and each day over $100,000,000 worth of goods come through our ports in both directions. A very high proportion of those exports and imports are by ship. My cases are about those activities – a Hong Kong request for the extradition of a Hong Kong resident who had allegedly committed frauds there; the customs valuation of cars being imported from Japan; and sea water damage to electrolytic coils being shipped from Busan in Korea to Tauranga. They are all cases about international agreements and their application in national law.

The first got a mention in the international law trivia competition last year. *Yuen Kwok-Fung* v *Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463. The decision was given on the day of that contest. It mentioned the "still valuable scholarly account by Ivan Shearer". That was a case involving the careful reading of the extradition treaty with Hong Kong and the New Zealand Extradition Act and a determination of their interrelationship. That was to be done against some understanding of the law and practice of extradition, particularly as it related to reasons, some discretionary, some mandatory, for refusing to deliver the accused. The case also involved the proposition, which some in the process found difficult to understand, that the "construction" of the Act by reference to the treaty could mean that the Act was overridden. The direction in the Act leading to that result accorded of course with the proposition that national law must comply with international law, a direction which would hardly surprise this audience. It has however worried others and a New Zealand parliamentary select committee has indeed recently reported on such legislative provisions, that is those which allow for treaties to override statutes as a matter of New Zealand law.

The second case is about legislation which fully incorporated the treaty provisions, but (1) without mentioning that that is what it was doing, and (2) adding some words to the treaty provisions. The legislation was designed to give effect in New Zealand law to the Agreement on implementation of article VII of the General Agreement on Tariffs and Trade, an agreement about the valuation of goods for import duty purposes. Commissions and brokerages are to be added to the price paid for Customs valuation purposes but not if they are fees paid to "buying agents" or as "buying commissions".

The Customs Service ruled that all of the payments on the cars being imported into New Zealand by the importer to its Japanese intermediary must be included in the calculation. The Service did not consider the intermediary to be a "buying agent".

In coming to the opposite conclusion, the Court of Appeal rejected the High Court's reliance on the New Zealand common law of agency. Given its international currency, the language of the Agreement and the schedule should be construed on broad principles of general acceptance. Guidance was also to be taken from the commentaries of the Technical Committee on Customs Valuation established under the Agreement with a view to ensuring uniformity in interpretation and application of the Agreement. United States' authorities and

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publications and the purpose of the exclusion of the buying commission from the transaction price were also taken into account.

Applying this law to the facts the Court held that for the purpose of the New Zealand Act the intermediary was the importer's buying agent and the export fees paid were buying commissions for representing the importer in Japan in the purchase of the cars. They were accordingly not part of the price for valuation purposes (*Integrity Cars (Wholesale) Ltd* v *Chief Executive of New Zealand Customs Service* (2001) 1 NZCC 61, 198).

The final case – tomorrow's judgment – is also about a treaty text – the Hague Rules of 1924 on carriage of goods by sea. The Rules were incorporated into the agreement – the bill of lading – which was before the Court. But they were not compulsorily applicable and the matter, the parties were agreed, was one of contract : how was the limitation of liability to be determined? To what extent had the parties amended the Rules when adopting them? Depending on the answer, the shipper would be limited to about $15,000 or would receive its full loss which was in excess of $600,000 (*Tasman Orient Line CV* v *Dairy Containers Limited* (CA250/01) 17 June 2002).

In all three cases, the Court was engaged in the familiar, or to return to the word, the mundane task of finding the meaning of texts. It is true that the texts had international origins and associated understandings. The task in that sense was not completely standard, but should it be seen as significantly different from the regular fare of the Courts?

I move from the mundane to 11 September and the related crisis issues by way of a sentence in the prospective part of the *Strategic Survey 2001-2002* published last month by the International Institute of Strategic Studies. That sentence which appears after 360 pages of a survey of perspectives, strategic policy issues and five world regions is in a section headed *legal challenges* – an interesting recognition by the authors of the role of law in matters of high strategy. The section proposes that lawyers should come together in a systematic debate. US lawyers should take priority because the US would lead most operational aspects of the campaign. Those lawyers, the sentence says,

> might focus in the first instance on defining the power of US civilian courts and military tribunals to apply international law. (362)

United States courts, I thought, had settled those issues long ago. My understanding of that, without doubt, influences the way I think about those issues in our small country, while realising that there are important differences between our legal systems in this respect. It is a great worry if US lawyers really do have to go back to school on these basic issues. It does say something about a fleeting crisis based approach to international rule of law. But at least there is a recognition that international law does exist and does have some kind of role. To be compared is the opinion expressed, according to Richard Butler in *The Australian* on Friday (14 June 2002, p13), by John Bolton, now an Under Secretary of State in the Bush Administration. Two years ago in a heated debate on the ICC, Mr Bolton exclaimed that "there is no such thing as international law, only national sovereignty."

To be put against that denial are some of the important positives of 11 September and later. I make some summary points which indicate that those in authority in major countries are taking international law and international institutions seriously. Consider, in respect of institutions the significant actions of the United Nations Security Council and NATO. Both sets of actions presented important issues although this outsider would note in respect of NATO and even more of ANZUS the caution displayed by the US. They were looking, it seems to me, much more to the coalition of the willing than to formal alliance obligations. The Security Council role has been very important, with its Ch VIII resolutions creating substantial and difficult obligations, as we have already heard today.

International law has not only become part of the reckoning or at least the rhetoric of major politicians but also of specialists in international relations and strategic studies. I return to the IISS's *Strategic Survey*.

That volume discusses, at some length, the attempts to deal with transnational money laundering mentioning one of the conventions on terrorism, arms control treaties and negotiations (including the death of the ABM treaty), homeland security and related national law and law enforcement developments and WTO and related

bodies and the anti-capitalists. In the chapter headed *Prospectives*, the discussion moves beyond military strategy to political science, emphasising that while the former may be necessary it will often not be sufficient. Further, good political science requires a solid legal framework, the authors say. They then go on to indicate ways in which the legal framework might be developed. There does appear to be a real and critical opportunity for serious interdisciplinary work. That opportunity is emphasised in the last three sentences of that *Survey*.

> In the campaign against terrorism, victory means bringing the fruits of the democratic capitalist system to those who have not yet fully enjoyed them. The task is ultimately not one for generals, but for political scientists. The United States, as the ranking super power for the foreseeable future, must provide both. (365)

That opportunity leads to my final comments which are on the wider perspective and on legal method, with a little substance.

On perspective, in relation to international terrorism generally and 11 September in particular, again I mention a figure or two, although I stress that figures are not all. The events of 11 September were evil and criminal. A qualitative judgment must also be made. But the quantitative is significant. International Red Cross figures show that since the end of the Cold War, week by deadly week over 500 weeks, on average over 4,000 people have been killed in armed conflict, three quarters of those in Africa (International Federation of Red Cross and Red Crescent Societies *World Disasters Report 2001* (2001) Table 15). State Department figures show that through the same period – that is the 1990s – the average number of deaths from international terrorism has been under ten a week (eg Cronin "Rethinking Sovereignty: American Strategy v the Age of Terror" (2002) 44(2) *Survival* 119,128). The number is comparable to, and generally lower than, the number of people killed on New Zealand roads through that period.

On legal method, I mention two matters: the characterisation of those captured in Afghanistan by the coalition forces and the Haass statement to which our chairman has referred. You will recall that the US position has moved somewhat since the beginning of the armed conflict on 7 October, but I understand the US authorities still use the expressions "battlefield detainees" and "unlawful combatants", distinguish between al-Qaeda and Taliban members (although that is apparently difficult in fact), and denies POW status to those they have captured, while saying that they are treated in accordance with the third Geneva Convention. The ICRC has been facilitating the exchange of Red Cross messages between the prisoners and their next of kin with over 500 messages being exchanged by the end of April 2002. It has also been visiting prisoners detained in Guantanamo Bay since 18 January in accordance with the procedures laid down in the Convention. It began its visits to US run places of detention in Afghanistan a little earlier, on 24 December.

Part of the reasoning appears to that the world faces a situation not envisaged when the Geneva Convention was prepared; one suggested consequence is that a new treaty may be required. But terrorism can be traced back at least to the Zealots nearly 2000 years ago, the League of Nations drafted a convention on terrorism in 1937, there are all the conventions relating to terrorism discussed earlier today and the 1977 Protocols to the Geneva Conventions expressly prohibit attacks which have as their purpose the spreading of terror through the civilian population.

I ask three questions about the position of the detainees:

1. What is the correct procedure for determining whether the individuals captured have POW status?

2. If they do not have that status, what is their status when the armed conflict ends?

3. Is it to the general advantage of the military on any side of such conflicts to have these new categories created? What about the reciprocal nature of much of international humanitarian law?

I now turn to the Haass statements, as quoted by our chairman. Haass is quoted as saying that he is not sure whether what is being proposed constitutes a new doctrine, but that a new principle or body of ideas is being developed. Sovereignty is limited. Two limits in particular are mentioned : a state's obligations not to massacre its own people and not to support terrorism in any way. A state in breach forfeits some of the normal advantages of sovereignty. A right to intervene might arise, even a right of prevention or peremptory self defence. (More specific statements, relating in particular to President Hussein, but to similar effect have appeared from Washington over recent days : eg *The New York Times on the web* 17 June 2002, "Bush to formalize a defense policy of hitting first".)

But is any of this really new? States' obligations to respect the fundamental freedoms and human rights of their own people have acquired an increasingly firm legal foundation over the last 100 years and especially since the adoption of the UN Charter. The practice, if not the right, of humanitarian intervention can be traced back even further. Obligations not to harbour those involved in acts of civil strife or terrorist acts in another state have also long been recognised, for instance in the Friendly Relations Declaration adopted unanimously by the General Assembly on United Nations Day 1970.

Then there has been extensive debate and state practice down the years on the limits on the use of self defence, particularly the preemptive use of armed force. Those developments have carried on against the background of the striving of the international community over the last century to place limits on the use of armed force. "We the peoples of the United Nations", according to the preamble to the Charter, state our determination to save succeeding generations from the scourge of war and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest. It is then necessary of course to go to the obligations and rights stated or recognised in the substantive provisions of the Charter, notably articles 1, 2 and 51 and chapter VII. But the wider context should not be forgotten.

Nor should care in the use of words be neglected. We can, I think, understand the rhetorical force of the use of the word "war" in expressions such as the "war against poverty" or the "war against drugs". But "war against terror" can move us too quickly to thoughts of the use of armed force in self defence in the context of that "war".

Francis Bacon in his essay *Of Judicature* had something wise to say about all this four centuries ago:

> Above all things integrity is their position and proper virtue. Cursed (saith the law) is he that removeth the landmark.

While Bacon was speaking of judges, I would suggest that his statement applies as well to lawyers, including those advising governments. We are to be deliberate, to be professional and not to be panicked by the moment, to return to the advice from Hilary Charlesworth with which I began.

The Significance of September 11 for International Law: Looking Beyond the Law of Self-Defense

Shirley Scott*

Somewhat dramatically, Cassese last year warned that the consequences for international law of September 11 were already proving 'shattering'.[1] Given that changes to the international law on the use of force may have ramifications for fundamental concepts and principles of international law including sovereignty and statehood, and the core function attributed to the system of international law has been to regulate the use of force between states, it does not seem surprising that some international lawyers are wondering just to what extent September 11 will impact on the system of international law as a whole.[2] And yet, if we accept that fundamental shifts in international law stem from fundamental shifts in world politics, and if we view September 11 in this broader temporal and political context, we find that September 11 does not represent such a shift. Rather, at least so far as we can see at this point, September 11 represents a crystallization, and perhaps a clarification, of the post Cold War international order and the international law integral to that order. This does not mean that September 11 holds no significance for international law. On the contrary, September 11 poses a major challenge to the international legal order, but its significance is indirect and may not be readily perceived by lawyers operating within a positivist paradigm.

In the early days after the attacks, comparisons were often drawn to Pearl Harbour.[3] If we are talking in macro terms, however, September 11 can better be compared to the completion of the Berlin Wall in 1961. A new international order had come into existence after World War Two. But the true nature of that international order was not immediately apparent in 1945. It took several events – including the Berlin crisis, the explosion of the first Soviet nuclear bomb, and the Korean War – for the Cold War that we now associate with that term to take shape. To be sure, elements of the new international order were in place in 1945, most notably the UN system of collective security, but it was through these events and others that bipolarity and its attendant principle of mutually assured destruction became central to the international order and the maintenance of peace in that order.

With the end of the Cold War there was a shift from bipolarity to what has generally been termed unipolarity,[4] but, like the early post World War Two years, it has taken time and events to confirm and clarify the nature of the post Cold War international order. The pax Americana of 2002 is not quite the same as the pax Americana of 1991. It has taken time for Russia to be gradually brought within the US sphere of influence and, as this January's US nuclear posture review pointed out, for US policy toward Russia to be premised on a basis other than that Russia presents a smaller version of the threat posed by the former Soviet Union.[5] Russia's inclusion in the coalition against terrorism confirmed Russia's absorption into the US sphere[6] and acted as a catalyst for

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1 Antonio Cassese, 'Terrorism is also disrupting some crucial legal categories of international law', at <http:www.ejil.org/forum_WTC>

2 See, for example, Michael Byers, 'Terrorism, the Use of Force, and International Law After 11 September', *ICLQ* 51 (April 2002), 401-414 at 414.

3 For example, Brian Whitaker, 'Sixty years on, America endures horror worse than Pearl Harbour', *The Guardian* 12 September 2001.

4 Samuel Huntington has proposed the term 'uni-multipolarity' to refer to a system with one superpower and several major powers. 'The settlement of key international issues rquires action by the single superpower but always with some combination of other major states; the single superpower can, however, veto action on key issues by combinations of others states.' Samuel P. Huntington, 'The Lonely Superpower', *Foreign Affairs* 78:2 (March/April 1999), 35-49 at 36.

5 'Nuclear Posture Review [Excerpts]' 8 January 2002. Available at http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm, accessed 11 June 2002.

6 'Mr Putin's strongly supportive response to the terror attacks last fall cemented the new ties'. 'No-Frills Arms Control', *The New York Times* 14 May 2002.

the establishment of the NATO-Russia Council.[7] As NATO Secretary-General, George Robertson, stated '[t]he criminal violence has brought east and west together and made us strong.'[8] The Bush Administration had denied the continued relevance of Cold War thinking when it announced its withdrawal from the ABM Treaty last December,[9] but at that time, such rhetoric sounded as no more than an excuse, at least to advocates of security-through-arms control. While the recent US-Russia Treaty reducing deployed strategic nuclear warheads may not have seemed significant in so far as the US won its goal of being able to store rather than to do away with the warheads, Bush was able to herald the treaty as `liquidat[ing] the legacy of the Cold War'.[10] Senator Jon Kyl, a Republican from Arizona, is quoted as commenting: 'The benefit of this agreement from a conservative point of view is that it once and for all buries the notion of the balance of terror'.[11]

For many critical of US foreign policy, September 11 indicated the depth of resentment of post Cold War US unipolarity; the attacks were a forceful statement of disenchantment with post Cold War US imperialism – or to use US terminology, globalisation. Bin Laden, who the US once relied on as a trusted partner in the strategy of Cold War containment,[12] apparently turned against the US in large part because of the stationing of US troops in his homeland of Saudi Arabia during the Gulf War. And yet, these terrorist acts – such an apparently clear expression of a sense of futility with the post Cold War status quo and of a sense of the impossibility of effecting change by acting within its frameworks – has served only to confirm and strengthen US hegemony. Existing allies rushed to express support for the US,[13] and have continued to do so. The Australian prime minister told the US Congress in June 2002, for example, that 'America has no better friend in the world than Australia'.[14] Others, whose relationship with the US had been more equivocal, were also brought closer. All sanctions against India and Pakistan were waived by President Bush eleven days after the attacks, and, following the 13 December attacks on the Indian parliament, India and the US have felt a common bond.[15] Having been told that they are either 'with the US' or 'with the terrorists',[16] 136 countries offered some kind of military assistance to the United States;[17] seventeen nations deployed to the US Central Command's area of responsibility.

The post September 11 crystallisation and clarification of the post Cold War international order has also appeared to confirm the right of the US to use force in response to a terrorist attack.[18] The Clinton administration had claimed this right in 1998. While most US allies had supported the 1998 Tomahawk missile strikes against terrorist training camps in Afghanistan and an allegedly chemical weapons facility in Sudan, the

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7 The Defence Ministers of the NATO-Russia Council held their first meeting on 6 June 2002.

8 Natasha Bita, 'Russia and NATO link in war pact', *The Australian* 29 May 2002, p. 11.

9 See, for example, 'ABM Treaty Fact Sheet. Statement by the Press Secretary. Announcement of Withdrawal from the ABM Treaty'. Available at http://www.whitehouse.gov/news/releases/2001/12/20011213-2.html, accessed 20 June 2002.

10 Patrick E. Tyler, 'Pulling Russia Closer', *The New York Times* 14 May 2002.

11 David Sanger, 'Bush and Putin to Sign Nuclear Pact', *New York Times*, 13 May 2002.

12 Sara N. Scheideman, 'Standards of Proof in Forcible Responses to Terrorism', *Syracuse Law Review* 50 (2000), 249-284 at 253.

13 See provisional verbatim record of the 4370th meeting of the Security Council, 12 September 2001. S/PV.4370. Available on the UN website, at <http://un.org>

14 `PM to Congress: trade aids security', *The Australian*, 13 June 2002, p. 2.

15 See, *inter alia*, 'Embassy of India. India-US Relations', 1 November 2002. Available at: http://www.indianembassy.org/indusrel/induspol.htm, accessed 19 June 2002 and Teresita Schaffer, 'The US and South Asia: New Priorities, Familiar Interests', *South Asia Monitor* 28 (1 October 2001). Available at http://www.csis.org/saprog/sam38.htm, accessed 20 June 202.

16 President Bush to a joint session of Congress, 20 September 2001.

17 'Campaign Against Terrorism: A Coalition Update', Available at http://www.whitehouse.gov/march11/coalition/coalitionupdate.html. Accessed 20 June 2002.

18 See discussion in Jack M. Beard, 'America's new war on terror: The case for self-defense under international law', *Harvard Journal of Law and Public Policy* (Spring 2002), 559-590 and Michael Byers, 'Terrorism, the Use of Force, and International Law After 11 September', *ICLQ* 51 (April 2002), 401-414.

strikes had been condemned by Russia, Pakistan and several Arab countries; the Non-Aligned Movement had denounced the US strikes as "unilateral and unwarranted" while UN Secretary-General Kofi Annan had criticized "individual actions" against terrorism, implying disapproval of the US strikes.[19] Even this mixed response had represented a change from the reaction that had greeted the 1986 US bombing of military targets in Libya in response to an explosion at the LaBelle disco in Berlin which killed 2 US servicemen and wounded 78 Americans. International reaction, other than from Great Britain, had at that time been largely negative.[20]

In practical terms, the evolution in the law of self-defense to encompass a right to use force in response to a terrorist attack would not appear to be of great moment so far as future US behaviour is concerned. Over the last couple of decades, the US has tended to use force where it suited it rather than where international law expressly permitted it. And, as Kosovo illustrated, precisely because the US has had no need for the 'approval' of international law in order to use force, it has been careful not to support an evolution in the international law on the use of force if it perceived any way that other states could possibly use that evolution to the detriment of US interests. In any case, there may well have seemed no choice of legal approach in the scenario faced by the US Administration on 11 September. Having suffered the humiliation and genuine pain of having the world's worst – at least in terms of numbers killed – terrorist attacks committed on its own territory and against its own people and institutions, there was no way that the US could have handed control over, and responsibility for, its response to any other person or body. If international lawyers limit their appreciation of the significance of September 11 to the international law of self-defence they will be missing what is perhaps the major lesson that September 11 has to teach.

One aspect of the post Cold War international order confirmed, clarified and highlighted by September 11 has been that of US dominance over key international institutions. Forty-seven IGOs made declarations of support and/or took actions in the wake of September 11. The IMF, for example, expanded its activities to include efforts aimed at countering terrorist financing. On 19 April 2001 the Group of Seven took the first multilateral joint action against terrorist financing by designating nine terrorists and terrorist financiers and one entity that support al-Qaida. The EU having, in December 2001, identified 42 terrorist entities and organizations that threatened peace in Europe, the EU and US in May 2002 announced joint blocking action on a list of terrorists and their supporters.[21]

Rather than prompt finalisation of a multilateral comprehensive treaty on terrorism, September 11 gave rise to Security Council Resolution 1373,[22] a much more vertical, top-down, mode of international law development. By 'reaffirming the inherent right of individual or collective self-defence', resolutions 1368 and 1373 lent legitimacy to the US legal justification for its use of force, without explicitly clarifying what the Security Council envisaged itself doing to 'take measures necessary to maintain international peace and security'. Strong though resolution 1373 might have been, the Security Council is unlikely to have considered that resolution sufficient to maintain international peace and security; if it did, then presumably the US self-defence action should have finished at that time. Resolution 1373 symbolises the enormous hold that the US has over international institutions, institutions that are integral to the international legal order.

US institutional dominance was, of course, already a feature of the post Cold War international order, as was highlighted throughout the 1990s by the issue of economic sanctions. The 1990s has been referred to as the 'sanctions decade';[23] while the Security Council used sanctions only twice during the Cold War,[24] in the 1990s

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19 Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan',*The Yale Journal of International Law* 24 (1999), 537-557 at 538.

20 Alan D. Surchin, `Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad', *Duke Journal of Comparative and International Law* 5 (1995), 457-497.

21 'US, EU Take Joint Blocking Action on Terrorist Assets', US Department of State, International Information Programs, 3 May 2002. At http://usinfo.state.gov/topical/rights/law/02050301.htm, accessed 3 May 2002.

22 Resolution 1373 (2001), 28 September 2001. S/RES/1373 (2001).

23 David Cortright and George A. Lopez, eds. *The Sanctions Decade: Assessing UN Strategies in the 1990s*. Boulder & London: Lynne Rienner, 2000.

24 Against Rhodesia in 1966 and South Africa in 1977. Elias Davidsson, 'The debate on economic sanctions: A Story of blind spots and obfuscation', at 1, available at available at <http: www.aldeilis.net/jus/econsanc/debate.pdf> accessed May 2002.

it imposed economic sanctions against Iraq, Haiti, Libya, the former Yugoslavia, Sierra Leone, Angola (UNITA), Cambodia, and Afghanistan.[25] According to Elias Davidsson,

> [l]eading members of the Security Council and the Iraq Sanctions Committee impose their will through voting procedures *within* these organs and by economic leverage on the Council members *outside* the United Nations. Decisions within these organs reflect therefore the balance of forces in the inter-state order, heavily tilted towards the United States and the industrially developed nations, who use non-democratic multilateral organs, such as the IMF and the World Bank to pursue their own interests.[26]

Sanctions have not only been imposed multilaterally. During President Clinton's first term, the US imposed new unilateral economic sanctions on 35 countries, representing 42 per cent of the world's population.[27] The effect of unilateral economic sanctions has been much stronger since the end of the Cold War because the states subject to sanctions, such as Cuba, no longer receive assistance from the Soviet Union to counter that impact.[28] The sanctions scenario accords with Philip Alston's critique of globalization, in which he suggested that the global agenda is increasingly becoming no more than an extension of the agenda of the US and the industrialized world.[29]

Bin Laden has criticised the Iraqi sanctions regime[30] and yet the West has not devoted much attention to considering the merits or otherwise of Bin Laden's grievances. To do so has been equated with 'moral ambiguity' as to the evil of the attacks.[31] But this may be a rather short-sighted reaction. The failure of the Taliban to comply with Security Council demands to hand over Osama bin Laden for trial for the 1998 embassy bombings led to the imposition of a range of sanctions from 14 November 1999 and additional sanctions were imposed after the bombing of the USS *Cole* in October 2000. But the isolation of the Taliban further radicalised and strengthened the Taliban.[32] As one Pakistani politician reportedly commented in 1999, 'If the United States starves or bombs Afghanistan to get one man, it will only create a thousand bin Ladens'.[33]

It is perhaps indicative of US post Cold War hegemony that positivist international legal debates have, on the whole, bought into the US policy agenda rather than query the appropriateness of certain US rhetoric. Since September 11 some international lawyers have expressed concern at the rhetoric of war in the phrase 'war on terror',[34] but this language is not new to the post September 11 era; the characterization of the US fight against

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25 Elias Davidsson, 'The debate on economic sanctions: A Story of blind spots and obfuscation', at 2, available at <http: www.aldeilis.net/jus/econsanc/debate.pdf> accessed May 2002.

26 Elias Davidsson, 'The Iraq Sanctions: An Annotated Chronology', at 2. Available at <http://www.aldeilis.net/jus/econsanc/chronology.pdf>, accessed May 2002.

27 Robert P. O'Quinn, `A User's Guide to Economic Sanctions', *Heritage Foundation Backgrounder* 1126 (25 June 1997) quoted in Elias Davidsson, 'The debate on economic sanctions: A Story of blind spots and obfuscation', available at < http: www.aldeilis.net/jus/econsanc/debate.pdf> accessed May 2002.

28 John and Karl Mueller, 'Sanctions of mass destruction', *Foreign Affairs* (May/June 1999), 43-53.

29 P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation', *EJIL* 8 (1997), 435-448.

30 Council on Foreign Relations, 'Terrorism: Questions & Answers', at <http://www.terrorismanswers.com/groups/binladen.html> accessed 12 July 2002.

31 For example, when Jonathan Sayees suggested in the UK parliament on 14 September 2001 that there might be a need to understand 'why there is such hatred for so many institutions in the United States' so as to be able to deal with some of the 'deep-seated causes' of terrorism, the Prime Minister, Mr Blair was adamant that there should be no 'moral ambiguity' about the events, that nothing could justify them. *11 September 2001: the response*. International Affairs and Defence Section, House of Commons Library, Research Paper 01/72, 3 October 2001, at 21.

32 Anthony Davis, 'Afghanistan: prospects for war and peace in a shattered land', *Jane's Intelligence Review* (August 2001), p. 33, quoted in *11 September 2001: the response*. International Affairs and Defence Section, House of Commons Library, Research Paper 01/72, 3 October 2001, at 52.

33 Pamela Constable, 'Pakistan Feels the Sanctions; UN Moves Against Afghanistan Raise Concern Across Border', *Washington Post* 17 November 1999 quoted in Sara N. Scheideman, 'Standards of Proof in Forcible Responses to Terrorism', *Syracuse Law Review* 50 (2000), 249-284 at 284.

34 See, for example, Frédéric Mégret, 'War'? Legal Semantics and the Move to Violence', *EJIL* 13:2 (2002), 361-399.

terrorism as a war was frequently used during the Reagan presidency, especially in his first term in office.[35] The acquiescence of international lawyers to the US agenda may be evident in the willingness to refer to a UN sanctions regime as something distinct from a US sanctions regime. But it is undoubtedly evident in the growing literature on the technicalities of the legal limits of the authority of the Security Council and in discussion of United Kingdom and United States bombing of Iraq since the Gulf War in terms of 'enforcement' actions as opposed to uses of force.

The international legal community has been largely brought into service in the implementation of the US policy agenda via international institutions, but recipients of 'Security Council' policy cannot fail but view the Council as a mere front for US policy. Saddam Hussein is recorded as saying to Perez de Cuellar during the Kuwaiti crisis in reference to Security Council resolutions: 'These are American resolutions. This is an American age. What the United States wants at present is the thing that is passed; and not what the Security Council wants.'[36] While, in relation to September 11 as to other events, `the United Nations [has played] an important role in providing legitimacy for US actions…',[37] and hence improving the acceptability of US policies to the domestic audience and to US allies,[38] the US presenting its own policies as UN policies has not helped the image of the UN when, for example, the UN becomes the scapegoat for an unsuccessful peacekeeping mission or when the US decides that only certain Security Council resolutions are to be enforced.

It is here that we reach the real significance of September 11 for international law. US institutional dominance may have seemed a good thing in permitting a swift international response to the horrors of September 11 but this should not blind us to the danger of the UN being perceived as no more than a mechanism for the implementation of (often widely unpopular) US policies. A number of European and North American international lawyers have over the last few years criticised the US for specific acts of non-compliance with international law, as well as for its perceived failure to lend sufficient support to the strengthening and further development of the system; there has been worthwhile discussion as to the impact that the 'sole superpower' has had on international law since the end of the Cold War.[39] The US announcement that it would not proceed to ratification of the International Criminal Court has been only one of the more recent triggers for discussion and criticism of US policy choices. But September 11 has forced us to move forward the focus of our debate. It is not realistic to think that the US will suddenly relinquish its position of dominance nor to fundamentally change its attitude to international law and institutions. After all, from a *realpolitik* perspective, the US has undoubtedly made skilful use of international law and institutions on its path to world hegemony[40] and its manipulation of the Security Council, NATO and other institutions is very much a part of what, again from a realist perspective, might be regarded as a very successful *modus operandi*. If the US did not implement its policies via the UN it would no doubt find some other way to do so.

But the UN is of particular significance to international lawyers. For all its imperfections, international lawyers need the UN – not only for the hopes of justice and peace that it embodies – but also for its multiple functions in the contemporary system of international law. Indeed, our present system of international law would make no sense were the UN extricated from it. The UN Charter fulfils a role something akin to a world constitution and UN structures and processes are integral to many branches of international law, even those seemingly far more humdrum than the international law of the use of force. Consider for example the international law of human rights, or the law of the sea, or the law of outer space. The majority of the world's population has not studied

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35 Jeffrey D. Simon, *The Terrorist Trap. America's Experience with Terrorism*. 2nd ed. Bloomington and Indianapolis: Indiana UP, 2001 at 166ff.

36 'The Glaspie-Hussein Transcript', quoted in Phyllis Bennis, *Calling the Shots: How Washington Dominates Today's UN* (New York, Northampton: Olive Branch Press, 2000), at 35.

37 Jusuf Wanandi, 'A Global Coalition against International Terrorism', *International Security* 26:4 (2002), 184-189, at 184.

38 Phyllis Bennis, *Calling the Shots: How Washington Dominates Today's UN* . New York, Northampton: Olive Branch Press, 2000.

39 See, for example, M. Byers and G. Nolte, eds. *US Hegemony and the Foundations of International Law* (CUP, forthcoming).

40 Shirley V. Scott, 'The Legalization of International Relations'. Remarks to the 96th annual meeting of the American Society of International Law, *ASIL Proceedings*, forthcoming.

international law, and does not know the legal significance of the North Atlantic Council's preparedness to equate a terrorist attack with an armed attack. The challenge for the international legal community, a post Cold War challenge that has been confirmed, clarified and highlighted by September 11, is to ensure that the UN – and the system of international law of which the UN is an integral part – are seen by the peoples of the world as more than mere vehicles for the implementation of US policy. The danger is that, next time, the planes will be steered – either in real life or figuratively – into the UN. And, if the structures of the UN come crashing down, where will this leave international law?

International Law Post-September 11

Shelley Wright*

"The key question then is whether international law has substantially shifted since 11 September 2001, or rather has there just been some incremental developments especially with respect to the law regarding terrorism?"

> What you're seeing from this administration is the emergence of a new principle or body of ideas – I'm not sure it constitutes a doctrine – about what you might call the limits of sovereignty. Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments including the US gain the right to intervene. In the case of terrorism, this can even lead to a right of preventative or peremptory self-defence. You essentially can act in anticipation if you have grounds to think it's a question of when, and not if, you're going to be attacked.
>
> Richard Haass, Director of Policy Planning, US State Department:

The following comments are based on "The Horizon of Becoming: Culture, Gender and History after September 11" *Nordic Journal of International Law* (2002, forthcoming).

. . . the blade striking home
through the thigh of your daughter;
the moonlight of idiot metal
slicing through memory's kiss -
what you see is
how your wish was mistaken:

that thin bird of light
which emerged from the foreigner's tongue
was just history, at play.

- from Martin Langford, The Wish: Timor 7/9/99[1]

Attempting to understand the history of international law is essential to understanding how it works (or doesn't work) and how it is changing. At the moment international lawyers are caught up in a crisis of terror, war and unilateral decision-making. Our understandings of history are themselves deeply flawed as analytical tools. The voices of the silenced are usually described as not being heard because of imbalances in economic and political power. On a deeper level they also may not be heard because the very nature of historical and legal discourse in the international arena makes their voices unintelligible within the "malestream" of time and history. We expect history to give us a sense of the truth of our shared past. But because historical records are dominated by the representation of the most powerful, the "truth" of those who are excluded from power may not seem genuine. More commonly, it is ignored. What we think of as a reality that we share may not in fact be shared in the same way by "others" – even when "we" ourselves are part of that "other". Women's history often tries to recapture the detail of all those "people without history"[2] who have worked, fought, mothered and struggled "behind the scenes" of the Great Events depicted in wars and political battles that are so central to our usual shared vision. As a woman as well as an international legal scholar I am constantly confronted by this dilemma. This is not to suggest that history and fantasy are the same, or that we cannot distinguish between the purely imaginary and that which connects with truth of some kind. It does suggest however that we need a richer understanding of what "truth" is and what "history" might be.

International law as we now know it was created as an offshoot of the development of the modern nation-state based on secular ideals of rationality and order. The use of force became not an initiation into manhood or

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1 M. Langford "The Wish: Timor 7/9/99" (25 September 1999) *Sydney Morning Herald* in "Spectrum" at p.10.

2 E.R. Wolf *Europe and the People without History*, 1st edition, University of California Press, Berkeley, 1982.

tribalism or even simply the militaristic expansion of empire (as in imperial Rome or even in militant Islam), but rather a reasoned aspect of state-policy and the fulfilment of economic and political ambitions.[3] International law precisely prioritises this dominant vision – the use of force, sovereignty, the state, the political, the military, the economic and the diplomatic. What does September 11 mean for women, for the poor, for indigenous peoples? I am not discounting the importance of recent world events – merely asking that we might see them through different eyes from which we might gain new insights. As Susan Sontag said in relation to September 11 (and was vilified in the US for saying):

> Let's by all means grieve together. But let's not be stupid together. A few shreds of historical awareness might help us understand what has just happened.[4]

Who were the individuals who boarded the airplanes and flew them into the World Trade Center and the Pentagon on September 11?

> There are clearly broader dynamics involved in the terrorism: dynamics which the forces of globalisation, among their many manifestations, have made possible. The terrorism witnessed on September 11th did not arise, as much Muslim fanaticism has, from among the poor, rural villages of Algeria or southern Egypt. And the remote training camps of Afghanistan may have fanned and given direction to the flames, but they were not its source. The hijackers, rather, were largely middle-class, university educated young men, studying abroad, in Western cities like Hamburg or London. They were men, who, as many commentators have pointed out, existed on the fringes, not at the centre of the Muslim faith. They lived in a world of overlapping and uncertain authorities. Their lives were ambiguously divided between the pull of the Western cities where they lived, studied, and travelled, and the radical factions within the mosques, where they worshipped and were recruited. These men were clearly as equally at ease, or more accurately at dis-ease, with modern technology and dress as they were with the traditions of the Muslim faith. They existed, as foreigners, within an increasingly fragmented social, cultural and economic space, while at the same time pushed up against the universalising influence of religion, and ultimately, of fanaticism. Their clash was as much from within as it was from without.[5]

On the morning of September 11 people in New York, Washington D.C., Boston and elsewhere walked out of their doors and went jogging, or caught the subway to work, or sat down to read the paper, or went to school, or got on a plane to go somewhere else. From a stream of moments touched only by whatever personal meaning we each bring to our lives on a daily basis we were suddenly thrown into History. This sense of History was broadcast non-stop and without commercial interruption all over North America by each of the national networks. Even in tiny Iqaluit, close to the Arctic Circle and capital of the newest Canadian Territory of Nunavut where I was on that morning, the ordinary daily routine was thrown into confusion by the events occurring to the south.

> "From what at first sounded like a bizarre accident," [John Ralston] Saul wrote of the terrorist attacks, "a wave of explosions and accidents and deaths spread through the day, at the end of which a rather frail, awkward man appeared on television to read a speech from a teleprompter in order to reassure Americans, indeed the world."[6]

From these few sentences, added to the book *On Equilibrium* at the last minute, a storm of controversy appeared in the Canadian national press, just as Susan Sontag's comments quoted above created a hail of vitriol. Being thrown into History meant that the individual interpretations of these events by two of North America's most influential critical thinkers became suddenly threatening. As Stanley Fish also wrote soon after:

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3 A. Giddens *The Nation-State and Violence: Volume Two of Contemporary Critique of Historical Materialism*, University of California Press, Berkeley, 1987; J.A. Keegan *A History of Warfare*, Pimlico, London, 1993.

4 S. Sontag "Talk of the Town" (24 September 2001) *New Yorker* as quoted in D. Anderson "The Style of a Radical Books" (2 March 2002) *Sydney Morning Herald*, Spectrum at http://www.smh.com.au/news/0203/02/text/spectrum9.html.

5 C. Berzins "The Frontier-less War: Security in the Neo-Medieval Age" (2002) unpublished paper.

6 Saul *On Equilibrium*, *supra* note 14, at p.318 as quoted in J. Geddes "Philosopher King" (4 February 2002) *Maclean's* at http://www.macleans.ca/.

> During the interval between the terrorist attacks and the United States response, a reporter called to ask me if the events of Sept.11 meant the end of postmodernist relativism. It seemed bizarre that events so serious would be linked causally with a rarefied form of academic talk. But in the days that followed, a growing number of commentators played serious variations on the same theme: that the ideas foisted upon us by postmodern intellectuals have weakened the country's resolve …
>
> But of course it's not really postmodernism that people are bothered by. It's the idea that our adversaries have emerged not from some primordial darkness, but from a history that has equipped them with reasons and motives and even with a perverted version of some virtues … [W]hat Edward Said has called "false universals" should be rejected: they stand in the way of useful thinking. How many times have we heard these new mantras: "We have seen the face of evil"; "these are irrational madmen"; "we are at war against international terrorism". Each is at once inaccurate and unhelpful. We have not seen the face of evil; we have seen the face of an enemy who comes at us with a full roster of grievances, goals and strategies. If we reduce that enemy to "evil", we conjure up a shape-shifting demon, a wild-card moral anarchist beyond our comprehension and therefore beyond the reach of any counterstrategies.[7]

Fish, although speaking as the representative of postmodernism, is (unlike Saul) firmly within a rationalist tradition of "enemies" and "strategies" well recognised in international law and modern international relations theory.

For example, there is usually said to be two models of individual and collective rights in international human rights law. Under one (admittedly exaggerated) version of civil and political rights collectives are seen as simply aggregates of individuals all in possession of individual rights. Each individual is in competition with every other over recognition and implementation of their rights. Rules regarding dispute resolution, the rule of law and equality of access to justice then become extremely important, as reflected in the *International Covenant on Civil and Political Rights* and in most Western democracies. But even small differences in access to wealth, education, information and security will lead to major differences in the balance of power. Inevitably some individuals will gain the capacity to control the collective agenda. Indeed, it is almost necessary that this should be so as no collection of completely free and self-determining individuals (at least in the numbers and within the complex social organisations contained in most contemporary nation-states) is capable of operating effectively in a collective sense without some conformity to group values. This is despite attempts to conceptualise such an individualistic model based on contract theory, theories of fairness or utilitarianism.[8]

The opposite perspective, also described in an extreme form, is to see the collective as a cohesive and unified group with a single authentic voice. Whether cohesiveness is maintained on ethnic, religious, linguistic, national or cultural lines it obliterates the uniqueness of individual experience. It is what is so often castigated as "tribalism" or "ethnic nationalism"[9] or even religious "fundamentalism". It is usually characterised as "extremist" and dangerous. However group cohesiveness is expressed it will again inevitably lead to an imbalance of power within the group. Those able to articulate and enforce the unitary tribal vision will control the principle levers of political and economic power. In addition, by treating collective entities as if they were unified individuals writ large we replicate the problems of the individual rights model on a trans-collective, or global, level. Nation-states, multinational corporations and even international organisations such NATO or the IMF themselves become competitive, adversarial, isolated and individualistic, pursuing their own goals without concern for wider international concerns or local problems. "Unilateralism" in international relations, particularly most recently by the United States, is one example of this perspective in international law.[10] Self-determination and other collective rights (including a right to collective and individual self-defence) then

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7 S. Fish "Condemnation without Absolutes" (15 October 2001) *New York Times* at www.nytimes.com/2001/10/15/opinion/.

8 See for example T. Franck *Fairness in International Law and Institutions*, Oxford University Press, New York, 1995; J.A. Rawls *Theory of Justice*, Belknap Press, Harvard, 1971; F. Tesón *A Philosophy of International Law*, Westview, Boulder, 1998.

9 M. Ignatieff Blood and Belonging: Journeys into the New Nationalism, Noonday Press, Toronto, 1995.

10 C. Chinkin "The State that Acts Alone: Bully, Good Samaritan or Iconoclast?" (2000) 11 *European Journal of International Law* 31.

become acts of selfishness and self-aggrandisement at the expense of weaker neighbours. Individual rights (from the first model) can easily be seen as threatening to the cohesiveness of group solidarity, thus justifying the denial of such rights to individuals detained in "Camp X-Ray" and elsewhere for allegedly being "terrorists" or "unlawful combatants".

Both human rights' models define collective as well as individual civil, political, economic, social and even cultural rights in such a way that one voice is inevitably pitted against another. The most powerful voice overwhelms those less able to articulate their needs and desires. Less powerful voices must learn how to be strategic in making known their needs and aspirations, careful not to disturb the equanimity of the most powerful. In effect smaller powers themselves begin to act as if they were mere satellites, courtiers or courtesans,[11] instead of independent agents capable of operating effectively with others in a similar position, while the majority of the least powerful are silenced all together.

This scenario is clearly being brought into focus in international relations and international law since September 11. The United States, the principle supporter of an extreme version of the individual rights model in both domestic and international law, has appropriated to itself the trappings of nationalism – American tribalism – in which the ethos of individual liberties is rapidly being silenced and marginalised. In this model of the collective in global politics, emanating from the most powerful voice internationally, other nations must choose how they stand in relation to the US "War on Terrorism". In President Bush's words "you are either with us or against us". Individual rights are being sacrificed both nationally and internationally while lesser national powers, such as the UK, Canada, other NATO countries, Australia and some Islamic states have been forced to choose whether to play the role of American "allies" or "enemies". To put it another way, they choose to be more or less influential courtesans to the imperial master.[12] Others such as Pakistan, India, Israel, Singapore, the Philippines, Zimbabwe and even (until Bush summarily lumped it in with the "axis of evil") Iran proved adept at using the war on terrorism as a means of pursuing their own internal and regional agendas, like courtly servants on the fringes of power. It is no accident that these countries come from the former colonial world. Palestinians, Zimbabweans, the people of central Africa, Argentinians, Colombians, even most Afghanis, appear to have lost out. The vast majority of people in the world, including especially women and children, have had no voice at all – like peasants standing outside the gates of the palace waiting in desperation for the remnants of bread from the feasts within. That this stereotype is itself a serious distortion of the roles of various players on the world stage does not eliminate the way in which states and non-state actors are inevitably influenced by these stereotypes and sometimes act, or at least appear to act, accordingly. The truly disturbing aspect of these cartoon images is that the architects of American foreign policy seem to accept them as reality. But many of these players do not have to choose such roles, in effect accepting the American view of reality as the only "truth". Until we are willing to see "truth" in much more complex terms the ideological perspective of the most powerful will seem overwhelming and alternative visions will be dismissed as naïve, dangerous or irrational. The irony is that the whole purpose and effect of "terorism" as a tool of dissent is precisely about doing the dangerous, the simple-minded and the apparently insane. The logic of terror strikes at the heart of the rational propelling everyone into the "truth" of random violence and fear. The perpetrators of brutality on all sides are now dictating the world agenda. Some analysts, such as Noam Chomsky, would see this as nothing new.[13] Others, such as Michael Byers, see a shift in global politics away from international law and the post-War order limiting the use of force back to the pre-War justification of aggressive military power as an arm of statecraft.[14]

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11 J.R. Saul *On Equilibrium*, Penguin Books, Toronto, 2001 at p.103. Saul does not have very good things to say about "lobbyists" or public activists like NGO's, seeing them as inimical to a genuinely effective democracy. But his analysis seems to be overly cynical and dismissive. It becomes much more problematic when nation-states themselves begin to act like "courtieurs", courting the power of the US for example instead of actively allying themselves in support of policies more conducive to world peace and stability. Middle powers such as those in Europe, Canada, Australia and Asia could act in much more responsible and intelligent ways than they appear to be doing in the months following September 11.

12 *Ibid.*

13 N. Chomsky *9-11*, Seven Stories Press (Open Media Book), New York, 2001.

14 M. Byers "Terrorism, the Use of Force and International Law after September 11" (2002) 51 *International and Comparative Law Quarterly* 401.

The individual and the collective are not in fact two different models, although they are often discussed as if they were in opposition to one another. Rather, they are the same model replicated on different levels. This model is clearly the framework for international law as a whole not just for human rights or the war on terrorism. From either perspective real human beings as individuals and as members of collective entities can maintain the cohesiveness of their own and the group's identity only when they control the authentic expression of "truth" at an absolute level while insisting that everyone else remain passive. Even in an individual rights model attempts to enforce rights on one's own behalf simply reinforces the pressure to remain passive, as only the already powerful have significant access to the means of implementation. Once genuine multiplicity rears its head then we are in the world of more than one voice – noisy, messy, conflicted, ambiguous, contingent, chaotic, anarchic and always unpredictable.

What the fall of the twin towers in New York represents, in addition to the nightmare of global terror brought home to a complacent America, is that dreams of monolithic power or universality of vision are ultimately impotent against the insistence of silenced voices *to be heard*. Multiculturalism is not simply a hazy liberal dream of peace and harmony or a postmodern cliche.[15] Where cultural or other differences are forcefully subsumed to a universalist agenda the result can be terrifyingly real and violently dangerous. The "peasants" will storm the palace gates if they are left in alienation and disenfranchisement for too long. More or less powerful courtesans and satellites of the Empire must then decide how to weather the storm, or pay the price of complicity.

The rhetoric and actions by the United States after September 11 are not simply reprisals or acts of self-defence for an attack on American soil, but are actions elevated to the universal level of defending freedom and civilisation as a whole. Other nations must choose to be either "civilised" or complicit with terrorism, i.e. "uncivilised". The story of the "War against Terrorism" is told, not as an *American* story, but as a universal one. And those who perpetrated the attacks on the United States are not simply alienated young men engaged in acts of egregious criminality, nor are they part of a larger movement of resistance by a literate civilisation buried under years of colonial exploitation. Instead the story becomes a universal story of good versus evil in which only the "good" are truly human. The "bad" are entitled to no respect, no witness, no due process, no history and no law. From history contained within the rational narrative structures of international law we instead have a mythic tale of good versus evil. *Mythos* is an important way of structuring thought and history. But it is fundamentally different from the structures of *logos* on which the apparently rational modern world of international law seems to be based. September 11 has projected us into a strange no-man's land – caught between the limited field of rational law represented by the international legal order and the mythic world of good versus evil more typical of a religious framework of thinking.[16] Both these present themselves as universal fields of knowledge: the one represented by rational modernity and secular law making, the other by so-called "fundamentalist" religious movements.

What the American response to the attack of September 11 has done is to move the global order out of the apparently universal reason of international law into the universalist claims of fundamentalist religion. The rather frightened and muted discomfort many international lawyers and rational commentators have to both September 11 and the American response is that we are no longer within our familiar framework of Euro-American history, hitherto accepted as secular and rational, but have moved into a neo-medieval world of players claiming access to universal truths of a deeply conflicting nature. Bush's slip of the tongue shortly after September 11, describing the American response as a "crusade" against terrorism, was revealing – we have indeed re-entered the territory of the Crusades and Holy War. It is of course arguable that we have always been there and that our supposed rational, secular, modern world of law and global order has been no more than a self-serving illusion.

Cogito ergo sum is one expression of a notion of individuality separating mind or soul from the merely corporeal or physical.[17] White men have traditionally described themselves as having higher mental faculties than women or non-European men, and have therefore characterised themselves as more capable of full

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15 M.J. Perry "Are Human Rights Universal? The Relativist Challenge and Related Matters" (1997) 19 *Human Rights Quarterly* 461.

16 See K. Armstrong *The Battle for God*, Ballantine Books, New York, 2001.

17 J. Foster *The Immaterial Self: A Defence of the Cartesian Dualist Conception of the World*, Routledge, London, 1991.

individuation and full citizenship than others. Women and non-white men, through their reproductive roles or supposed racial characteristics (themselves a creation of white male thinking) are more closely associated with the physical or earthy and occupy a role outside of history. This position of "dehistoricisation" means that any intervention of the non-historical in the history of the West is always seen as catastrophic, as well as being evidence of the evil against which the story of progress and development is contrasted and defined. International law participates in this view by placing sovereignty within the domain of Euro-American historical processes. Everything else becomes invisible and unimaginable, theoretically unexplained and unimportant.[18] The eruption of the "non-sovereign" can therefore never be predicted or understood because it is not part of the story of modern international law.

The post-structuralist assault on the Enlightenment and humanism has highlighted the ambiguity and anxiety contained within the apparently solid European white male subject. Barrett briefly refers to the "existential doubt" of Descartes himself.[19] This existential doubt or *angst* runs like a stain through much modern philosophy.[20] There is a constant half-hidden awareness of lack, of a gap, of the failure to ever quite reach the plateau of absolute mastery. This can be translated into international law, for example, as the need to continually invent new rules governing the use of force. Collective defence against acts of aggression, mandated under the UN Charter, is no longer seen as sufficient when the aggression is defined as "terrorism". But unilateral or peremptory action against terrorism (as described in Richard Haass' statement above) is really no more than an anxious grab for certainty in the face of unpredictable and chaotic forces against which no certainty is possible. What we are seeing after September 11 is national panic made global. And this, of course, is precisely what terrorism is designed to create. The extreme reaction of the United States to an act of terror penetrating the body of the American territorial zone of safety, the American "homeland", is evidence of a collective *angst* at a very deep level. A feminist analysis of September 11 might see the American reaction to the terrorist attacks as the expression of hysterical fear of rape or even castration on a national (now global) level. Terror is, after all, something that many people in other nation-states have experienced over many years (much of it sanctioned by American government involvement). This is not to suggest that what happened on September 11 should not be condemned. But the context of these events is evidence of a much deeper malaise over which the rational secular order of international law seems to be having little effect.

A curious coalition of the modern and the postmodern is forming against those who would carry us into a neo-medieval world, not as Berzins has described as a variation of postmodernist fluidity and shifting identities, but a world of fundamentalist myths and the "battle for God".[21] International law seems still to be trapped by the rhetoric of universality and the narrowness of colonial definitions of sovereignty and power. The voices of those who speak outside the "malestream" can suddenly hijack our world and turn it inside out. In those processes enormous violence is done. But this violence hides the longer term and continuing violence that we do not see because we cannot recognise what does not fit within our own peculiar story of ourselves. The World Trade Center will fall and fall again until we can see it, not as an isolated and unpredictable accident of unprecedented evil, but as the culmination of a complex of interrelated stories, none of which have ended.

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18 See Anghie's explanation of sovereignty versus non-sovereignty in "Finding the Peripheries: Sovereignty and Colonialism in Nineteeth-Century International Law" (1999) 40 *Harvard International Law Journal* 1.

19 M. Barrett *The Politics of Truth: From Marx to Foucault*, Stanford University Press, Stanford, 1991, at p.90.

20 See the discussion of humanism's flaws and fall in J. Carroll *Humanism: The Wreck of Western Culture*, Fontana Press, London, 1993 and A. Megill *Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida*, University of California Press, Berkeley, 1985.

21 Berzins, *supra.*, note 5; Armstrong, *supra* note 16.