

Pandora's Box

A Trip Abroad

2013



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Pandora's Box 2013

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Editors

Samuel Walpole & Allister Harrison

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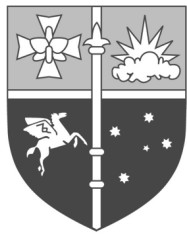
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'Legal problems, because they often reflect human problems, are not unique to any one system of law. And the appropriate answers must be moulded, at least in part, by reference to experience and, in large measure, experience is common to all peoples.'

-- Sir Anthony Mason, 'The Relationship Between International and National Law, and its Application in National Courts' (1992) 18 *Commonwealth Law Bulletin* 750, 753.

FOREWORD

International and comparative law were the two broad areas of law that fascinated me most as a student. In my undergraduate program, I took both public and private international law, and comparative law, before pursuing international commercial law subjects in my post-graduate degree. This path led ultimately to doctoral studies in comparative marine insurance law and I have continued to attempt to both study and practise in areas of private international and comparative law throughout my career.

The subject matter of this edition of *Pandora's Box* is, therefore, of enormous interest to me personally, as I am sure it will be to its many readers. The Editors are to be congratulated for persuading such an eminent group of scholars to contribute to this eclectic collection of essays and reviews. I hope that those readers who have not yet developed a deep interest in exploring matters of international and comparative law, and the importance of such matters to a deeper understanding of domestic law, are inspired by this edition to do so.

Professor Sarah Derrington^{*}
October 2013

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A NOTE FROM THE EDITORS

Contemporary legal education remains, for the most part, a black letter affair. Heavy focus is placed upon the various incarnations of the private law – the rules of tort, contract, trusts and the remedies that accompany their breach – for it is commonly accepted that it will one day be commercial, personal injury or corporate work that pays the bills (a perspective that Professor Jim Allan has referred to as ‘plaintiffitis’).

The study of such areas is, of course, incredibly important, and demands immense intellectual legwork to sustain it. But in sustaining our focus upon the private law – and even in examining ‘bigger picture’ areas like constitutional or administrative law – it is all too easy to accept as Gospel the Australian context (or at least the common law/statutory context) in which our idiosyncratic legal system has blossomed.

Consequently, we can often lose sight of the most profound and penetrating characteristic of law – its universality. Where there are humans, there is law of one variety or another. Perhaps law is not a system of social rules (cf Hart) nor a game of prediction (cf Frank) nor even behavioural psychology (cf Hägerström). Law is an aspiration, one common to humans across geographical boundaries. It is the purest manifestation of a desire to secure liberty and justice, the fruits of which grow sweeter and subtler with every harvest. The study of law is at its most rewarding when one turns their mind to the manifold ways in which it these lofty goals have been attempted. And so, in a journal now as old as the average undergraduate law student (certainly as old as its two editors) it seems an opportune time to gently remind our readership of this reality. JATL is proud to present *Pandora’s Box 2013: A Trip Abroad*.

Inside, you will find a variety of insights from highly distinct and equally distinguished voices. It is a journey that takes us to the high seas, the streets of Paris, the Extraordinary Chambers in the Courts of Cambodia, the Niger River delta, the high-rise firms of Japan, the Pyramids of Giza, and around the globe again many times over. It is a journey we have enjoyed chronicling, and one that we hope you enjoy retracing just as much.

Thanks must be given to many people. Thank you in particular to our sponsors, the *Queensland Law Society* and *UQ Office of Undergraduate Education*, for their continued generous support. We would also like to thank Will Isdale (Editor 2011-2012) for his guidance and cover design, Dr Anthony Cassimatis for his tip-offs and manifold connections, Joyce Meiring for her enlivening

artwork, Simon at Worldwide Printing for his attention to detail and the entire JATL society for their ongoing support. Finally, and most importantly, we must thank our distinguished contributors and reviewers, for their generosity in sharing their unique insights.

Please enjoy *A Trip Abroad*. We hope you return, as we have, with a renewed thirst for justice in the law.

Allister Harrison and Sam Walpole
Editors, *Pandora's Box* 2013
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ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal published by the Justice and the Law Society (JATL) of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

Pandora's Box is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind - as that is what the legal mind should be.

Pandora's Box journal is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit*.

Pandora's Box is launched each year at the Justice and the Law Society's *Annual Professional Breakfast*.

Additional copies of the journal, including previous editions, are available. Please contact pandoraseditor@justiceandthelaw.org for more information

ABOUT THE CONTRIBUTORS

Hilary Charlesworth is an Australian Research Council Laureate Fellow, Professor and Director of the Centre for International Governance and Justice in the Regulatory Institutions Network at the Australian National University. She also holds an appointment as Professor of International Law and Human Rights in the ANU College of Law. Professor Charlesworth completed her undergraduate education at the University of Melbourne, and subsequently obtained her Doctor of Juridical Science from Harvard University. Professor Charlesworth chaired the inquiry leading to the *Human Rights Act 2004* (ACT), and in 2011 was appointed as judge ad hoc of the International Court of Justice in the Whaling in the Antarctic Case. In 2007, she was made a Member of the Order of Australia for service to international and human rights law.

Lauren Dancer is a 2012 Australia-At-Large Rhodes Scholar, and is currently studying towards a Master of Public Policy at the University of Oxford. She recently completed a Bachelor of Civil Law at the University of Oxford, focussing on public international law and human rights law. Lauren graduated from Griffith University with degrees in law and international relations in 2009. She has previously worked as an Associate to The Hon Justice Douglas in the Supreme Court of Queensland, and as a solicitor with Ashurst in Sydney. She was admitted to the legal profession in the Supreme Court of Queensland in 2010, and to the High Court of Australia in 2011.

Sarah Derrington commenced as Academic Dean and Head of School at the TC Beirne School of Law, University of Queensland in July 2013. Educated at the University of Queensland, Professor Derrington previously taught maritime law, equity and commercial law. She has published in various journals, including *Lloyd's Maritime and Commercial Law Quarterly* and the *Law Quarterly Review*, and is the co-author of *The Law and Practice of Admiralty Matters*. Additionally, she is the immediate past president of the Maritime Law Association of Australia and New Zealand, a member of the Commonwealth Admiralty Rules Committee, the Chartered Institute of Arbitrators and the Nautical Institute. Professor Derrington also continues to practise at the Queensland Bar, exclusively in shipping law, and is an Associate Member of Quadrant Chambers, London.

The Hon Justice James Douglas was appointed to the Queensland Supreme Court in November 2003. Before then his Honour spent 27 years in practice as a barrister in Queensland, becoming a Queen's Counsel in 1989. His Honour was President of the Bar Association of Queensland from 1999 to 2001. From 1989 to 1996 his Honour was Chairman of the Queensland Symphony Orchestra's Advisory Board and Trustee of its Development Fund and from 1990 to 1996 Justice Douglas was also Chairman of the Queensland Theatre Company. His Honour is a member of the International Academy of Comparative Law and of the American Law Institute, reflecting his interest in other legal systems and comparative law. Justice Douglas is also a committee member and former president of the Alliance Française de Brisbane Inc and a member of the Senate of the Australian Catholic University.

Craig Forrest is a Reader in Law and Director of the Marine and Shipping Law Unit at the TC Beirne School of Law, University of Queensland. He teaches and undertakes research in private international law, cultural heritage law and maritime law. His current research interest focuses on the international law applicable to wrecks, and he was a member of the South African delegation to the UNESCO meeting of experts to draft the international convention on the protection of underwater cultural heritage from 1998-2000. Dr Forrest is a member of the International Law Association's International Committee on Cultural Heritage Law and was a Research Fellow at Cambridge in 2005. He has also taught in the United Kingdom, South Africa, Hong Kong and Korea. Before turning to the law, he served as a naval officer in the South African Navy.

Paul Kettle is a Brisbane-based lawyer currently working in the Queensland government. He holds a Bachelor of Arts and Bachelor of Laws (Hons IIA) from the University of Queensland. He worked as a legal intern in the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia in 2011.

Jonathan Kolieb is currently the A.O. Capell Prestigious Scholarship holder at the University of Melbourne where he is a PhD Candidate in the School of Law, writing a dissertation entitled: 'Corporate Peace-building: Regulating the Private Sector for Conflict Transformation'. He also teaches US politics and foreign policy at the University. Jonathan previously spent several years working and studying in the US. He served as Congressional Liaison Officer at the Embassy of Australia, Washington DC; as a consultant to the UN Secretary-General's Special Representative for Children and Armed Conflict in New York; and as research associate and special assistant at The Century Foundation in Washington DC. Jonathan is a former Rotary World Peace Fellow, and is a graduate of the University of California, Berkeley (LLM and MA), University of Melbourne (BA/LLB) and Monash University (BA (Hons)).

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Donald Rothwell is Professor of International Law and Head of School at the College of Law, Australian National University where his research focuses on law of the sea, law of the polar regions and the implementation of international law within Australia. Professor Rothwell received his legal education from the Universities of Queensland (BA LLB (Hons)), Alberta (LLM), Calgary (MA) and Sydney (PhD). He has acted as a

consultant or member of expert groups for UNEP, UNDP, IUCN, and the Australian Government and as an advisor to the International Fund for Animal Welfare. In 2012 he was appointed as Rapporteur of the International Law Association Committee on Baselines under the International Law of the Sea. Professor Rothwell has published over 160 articles, book chapters and notes; authored, co-authored or edited 17 books and has taught a variety of international law courses, ranging from the law of the sea to international humanitarian law.

Jordan Sosnowski is an Associate Fellow at the Oxford Centre for Animal Ethics. She graduated from Monash University with a Master of Laws, Juris Doctor and a Bachelor of Arts from the University of Queensland, majoring in Philosophy and English Literature. Jordan is currently working in the community legal sector and hopes to undertake a PhD in Animal Law in 2014.

Warren Swain is a Senior Lecturer in Law in the TC Beirne School of Law, University of Queensland. He was educated at the University of Oxford and he was previously a Stipendiary Lecturer in Law at Hertford College and University of Oxford Law Faculty, Lecturer in Law at the University of Birmingham and Lecturer in Law at Durham University. Dr Swain's research is concerned with the history of private law and intellectual history in so far as it relates to law. He is also interested in legal biography.

Gillian Triggs is President of the Australian Human Rights Commission. Previously, she was Dean of the Faculty of Law and Challis Professor of International Law at the University of Sydney (2007-2012), and Director of the British Institute of International and Comparative Law (2005-2007). Professor Triggs holds a Bachelor of Laws and PhD from the University of Melbourne, and a Master of Laws from Southern Methodist University in Dallas, Texas. In addition to her academic career, Professor Triggs formerly worked as a barrister with Seven Wentworth Chambers and as an international law consultant to Mallesons Stephen Jaques.

Leon Wolff is an Associate Professor of Law at Bond University. He is the founding co-director of the Australian Network for Japanese Law (ANJeL), deputy director of the Centre for Law, Governance and Public Policy, and Coordinator of First Year Studies. In addition to his legal qualifications, he also has accreditation as an English-Japanese translator and interpreter. His research expertise lies in Japanese law and society and legal education.



Professor Donald Rothwell

Art by Joyce Meiring

An Interview with Professor Donald Rothwell* on *'The International Law of the Sea'*

PB: Professor Rothwell, thank you for joining us. The international law of the sea has existed since antiquity, and has culminated in the articulation of the *United Nations Convention on the Law of the Sea* (UNCLOS).¹ Could you briefly trace the development of this area of law, and how it came to be expressed in the Convention?

DR: The law of the sea is perhaps one of the longest standing bodies of international law. It emerged through state practice in antiquity and, to that end, the role of publicists in the development of the international law of the sea has been quite significant. In the 1600s, publicists such as Hugo Grotius and John Selden were very influential in terms of developing the initial thinking as to how the oceans should be subject to management and, ultimately, governance and control. At the time, the Grotian view of the freedom of the seas prevailed. That created the dominant paradigm for the law of the sea which prevailed up until, literally, the last twenty or thirty years. Thus, Grotius and his work as perhaps the preeminent foundational publicist in the international law of the sea, has been incredibly influential in how the law of the sea was originally conceived and developed. The principle of the freedom of the high seas is very much a Grotian construct.

During the 20th century, however, and certainly post World War II, with the development of the International Law Commission (ILC), there began a push to codify certain areas of international law. The ILC developed a draft law of the sea convention in the 1950s that went to a diplomatic conference in Geneva in 1958. Out of that resulted the four Geneva Conventions on the Law of the Sea. That first UN Conference on the Law of the Sea was a major turning point in converting the law of the sea from an area based primarily on customary international law to a predominantly treaty based area. There was a subsequent UN Conference on the Law of the Sea in

* Professor Rothwell is Professor of International Law and Head of School at the Australian National University College of Law. His research focuses on the law of the sea, law of the polar regions and implementation of international law in Australian domestic law. This interview was conducted by Samuel Walpole and Allister Harrison on 16 August 2013 via telephone. Questions for the interview were based on issues canvassed in Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010), along with other current issues relating to the law of the sea.

¹ Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

1960 which ultimately ended without any agreement being reached. However, the third UN Conference on the Law of the Sea, which started in 1973 and ended in 1982, ultimately concluded the current 1982 *United Nations Convention on the Law of the Sea*. The current Convention is an expression of those developments in the law between 1958-1962 through UN conferences. However, even UNCLOS still has embedded into it some of those fundamental notions that Grotius developed; that is, concepts of freedom of the seas.

PB: Australia is an island nation and marine issues are often prevalent in our media. Consequently, would you say the international law of the sea has a particular significance for Australia?

DR: Very much so. This is reflected in the significance that Australian government lawyers give to law of the sea issues and it is increasingly being reflected by the attention academic lawyers are giving to the topic. Australia has also been able to benefit enormously from the developments of UNCLOS, in particular. This is not only through the capacity to proclaim a territorial sea but, perhaps most significantly, the ability to claim a 200 nm exclusive economic zone (EEZ) and a minimum 200 nm continental shelf. Most recently, in 2012, Australia was able to proclaim a continental shelf extending beyond 200 nm consistent with recommendations that Australia received from the Commission on the Limits of the Continental Shelf. It is poorly understood in Australia that we have this vast maritime area over which Australia exercises, in some parts, sovereignty and in other parts sovereign rights and jurisdiction. This, in total, makes Australia one of the largest land and marine nations in the world. To a degree, Australia has been able to enjoy the benefits of our geographic location. It is really only to the immediate north of Australia, as we adjoin Papua New Guinea and Indonesia in particular, where there are any significant limitations to Australia's ability to project its own maritime zones very extensively from the coastline.

PB: International law divides the sea into a variety of different zones, such as the EEZ and the territorial sea. How do the rights of nation states differ across these different zones, and how does this legal regime differ with respect to the high seas?

DR: The territorial sea is, as its name suggests, an area in which the coastal state effectively has an extension of its land territory into the adjoining maritime zone. The rights of the coastal state to the territorial sea are

absolute. There is only one exception: the accepted right of foreign vessels to navigate through the waters of the territorial sea provided that they are exercising the right of innocent passage. Consequently, the territorial sea should really be seen as an extension of a state's land territory from the low water mark coming out of its coastline. The EEZ is, as its name suggests, a 200 nm zone over which the focus is predominantly on resources within that area. These include fisheries, oil and gas and the like. Within the EEZ, the coastal state enjoys sovereign rights over those resources along with jurisdiction over certain activities such as, most relevantly for Australia, marine pollution.

The major difference between these zones and the high seas is that the high seas are an area over which no one state has any sovereign rights. Jurisdiction can be exercised over the high seas in limited circumstances. Any state can exercise jurisdiction over one of its own flag vessels on the high seas and then, of course, there are exceptions in respect of activities, such as piracy on the high seas, where any state may exercise jurisdiction under UNCLOS. Otherwise, the high seas are an area over which no sovereign rights can be asserted, or will be recognised.

PB: What restrictions are imposed on the passage of naval vessels, or on the conduct of military exercises?

DR: Within the territorial sea, UNCLOS is fairly clear: all vessels have a right of innocent passage providing that the activities engaged in by those vessels do not constitute a threat to the peaceful security of the coastal state. For example though, one provision in the Convention makes it clear submarines are required to navigate on the surface and show their flag when passing through the territorial sea. However, all naval vessels of all states, providing they are navigating peacefully, should be able to pass through the territorial sea without impediment.

Beyond the territorial sea, high seas navigational freedoms apply both in the EEZ and high seas proper. In the high seas proper there is really no doubt that military exercises can be conducted. There has been some debate as to whether military exercises are consistent with use of the oceans for peaceful purposes. Some countries, like the United States, have been insistent on the ability to conduct military exercises on the high seas and broadly that has been accepted. One of the more contentious issues is whether a foreign power can conduct military exercises within the EEZ of a coastal state. That has raised

some contentious questions, which have been reflected in issues between China and the United States in parts of the South China Sea.

PB: That leads us well into our next series of questions regarding current marine issues. Firstly: Piracy, particularly off the Coast of Somalia, has been well publicised in recent years. What legal issues exist for states attempting to combat piracy? You mention in your book that jurisdiction is a key issue for counter-piracy operations.²

DR: The principal issue is that whilst UNCLOS clearly gives all states capacity to engage in counter-piracy operations within the high seas and the EEZ, many of these operations have raised issues about counter-piracy operations within the territorial sea. Within the territorial sea, it is not consistent with the Convention for a foreign military vessel to foreign states' territorial sea to conduct enforcement operations against pirates. The distinction that is often made is between sea robbery, being an act within the internal waters of a state, and piracy, that occurs beyond those waters. Of course, pirates do not make any distinction as to where they conduct their activities and yet foreign military vessels do have to make those distinctions. An interesting development in the law of the sea has been the UN Security Council adopting a series of resolutions, from 2008 onwards, which have given foreign military forces acting in concert with coastal states capability to exercise some form of counter-piracy jurisdiction within those coastal states' territorial sea. That has ultimately proved quite effective from an enforcement perspective. There have been additional issues with respect to prosecution of pirates and a whole range of transnational and international criminal law issues in terms of how these prosecutions occur. However, from a pure international law of the sea perspective, these issues have been resolved, albeit on a regionally specific basis.

PB: Another prominent issue relating to Australia is our case in the International Court of Justice (ICJ) against Japan's Whaling programme which, of course, is brought under the Whaling Convention. However, could you outline the issues in the case and what the implications of any future decision may be?

DR: Ultimately, the principal arguments Australia raised, as reflected in both the Australian memorial and oral argument, is principally focused

² Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 434.

around Article 8 of the *International Convention for the Regulation of Whaling*.³ Article 8 is the provision that allows states to issue special permits for the purposes of scientific research. Australia has also contended that Japan's JARPA II whaling programme in the Southern Ocean is not only not conducted consistently with Article 8 but is, in fact, an activity conducted inconsistently with the current moratorium on all forms of commercial whaling. Ultimately, the way in which the case was framed and argued in the ICJ became a treaty law issue. Having said that, a careful analysis of both memorial and oral argument shows that both Australia and Japan expanded their argument to look at how "scientific research" is interpreted in a range of other instruments. Issues arose in terms of how "scientific research" was interpreted under UNCLOS, which discusses marine scientific research in a variety of contexts. To that end, whilst UNCLOS was not directly involved in the core legal argument before the ICJ, the court's ruling may have ramifications for the way in which "scientific research" is understood in UNCLOS.

PB: Moving to another issue, there has been ongoing debate in Australia for many years about asylum seekers arriving by boat. There has been significant discussion about whether it would be lawful to "turn back boats". Would this represent a breach of Australia's international obligations?

DR: From a law of a sea perspective I think there are some very significant issues here. First of all, where is it exactly proposed that vessels carrying asylum seekers would be subject to interdiction? If they were subject to interdiction beyond the contiguous zone,⁴ in the EEZ which is subject to high seas navigational freedoms, then there would immediately be an issue as to whether Australia even has capacity to interdict such vessels, or to seek to exercise control over such vessels without consent. At the moment when Australian vessels visit asylum seeker-carrying vessels beyond the contiguous zone those visits predominantly occur with consent. Those vessels consent to the visits because often they are in a safety of life at sea situation where their vessel is unseaworthy or, secondly, they welcome Australian vessels' assistance in ultimately bringing them to Australia.

³ *International Convention for the Regulation of Whaling*, opened for signature 2 December 1948, 161 UNTS 72 (entered into force 10 November 1948).

⁴ The zone that sits just beyond the territorial sea, extending out 24 nm from the coastline, and within which Australia can exercise control and jurisdiction with respect to immigration matters.

Any interdiction of vessels without consent beyond 24 nm, in my view, has no basis at all under the current law of the sea.

Secondly, to seek to control those vessels, which appears to be consistent with the approach being suggested in terms of turning back the boats, once again, would have no basis under the law of the sea. If these vessels were conducting acts of piracy, there would be a jurisdictional base. However, if vessels are carrying asylum seekers at sea there is nothing under international law prohibiting vessels carrying these persons across the EEZ or the high seas. Therefore, there is no legal basis for taking control over these vessels.

Thirdly, the issue of taking the vessels into the Indonesian EEZ, or certainly the Indonesian territorial sea, would raise significant issues with Indonesia. Certainly, any entry of an Australian warship into Indonesia's territorial sea where that warship is not engaged in innocent passage, which clearly this would not be, would be fiercely met by Indonesia. There is a whole raft of issues. We have not even touched on the safety of life at sea questions associated with seeking to exercise control over an unseaworthy vessel and then possibly abandoning it somewhere in the ocean.

PB: Another thorny issue is climate change and marine environmental security, which you have noted as key challenges for the law of the sea. How do these issues interact with international law and what are the challenges they pose?

DR: Climate change, in particular, raises some quite fascinating and very distinctive issues. From a pure law of the sea perspective, climate change can, in certain circumstances result, ultimately, in the submersion of quite significant terrestrial land features. In some cases, arguably, we may see the disappearance of the sole basis upon which certain maritime claims are made. That will raise questions as to whether the ability of states to protect certain maritime claims, or rely upon baselines drawn upon their coast, will have to be revisited. Interestingly, the International Law Association has recently formed a committee looking at the impact of climate change on aspects of the law of the sea and the issues arising for those whose land territories might be affected by these issues.

There are also clear marine environmental security issues arising from climate change, in a number of settings. One that has garnered recent publicity is the movement of fish stocks throughout the world into

not previously contemplated parts of the world's oceans. This is occurring because, to a degree, polar oceans are becoming more temperate. As the polar oceans become more temperate, tropical fish stocks or fish stocks that have traditionally been found in other parts of the world's oceans are moving further south (in Australia's case, effectively towards Antarctica). That raises issues because around the Southern Ocean we already have a Convention in place directed toward living marine resource management.⁵ This Convention is very specifically directed toward the traditional marine environment found in and adjacent to the Southern Ocean. Some of those traditional paradigms are being challenged as a result of our emerging understanding of climate change. This is just one example of some of the challenges we are looking at. Fisheries issues are very pertinent at the moment. Not only do we have issues in the Southern Ocean but there are potentially larger issues in the Northern Hemisphere where European or Atlantic Ocean-based fish stocks might be moving toward the Arctic.

PB: In your book, you mention that UNCLOS establishes the International Tribunal for the Law of the Sea. You characterise the Tribunal as 'unusual in public international law because it is comprehensive and compulsive'.⁶ Why is this unusual, and why did UNCLOS adopt such a system?

DR: It is unusual in the sense that every state that signs up to UNCLOS is bound to accept as a minimum the dispute resolution mechanisms found in Part XV of UNCLOS. Outside of the World Trade Organisation, this is one of the only examples of a major global multilateral convention which has a compulsory, formal dispute resolution mechanism embedded into it. It is also a comprehensive system because not only did it create a new judicial institution, the International Tribunal for the Law of the Sea, but it also created a number of other optional ad-hoc tribunals. In addition, state parties have the option of referring law of the sea disputes to the ICJ. States have access to a smorgasbord of dispute resolution options for law of the sea disputes.

The mechanisms are slowly, but surely, being tested. At this point in time, we have a very interesting example in the form of an arbitration

⁵ *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 48 (entered into force 7 April 1982).

⁶ Rothwell and Stephens, above n 2, 439.

between the Philippines and China concerning the South China Sea, which was commenced earlier this year. China has refused to accept the jurisdiction of the UNCLOS Annex VII arbitral tribunal and we are waiting to see how that ultimately plays out.

It was felt essential to put dispute resolution mechanisms in place because UNCLOS was so comprehensive in covering many new areas of international law. The framers in the 1970s quite rightly anticipated that as these new aspects of the international law of the sea developed through state practice a range of possible disputes would develop. Accordingly, it was useful to have in place mechanisms to resolve these disputes. To that end, the framers recognised there would be a need to have a very comprehensive peaceful mechanism for dispute resolution. The last thing they wanted to do was to set out a new framework under which states could assert all these new maritime claims and create all these new disputes. There was concern disputes could result in conflict so peaceful settlement is, consequently, deeply embedded in the ethos of the convention.

PB: UNCLOS is over thirty years old. Have the mechanisms you have just described been effective? Will they continue to be effective, and how are the remaining challenges best addressed?

DR: I think it can be said that UNCLOS has been effective. It was concluded in 1982 and entered into force in 1994 so it has been in force now for 19 years. Notwithstanding the fact the United States is the largest maritime power which has not yet become a party to UNCLOS (and one would think this would result in disputes) it has not resulted in significant issues. So, by and large, UNCLOS has successfully provided an orderly framework for the assertion of maritime claims and, as we have just discussed, the resolution of disputes.

The Convention, however, was never intended to be totally comprehensive. It is often described as the constitution for the oceans. I like that description as UNCLOS provides a fundamental framework for much of the law of the sea, whilst leaving scope for the negotiation of additional instruments. We have seen that, especially with regard to fisheries. For example, the fish stocks agreement concluded in 1995⁷ fills a major gap in the law in terms of some fish

⁷ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly*

stocks. We have also seen multiple regional fisheries agreements concluded. Australia is a party of many of these in this particular region.

One of the big issues at the moment is the regulation of certain activities on the high seas. There is a major process in place within the United Nations at present under which states are working to resolve questions concerning what is called biodiversity beyond national jurisdiction (BDNJ). There is a debate ensuing, which Australia is a major player in, as to whether another implementing agreement is required in the form of additional instrument dealing specifically with BDNJ.

We have also discussed some other areas where issues have arisen. Piracy is the most obvious one, as we have discussed. There, the Security Council has filled some of the gaps that have otherwise been identified in the law of the sea framework.

I think it is quite encouraging to see UNCLOS as a constitution for the oceans. It is very well bedded down and when gaps have appeared, state practice has filled those gaps or, alternatively, states have sought to resolve them either by going to the Security Council or adopting other global or regional instruments that support the UNCLOS framework.

PB: Professor Rothwell, thank you for speaking to *Pandora's Box*.

The French Criminal Jury System

The Hon Justice James Douglas*

My direct exposure to the French criminal justice system is very limited. In December 1984, my family and I were trapped on a traffic island on our way to the Louvre. I was carrying our 19 month old son in my arms. My wallet was, very foolishly, bulging in my hip pocket. My wife was some metres ahead of me and not aware of a small group of gypsies who, spying an easy prey, descended on me and relieved me of the wallet. One of them had the cover of a sign protesting what was then happening in the former Yugoslavia.

Almost immediately an official car pulled over and one of its occupants made a call on a radio telephone. A group of Frenchmen raced across to the traffic island and apprehended the gypsies. A young Englishman, selling paintings outside the Louvre, lit out after the girl who had raced off with my wallet, caught her down by the Seine and retrieved the wallet and, having refused her offer of half the contents, brought it back to me. By then a van full of police had arrived, summoned by the radio telephone. We and the gypsies were bundled into the van and taken off to a nearby police station where I made a statement, a *procès-verbal*.

Ever hopeful of another trip to Paris, I asked the young plain clothes detective wearing jeans and taking the statement whether this meant that I would be needed to give evidence at the trial (and come back, I hoped, at the expense of the French State!). “Oh no” was her answer. My statement was now on the *dossier* and my oral evidence would not be needed.

I did return to Paris of course, some time later on the same holiday, found the English artist and bought a painting of the church of *Sacré Coeur* from him. I was never called as a witness unfortunately but I must say that I was very impressed by the speed and efficiency of the French criminal justice system. Bearing in mind the comparative nature of this essay, I must also pay tribute to the honesty of the young Englishman.

Now that misdemeanour would never have come before a *cour d'assises*¹ in France, the court where French criminal juries are used. It would have come before a lower court and would, very likely, have been disposed of speedily. If you are interested and can track it down there is a good French documentary film, *Le 10^e Chambre, Instants d'Audience*, which will show you how the system of

* Judge, Supreme Court of Queensland.

¹ It means literally ‘the court of the seated’. You can see in it the etymological origins of the English Assizes.

summary justice for less serious offences works there. You can see extracts of it on YouTube but you will need to speak good French to follow it.²

Those tribunals, where the vast bulk of criminal cases are dealt with, do not use juries and reflect more clearly the popular view of the French criminal justice system here. We think of it as an inquisitorial rather than an adversarial system and many believe inaccurately that it operates with a presumption of guilt rather than innocence. The more accurate analysis is that the French system requires the court to convince itself of the guilt of the accused. In that context another surprising feature of the French system for us is that there has been, historically speaking, no system for pleading guilty. The accused has to be proved guilty to the satisfaction of the court. The process of investigation will weed out many suspects whose prosecutions will not proceed.

I COURS D'ASSISES

That the French use juries, historically inspired by the English jury system and introduced in 1791 to bolster revolutionary democratic principles, is not so well known. Trial by jury is reserved for the most serious offences where the potential minimum sentence is greater than 10 years. Those offences are known as *crimes* in the French system. It is probably useful to call them felonies in English translation.³

Since 2011 the court hearing those charges is constituted by three judges and six jurors at the first instance. There used to be three judges and nine jurors. There is now, since 2000, provision for an appeal from such a court to an appellate *cour d'assises* consisting of nine lay people and three judges, an institution which I shall discuss shortly. Again, until 2011, it consisted of twelve jurors and three judges. Typically the serious felonies dealt with before these courts are murder, manslaughter, rape and drug trafficking.

II FOCUS ON THE INVESTIGATION - PRODUCTION OF THE DOSSIER

Another different feature of the French system compared to ours is that the focus is not so much on the trial as on the investigation of the charge through the court system, controlled, in cases such as these, by the *juge d'instruction* who supervises the collection of the evidence by the judicial police. The government of President Sarkozy threatened to replace the *juge d'instruction* by

² <http://www.youtube.com/watch?v=tDUI3Z3FJ3c>

³ Article 131-1 of the *Code Pénal*. The French *Penal Code* and the *Code of Criminal Procedure* can be found here in French and English: <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

normal prosecutors, to much opposition from members of the judiciary and the general populace. That particular change was not made. I gather that the current administration supports the continued use of the *juge d'instruction*.

There is no right to silence as we conceive of it. A person under investigation may refuse to answer questions but the normal expectation is that he or she will respond to inquiries. If a suspect fails to do so adverse inferences can and will be drawn. There is also a system of criminal legal aid which is extensive and available from the start of an investigation. During a typical investigation there will be several occasions when the accused will be examined by the *juge d'instruction*, normally with his lawyers present, in respect of the progress of inquiries by the police.

This is the process of the development of the *dossier* or file which lays the basis for the prosecution and of the evidence which will be led at the trial. The *dossier* will consist of documents similar to those gathered in a police investigation here, such as witness statements, photographs, scientific evidence including expert evidence and recordings including transcripts of statements made by the accused. It will also include the results of interviews before the *juge d'instruction* where the evidence, as it is gathered, will be presented to the accused and his comments requested.

A significant and separate part of the *dossier* will focus on the character of the accused, something which does not normally become relevant in our system until and if any sentence is to be imposed. The accused's general character is regarded as relevant in the French system, not only in respect of penalty but also in respect of guilt on the basis that the court's focus is on the nature of the person being charged as much as on the nature of the acts said to constitute the charge. In French terms they judge the person not the crime. The rules of evidence are far less technical than apply in common law systems and focus on relevance, taking a much broader view than in our system where, of course, we normally exclude "propensity" reasoning in considering whether a crime has occurred.

III EXPERT EVIDENCE

Expert evidence will often be sought in the investigation and called at the trial. The courts themselves in France keep lists of relevantly qualified experts who are called on to examine the scientific issues in the individual cases. It is a mark of prestige to be appointed to the courts' panels. Typically a case may require ballistic or other scientific evidence and there will often be medical and psychological reports concerning the condition of any victims and the mental state of the accused. The accused is given the opportunity before the trial to

examine those reports and, if he or she wishes, to ask for further reports either from the same or from another expert to deal with particular issues.

IV THE TRIAL

At the trial the *dossier* will be in the hands of the three judges but is not made available to the jurors. They are selected by a process similar to ours where jury panels are drawn from the electoral roll to sit in court for particular periods.

In a normal criminal trial conducted without a jury the *dossier* would supply the evidence required for the hearing without the need for oral evidence unless a party wanted to cross-examine a witness. The accused would still be interrogated by the judge. In jury trials, however, the important witnesses are called. That may reflect the orality connected with the English jury system as well as the wish that the jurors observe the witnesses to assist them in reaching their decision. The parties may agree that certain witnesses need not be called. Accordingly, a significant body of oral evidence may be led before the French jury but much of it focuses on what may be called an audit of the *dossier* rather than a detailed exposition of all the facts contained in that file. In other words it is not necessary to lead orally all the evidence obtained by the investigation. The accuracy of the most important information on the file is what is most commonly addressed.

The questioning in a French criminal court is traditionally conducted by the judge presiding. In 2000, their Code of Criminal Procedure was amended to permit the parties also to examine witnesses.⁴ Previously the system was that the judge would examine witnesses and parties could suggest lines of questioning to him or her. I understand that continues to be the normal procedure. There is, however, an increasing incidence of the use of cross-examination by the lawyers, perhaps stimulated by the expectations of French citizens used to seeing television crime dramas from English speaking countries.

As I indicated earlier, there is no general right to silence in the sense that inferences can and will be drawn against an accused who does not answer questions. Normally the accused is interrogated before the jury, another significant distinction from standard practice in our courts where the calling of an accused is the exception rather than the rule.

⁴ See Article 442-1 and my paper given at a symposium organised by Bond University which can be found at: <http://archive.sclqld.org.au/judgepub/2012/douglas241112.pdf>

A complicating feature of the French system is that civil parties, those who have been affected by the crimes alleged, normally appear and pursue claims for civil damages or other relief in parallel proceedings at the same time as the criminal trial is heard.

When the judges and jury retire together to consider their verdict, the issue is not whether the accused is guilty or not guilty. Rather the jury is asked to answer a series of questions relevant to the issues raised by the charge, the answers to which will determine whether or not the accused is guilty. The judges and jurors consider the issues in conference, including questions of penalty. To that extent, at least, the interaction between judge and jury is quite unlike our system.

Four years ago my associate was a young French judge and one of the differences between our systems which drew his attention was the care we judges use to make sure that we do not speak to the jury except in the court room and then in a very formal way.

Nor is the decision one that must be arrived at unanimously or by a majority of ten out of twelve as may occur in most cases here now. There has to be a two-thirds majority of the combined numbers of the jury and the judges. They need to be thoroughly convinced of the accused's guilt, or in the French term, have an *intime conviction* of it, guilt, in the "sincerity of their conscience." Before the court retires, the president of the court is required to read the following instruction which is also placed in the jury conference room prominently in large letters:⁵

The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of

⁵ Using the translation at the Légifrance website. The original in French is:

"La loi ne demande pas compte aux juges des moyens par lesquels ils se sont convaincus, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs: 'Avez-vous une intime conviction?'"

his defence. The law asks them but this single question, which encloses the full scope of their duties: 'Are you inwardly convinced?'.

The language is not the same as our formula of "beyond a reasonable doubt" but the gravity of the conclusion required is just as obvious.

V APPELLATE COURS D'ASSISES

Traditionally there was no appeal from a decision of the *cour d'assises*. That approach stemmed from the view that the jury's verdict was inviolable, itself derived from the revolutionary belief that the voice of the people was equivalent to the voice of God.⁶ Yet, in 2000, the decision was made to create the appellate *cours d'assises*. This was partly driven by concerns raised by France's accession to the European Convention on Human Rights and the view of the European Court of Human Rights that there should be a system of appeals and a system equivalent to providing reasons for decisions.

What seems unusual to us is that the appeal is conducted as a retrial. The evidence is called again before a slightly larger jury, nine instead of six with the same number of professional judges. It is curious for us to see a trial court substituting its decision for an earlier trial court as part of an appeal process. We leave the appellate process to a panel of judges who review the evidence and the conduct of the trial below. Even if we do give our judges wide powers to set aside a jury verdict they will either quash the conviction or send the decision back to the trial court if a new trial is needed. Our courts of appeal sometimes receive fresh evidence but do not conduct a complete new trial.

It seems likely that the sacrosanct nature of the jury's verdict requires any review to occur before a court which also includes a jury, and, at least for form's sake, a larger number of jurors. Moreover, there is no system in French courts to transcribe oral evidence. The appeal must, therefore, necessarily be one constituting what we would think of as a hearing *de novo* on fresh evidence. The record, the *dossier*, does not contain the oral evidence that was before the original jury. The appellate jury court does, however, receive evidence of the answers provided by the earlier jury. When it began, the appellate system was not used frequently but is used more now as the legal system becomes more familiar with the new institution.

⁶ *Vox populi, vox dei*. See V.P. Hans and C.M. Germain, 'The French Jury at a Crossroads' (2011) 86 *Chicago-Kent Law Review* 737, 757.

A final appeal, solely on points of legal principle, lies to the *Cour de Cassation*, France's highest court in the normal court structure.⁷

VI CONCLUSION

The criminal jury trial in France began as a legal transplant from England. The revolutionaries believed in the importance of citizens' involvement in the criminal trial to reflect democratic principles. The English system was an obvious model to adapt. The system is still an important aspect of French democracy and legal culture, although there have been differing dynamics affecting it over the years depending upon politicians' perception of the severity on crime of judges compared to jurors. Limitations have also been imposed over the years on the types of charges that may be dealt with by jury trial.

In my view, the jury trial in our system similarly retains its importance as a protector of democratic principles. The fascination, as with many aspects of comparative law, lies in examining how an idea takes root in foreign soil and is transformed, often dramatically, by its adaptation to a different society. The examination of the French jury trial system throws an interesting light on how the closed bureaucratic investigative system, otherwise typical of French criminal law, can be opened to the scrutiny of ordinary French citizens, if rather differently from the way the jury operates in the common law.

From the comparative viewpoint understanding the French system can assist when considering possible changes to ours. The converse is also true. The introduction of cross-examination into the French system is one example of the common law's influence there. Bron McKillop in his 1997 monograph, *Anatomy of a French Murder Case*,⁸ describes three features of the French system of which we could take advantage: greater control by the judiciary over the legality and propriety of the use of police powers to obtain evidence; the use of independent experts from panels supervised by the courts; and the ability to draw adverse inferences from the silence of the accused. England and some Australian jurisdictions have adopted legislative changes reflecting those sorts of concerns, sometimes controversially.

While the International Criminal Court and the specialised international criminal tribunals do not use juries, their criminal procedure is essentially a

⁷ They have a separate system of courts dealing with the review of administrative decisions which culminates in the *Conseil d'État*. There is also a body called the *Conseil Constitutionnel* which reviews the constitutional validity of legislation.

⁸ (Hawkins Press, 1997) 100-102.

hybrid of civilian and common law systems. They provide further examples of the internationalisation of legal norms. Complaints about the dilatory pace at which cases proceed in those courts suggest, however, that a greater focus needs to be placed on improving their procedures. Informed comparative analysis about ways to improve that system should start from a proper understanding of the procedural sources, a course which needs to draw on an understanding of how the rules reflect the particular societies from which they came. Legal transplants or hybrids do not always grow as expected. They may need pruning and fertilising to achieve their potential, a useful task for cooperation among comparative lawyers.

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Feminist Travels in International Law

Hilary Charlesworth*

Feminist analysis first emerged in international law just over two decades ago. It has taken many different forms and is now a lively feature of international legal debate. But has it had any effect? And is it worth pursuing? Overall I think that feminists have been successful in bringing the language of women's empowerment into international law but less adept at identifying methods to give this language life on the ground.

One major strand in feminist scholarship has been concerned with the involvement of women in the development of international law, documenting the absence and exclusion of women from law-making fora. International institutions have been ready targets for this criticism. Examples of this type of criticism in the area of human rights include the absence of women in the processes of defining human rights standards and in implementing them.¹ The unequal representation of women in most of the institutions of the United Nations (UN) human rights system is a human rights issue in itself, contravening the obligation to ensure that women have the opportunity to participate in the work of international organisations 'on equal terms with men and without discrimination'.²

The lack of women is also connected to the lop-sided concerns of the traditional human rights canon which sidesteps issues that have a particular significance for women. For example, the issues of illiteracy, development and sexual violence are dealt with in "soft" law instruments but are not addressed by legally binding norms. Moreover, international law focuses on states as primary violators of human rights. Much more significant are the activities of non-state actors, such as international monetary institutions, which can impose social and economic conditions on their loans that adversely affect women's lives.

A second significant strand of feminist scholarship has focussed on the role that gender plays in the formation of international law. It has studied the

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¹ See e.g. Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011).

² *Convention on the Elimination of all forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 8.

language and imagery of the law and their dependence on gendered categories. International law lays claim to rationality, objectiveness, and abstraction, characteristics traditionally associated with Western masculinity, and it is defined in contrast to emotion, subjectivity, and contextualized thinking. Its claimed universality disguises its gendered character. Examples of this type of critique include the limited nature of the international legal understanding of equality and non-discrimination which promise equality only on male-defined terms. They require that women be treated in the same way as a similarly situated man, without recognising the effects of structural discrimination against women. Moreover, women's rights are presented solely as an issue of non-discrimination with respect to men. But the fundamental problem for women is not simply discriminatory treatment compared with men. Women are in an inferior position because they lack real economic, social, or political power in both the public and private worlds.

Despite the limitations of international law identified in feminist analyses, international law has been constantly invoked in feminist struggles as a source of transformation and empowerment. This has created a certain tension within feminist international legal scholarship, and sometimes a deeply fractured politics.³

Feminist international legal writings often draw on a range of theoretical positions that can sit uneasily together; for example the idea that women have distinctive attitudes, interests, and experiences may be combined with an argument that a reconstructed international law can deliver a truly impartial form of justice. This has led to charges of theoretical incoherence or impurity. Such a critique illustrates Elizabeth Grosz' observation that feminist theories rest on a deep tension between their role analysing the thoroughgoing masculinity of disciplinary knowledge and their role as a response to political feminist goals; they often incur the wrath of the traditional academy because of their overtly political ends; and the ire of feminist activists because they can become immersed in the male-dominated world of theory.⁴

Because of the significant scholarly literature in this area over the last two decades, some feminist ideas have now been absorbed into the rhetoric of international law and its institutions. International women's groups have taken up feminist critiques of the international legal order. In many areas, however,

³ The differences between Catherine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press, 2006) and Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) are examples of this.

⁴ Elizabeth Grosz, "A Note on Essentialism and Difference" in Sneja Gunew, ed., *Feminist Knowledge: Critique and Construct* (Routledge, 1990) 332.

progress has been limited. Feminist issues have been either corralled in the margins or rendered so bland that they have no transformative bite.

Feminist ideas have fared little better within the academy. Feminist international legal scholarship typically presents itself as in conversation with the mainstream of international law. We ask the mainstream to consider women's lives when applying or developing the law; we critique the assumptions of international legal principles; and we argue for an expanded referential universe. This conversation is, however, almost completely one-sided; a monologue rather than a dialogue. It is very hard to find any response from the mainstream to feminist questions and critiques; feminist scholarship is an optional extra, a decorative frill on the edge of the discipline.

Although feminist international lawyers are often grouped under the umbrella of "New Approaches to International Law", feminist ideas are in some tension with those of critical theorists. For example, David Kennedy's work has excavated the dark sides of international law. He understands the law as a method of ducking responsibility for ethical and political choices.⁵ On this account, international law is worth studying for its contradictions and obfuscations but it can deliver only illusory benefits. Feminists, by contrast, embrace normative projects – in particular achieving equality for women. Feminist lawyers tend generally to assume that the right sort of international law will achieve women's equality, or at least get them part of the way.

It is striking that most of the debate and engagement with feminist ideas in international law comes from other feminists. Indeed feminist scholars have created a veritable industry of internal critique, pointing to the problematic assumptions and approaches of other feminists. Examples of such critiques include those of Third World and postmodern feminists. Take Ratna Kapur's scrutiny of what she terms the 'victimisation' rhetoric used by the international human rights movement when discussing the situation of Third World women, particularly in relation to violence and trafficking. Kapur argues that the assumption of a common international women's victimhood operates to keep women in their place by presenting them as both vulnerable and ignorant.⁶ She criticises a focus on sex as the locus of women's oppression and urges a more complex understanding of women's lives through considering factors such as race, wealth, class, and religion.

⁵ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004).

⁶ Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Law Journal* 1.

Karen Engle has examined one of the apparent success stories of international feminist activism, the criminalisation of rape in the International Criminal Tribunal for the Former Yugoslavia.⁷ She suggests that this strategy is built on a view of women as passive victims of sexual violence, and that it presents a one-dimensional view of the suffering of women in the conflict in Bosnia-Herzegovina. Engle contends that the strategy of prosecution has had the practical effect of reifying ethnic differences and the legal and moral effect of denying the possibility of sexual agency in times of conflict. She is sceptical of the utility of any claims made in the name of feminism and implies that change will depend on economic reforms such as redistribution of wealth.⁸

To some extent, the internal debates among feminists map onto a divide between scholars and activists. Academics seem much more willing to scrutinise the premises of feminist theory and to attack impurity and inconsistency; people working in NGOs or international institutions with feminist agendas, by contrast, are generally keen to work with a big picture, and associate feminism with getting more women involved in decisions, or using international law to help women. Using this rather crude distinction, we can see that generally, academics are more concerned to identify the flaws and fault lines of feminist analyses of international law, while feminists in NGOs or international institutions tend to accept feminist agendas as self-evidently worthwhile.

I think that the situation is more complex than either the enthusiasts or critics of feminist analysis claim. It is clear that feminist concepts now have some respectability in the international arena. One example is the use of the language of women's rights and empowerment in the context of peace building, most famously in Security Council Resolution 1325 in 2000. That resolution spoke of supporting women's capacity 'to take their rightful and equal place at the decision-making table in questions of peace and security'. Another, more problematic, example is the invocation of women's rights in the invasion of Afghanistan in 2001. Using military force to implement women's rights sat uneasily with many feminists; moreover the fate of women's rights in Afghanistan since the invasion suggests that the attention paid to them was superficial.

On the other hand, the critiques overstate the power of feminist analysis: international feminist projects have had limited success in empowering

⁷ Karen Engle, 'Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778.

⁸ Karen Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 47.

women. Feminist commitments, such as the equality of women, have influenced the development of international law, but they have been incorporated only in a partial manner and implemented without regard to context or with empathy for their intended beneficiaries. Dianne Otto has pointed out that increased institutional acceptance of feminist vocabularies has been undermined by 'selective engagement' with feminist ideas, the lack of systems of accountability and the re-emergence of stereotypes of women.⁹ She argues that Resolution 1325 was adopted to shore up the legitimacy of the Security Council and that it fails to deal with structural discrimination against women.¹⁰

This underlines a distinction between feminist messages and feminist methods in international law. The former have been influential in rhetorical terms, while the latter have been ignored. Feminist messages however are likely to be productive only if they are deployed through feminist techniques such as 'world travelling'.¹¹ This involves being explicit about our own historical and cultural backgrounds, trying to understand how other women might see us, and recognising the complexities of the lives of other women.¹²

Feminist methodologies suggest that prescriptions of women's equality must respond to the needs and desires of the women we think we are supporting. Understanding these needs is not always easy and requires humility, patience and empathy. So the challenge is to devise practical and responsive feminist methods to support feminist political projects.

⁹ Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 *Melbourne Journal of International Law* 11, 12.

¹⁰ Ibid 21.

¹¹ The term was introduced by Maria Lugones in 'Playfulness, "World"-Traveling, and Loving Perception' (1987) 2 *Hypatia* 3.

¹² Isabelle Gunning, 'Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries' (1991-92) 23 *Columbia Human Rights Law Review* 189, 191.

‘A Little Out of the Way Place’: The Civilians in England Warren Swain*

The Civil law and Civilian ideas, meaning in this context the *ius commune* or Common law of Europe, which was ultimately derived from Roman law, were influential in shaping the direction of English law at certain points in the history of the Common law.¹ Civil law had a more permanent place too. A number of domestic courts were governed by the Civil law as opposed to the Common law or Equity. The novelist Charles Dickens, whilst perhaps best remembered by lawyers for his satire on the Court of Chancery, also gave an account of the Civilian courts in his eponymous novel, *David Copperfield*. In it he described Doctors’ Commons, the location of many of the Civilian courts and those who practised within them, as ‘a little out of the way place ... a place that has an ancient monopoly in suits about people’s wills and people’s marriages, and disputes among ships and boats’.² Dickens worked as a court reporter in Doctors’ Commons and wrote from personal experience.³ He made these observations in the 1840s, a mere decade before the ‘ancient monopoly’, and with it the specialist Civilian lawyers were swept away altogether.

Doctors’ Commons derived its name from the advocates or doctors who practised there. Unlike the barristers, trained in the Inns of Courts, in order to be admitted, a doctorate in Civil law from Oxford or Cambridge University was usually required.⁴ Canon law and Civil law were taught in both institutions from the Middle Ages.⁵ There was no instruction in the Common law before the eighteenth century.⁶ It took at least eight years to qualify.⁷ The proctors,

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¹ Peter Stein, *The Character and Influence of the Roman Civil Law* (Hambledon Press, London, 1988) ch 15, David Ibbetson, *Common Law and Ius Commune* (Selden Society, London, 2001). On the influence of the Canon law, see R H Helmholz, *Canon Law and English Common Law* (Selden Society, London, 1983).

² Charles Dickens, *David Copperfield* (Vintage Books, London, 2008) 343.

³ Claire Tomalin, *Charles Dickens: A Life* (Penguin Press, London, 2011) 40-41.

⁴ Oxford awarded the D.C.L and Cambridge the L.L.D. There are a few exceptions in earlier times. Richard Zouche was admitted as an advocate without a doctorate, see G D Squibb, *Doctors Commons, A History of the College of Advocates and Doctors of Law* (Oxford University Press, Oxford, 1977) 31.

⁵ J I Cato (ed.), *The History of the University of Oxford, volume 1 the early Oxford Schools* (Oxford University Press, Oxford, 1984) chs 13-14; Damian Leader, *A History of the University of Cambridge, volume 1 the university to 1546* (Cambridge University Press, Cambridge, 1988) ch 8. For some idea of the literature that was studied, see Francis de Zulueta and Peter Stein, *The Teaching of Roman Law in England Around 1200* (Selden Society, London, 1990).

⁶ Even then Sir William Blackstone’s lectures at Oxford were not a formal course of instruction required by the statutes of the university but an enterprise of Blackstone’s own devising. These proved highly successful and profitable resulting in his four volume *Commentaries on the Laws of*

who also practised in the Civil law courts, were the equivalent of attorneys.⁸ A few had received a university education in the Civil law but the majority had not.⁹ Both advocates and proctors were relatively small in number. In 1511 there were sixty doctors, most of whom were advocates.¹⁰ In 1768, the year that Doctors' Commons was granted a Royal Charter, there were just seventeen members.¹¹ By 1830 this had risen to forty-six and fallen back to thirty by 1850. The number in active practice was even smaller.¹² By the nineteenth century there were around one hundred proctors.¹³ Following the loss of their monopoly some proctors continued doing probate work for a couple of decades,¹⁴ some of the doctors began practising in the Common law or busied themselves as law reporters or in other activities.¹⁵ Meanwhile Doctors' Commons sold its library in 1861 and finally the premises in 1865.¹⁶

In the early thirteenth century, in the work commonly called *Bracton*, a distinction was made between the legal jurisdictions of 'the church and the realm'.¹⁷ Some of the elements of mature Canon law were already well established by this time. The Anglo-Saxon church settled disputes through synods or individual clergy, made law by issuing canons¹⁸ and recognised the value of Roman learning.¹⁹ As the Constitutions of Clarendon of 1164 shows, the existence of rival jurisdictions belonging to the Church and the Crown led

England (Clarendon press, Oxford, 1765-69). The Common law was not taught officially until the late nineteenth century.

⁷ F L Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, Cambridge, 1970) 77.

⁸ With the difference that they were allowed to address the court on points of practice, see William Cornish et al, *The Oxford History of the Laws of England, vol. xi 1820-1914: English Legal System* (Oxford University Press, Oxford, 2010) 699.

⁹ R H Helmholz, 'The Education of English Proctors, 1400-1640' in Jonathan Bush and Alain Wiffels (eds.), *Learning the Law* (Hambledon Press, London, 1999) 191, 195.

¹⁰ Squibb, above n 4, 7.

¹¹ Ibid 53 and Appendix III.

¹² Cornish, above n 8, 696. For contrasting figures at the Bar see, David Lemmings, *Professors of the Law* (Oxford University Press, Oxford, 2000) 63. The number of calls averaged around 60 in the 1680s, falling to 25 in the 1760s and growing to 58 by around 1810.

¹³ Cornish, above n 8, 699.

¹⁴ Ibid 701.

¹⁵ For an account, see J H Baker, *Monuments of Endless Labours* (Hambledon Press, London, 1998) ch 16.

¹⁶ The premises were demolished shortly afterwards. The site is now occupied by the Faraday Building, the home of London's first telephone exchange.

¹⁷ Samuel Thorne (ed.), *Bracton On the Laws and Customs of England* (Harvard University Press, Cambridge, Mass. 1968) vol. 2, 304.

¹⁸ R H Helmholz, *The Oxford History of the Laws of England, vol I, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press, Oxford, 2004) 37-38.

¹⁹ John Winkler, 'Roman Law in Anglo-Saxon England' (1992)13 *Journal of Legal History* 101.

to conflict long before the Reformation.²⁰ Despite this, by the end of the thirteenth century, a recognisable structure of regular consistory courts served by professional lawyers had emerged in each diocese. By far the most important court sat at Canterbury. York was the other major centre. The rules of procedure were derived from Roman law.²¹ The substantive rules were contained in the twelfth-century work, Gratian's *Decretum*²² and the later *Gregorian Decretals*.²³

Unsurprisingly the majority of thirteenth century cases concerned 'pure' church matters such as ecclesiastical offices, revenue or tithes, or other dues.²⁴ Other litigation was much further from subjects that the modern mind would associate with ecclesiastical courts. The second largest group of cases dealt with marriage, divorce and legitimacy;²⁵ the third with testamentary disputes.²⁶ Defamation²⁷ and breach of faith (*fidei laesio*) also fell within the court's jurisdiction.²⁸ The latter was particularly controversial. In the fourteenth and fifteenth centuries actions for breach of faith between two laymen appear in large numbers,²⁹ posing a clear threat to the Common law. Most cases concerned sale of goods but any unilateral promise was also enforceable. Some Canonists even toyed with the idea that a simple promise to perform was enough to bring an action but this was never the position in England. A sworn promise, one with an oath or pledge of faith, was always required.³⁰ Where the claim was successful the plaintiff secured an order that the defendant fulfil the promise. By the late fifteenth century breach of faith began to decline. By the 1530s its place had been taken by the action of *assumpsit* which covered much the same ground.³¹

²⁰ Helmholz, above n 18, 114-18

²¹ Norma Adams and Charles Donahue, *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301* (Selden Society, London, 1981) 37-72.

²² James A Brundage, *Medieval Canon Law* (Longman, London, 1995) 47

²³ *Ibid* 55.

²⁴ Adams and Donahue, above n 21, 72-81.

²⁵ *Ibid* 81-88.

²⁶ *Ibid* 88-93. Many of these cases were about debts owed to or owing by the deceased. These could not be claimed in the Common law action of debt, see Brain Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (Oxford University Press, Oxford, 1952) 85-86.

²⁷ Adams and Donahue, above n 21, 94-96.

²⁸ *Ibid* 96-97.

²⁹ Woodcock, above n 26, 89-92.

³⁰ Helmholz, above n 18, 360-63.

³¹ R H Helmholz, 'Assumpsit and fidei laesio' (1975) 91 *Law Quarterly Review* 406, 426-27. On *assumpsit*, see David Ibbetson, *An Historical Introduction to the Law of Obligations* (Oxford University Press, Oxford, 1999) ch 7; Warren Swain 'Assumpsit' in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).

Actions for breach of faith provide a particularly clear example of the frictions that could arise between the Common law, represented by the actions of debt and covenant, and Canon law.³² These jurisdictional battles were fought out through the writs of prohibition.³³ Tensions grew in the decades prior to the Reformation. Yet when the break from Rome came the ecclesiastical courts carried on much as before.³⁴ Despite the threat posed by the writ of prohibition there remained sufficient practical advantages in order to tempt litigants to the ecclesiastical courts.³⁵ The English Civil War and the Interregnum which followed saw a more significant challenge to the ecclesiastical courts. The Civilian Robert Wiseman, gloomily wrote that the Civil law courts of all descriptions were, 'like a spoil divided; some carried to the courts of common law, some to the Court of Equity, others sent into the country, some left without any rule or regulation'.³⁶ The Civilians would gain some benefit from the fact that the new nationwide Probate Court, in particular, proved to be an inadequate replacement.³⁷ Aside from those who had supported the Royalist cause, and who were forced to flee abroad, the Civilians bided their time.³⁸

After the Restoration in 1660 the ecclesiastical courts were revived but never quite the same again.³⁹ Such business as existed was increasingly concentrated within a small number of courts. By the nineteenth century the vast majority of matrimonial causes were heard in at the London Consistory Court.⁴⁰ The action for annulment, meaning the marriage was invalid *ab initio*, or a separation *a mensa et thoro*,⁴¹ in Canon law were attractive options in a society

³² J H Baker, *The Oxford History of the Laws of England*, vol. vi, 1483-1558 (Oxford University Press, Oxford, 2003) 241-44.

³³ A writ of prohibition was available to the defendant in an ecclesiastical court against the plaintiff or court to halt the suit by alleging that it was a matter that was properly within the jurisdiction of the Royal Courts, see David Millon, 'Ecclesiastical Jurisdiction in Medieval England' [1984] *University of Illinois Law Review* 621. For examples of prohibition cases, see David Millon, *Select Ecclesiastical Cases from the King's Courts 1272-1307* (Selden Society, London, 2009) 1-47.

³⁴ R H Helmholz, *Roman Canon Law in Reformation England* (Cambridge University Press, 1990)

³⁵ Helmholz, above n 18, 304-306.

³⁶ Brian Levack, *The Civil Lawyers in England 1603-1641* (Oxford University Press, Oxford, 1973) 199.

³⁷ C Kitching, 'Probate During the Civil War and Interregnum' (1976) 5 *Journal of Society of Archivists* 346.

³⁸ Ibid ch 6.

³⁹ R B Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, Cambridge 2006) chs 9-10.

⁴⁰ Ibid 92.

⁴¹ This was a form of judicial separation which allowed a husband and wife to live apart without allowing them to re-marry. Adultery and cruelty were typical grounds for this sort of order.

where an Act of Parliament was required for a divorce.⁴² Testamentary matters were increasingly concentrated in the Prerogative Courts of Canterbury and York.⁴³ It was estimated in 1830 that four fifths of contested ecclesiastical cases came before these courts.⁴⁴ By this time the numbers were still relatively small as much of the testamentary litigation had already been lost to the Court of Chancery. By the early nineteenth century the old order was increasingly seen as unsatisfactory. Amongst other reforms, a Royal Commission recommended the abolition of the Court of Delegates as the final ecclesiastical court of appeal, and its replacement with the Privy Council.⁴⁵ After some setbacks⁴⁶ new courts of Probate and Matrimonial Causes were finally created.⁴⁷ These were open to the common lawyers for the first time.⁴⁸

The High Court of Admiralty was the second major Civilian court.⁴⁹ It was equally venerable. Evidence exists of a criminal case in the 1360s.⁵⁰ By the end of the fourteenth century civil cases were being heard as well.⁵¹ Almost from the beginning the High Court of Admiralty was under attack. As a result of statute it was limited by location rather than cause of action.⁵² Only matters arising on the 'high seas' were within its jurisdiction. In the fifteenth century the Common law courts allowed actions to be brought against litigants who ignored these limits.⁵³ By the sixteenth century numerous writs of prohibition had been issued.⁵⁴ What amounted to 'on the seas' was interpreted narrowly by

⁴² For examples in practice, see R H Helmholz, *Marriage Litigation in Medieval England* (Cambridge University Press, Cambridge, 1974) ch 3. For a discussion of separations formal and informal, see Lawrence Stone, *The Family, Sex and Marriage in England* (Penguin, London, 1984) 34-36.

⁴³ Outhwaite, above n 39, 90.

⁴⁴ *The special and general reports made to His Majesty by the commissioners appointed to inquire into the practice and jurisdiction of the ecclesiastical courts in England and Wales* (1831-32) (199) Parliamentary Papers XXIV 11.

⁴⁵ Ibid. This reform was enacted in (1832) 2 & 3 Will IV c. 92. See C Smith 'The quest for an authoritative court of final appeal in ecclesiastical causes: a study in difficulties, c. 1830-1876' (2011) 32 *Journal of Legal History* 189.

⁴⁶ For an overview see, Anthony Manchester, 'The Reform of the Ecclesiastical Courts' (1966) 10 *American Journal of Legal History* 51.

⁴⁷ (1857) 20 & 21 Vict. c.77; (1857) 20 & 21 Vict. c. 85.

⁴⁸ Defamation was also removed from the ecclesiastical courts, (1856) 18 & 19 Vict. c 41.

⁴⁹ The High Court of Chivalry has also applied civil law. It has only sat once since 1737. In its heyday this court was much more than a heraldic tribunal, see G D Squibb, *The High Court of Chivalry* (Oxford University Press, Oxford, 1959).

⁵⁰ M J Pritchard and D E C Yale (eds.), *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society, London, 1993) xxx.

⁵¹ Ibid.

⁵² (1389) 13 Ric II c 5; (1391) 15 Ric II c 3; (1400) 2 Hen IV c 11.

⁵³ Baker, above n 32, 212.

⁵⁴ Ibid 213.

the Common law judges.⁵⁵ At times both Civilians and Common lawyers resorted to legal fictions in order to try to preserve what they regarded as their rightful jurisdictions.⁵⁶

Aside from a few key areas,⁵⁷ by the seventeenth century the Admiralty Court was in terminal decline. The process continued into the eighteenth century despite the rapid expansion of the merchant navy.⁵⁸ The Common law courts, which enjoyed a concurrent jurisdiction in many instances of maritime contracts absorbed, much of this business though there continued to be some very public jurisdictional squabbles, especially in relation to sailors' wages.⁵⁹ Although much diminished,⁶⁰ the Admiralty Court remained a significant presence in a few areas, of which prize money was one of the most significant, especially in wartime.⁶¹ The early nineteenth century saw a revival in its fortunes.⁶² The Napoleonic Wars which ended in 1815 led to a flood of prize litigation.⁶³ In part the rivalry was due to the calibre of men like Sir William Scott and Stephen Lushington⁶⁴ who sat as judges during this period. In the end this proved to be a brief final hurrah. By the 1860s the High Court of Admiralty had gone the same way as the Ecclesiastical Court with the loss of

⁵⁵ *Constable's Case* (1601) 5 Co Rep 106. Some Common law judges were more hostile than others. Chief Justices Coke and Hobart were particularly strong critics, D E C Yale, 'A View of the Admiralty Jurisdiction: Sir Matthew Hale and the Civilians' in Dafydd Jenkins (ed.), *Legal History Studies* 1972 (University of Wales Press, Cardiff, 1975) 87, 98-100.

⁵⁶ Baker, above n 32, 213-14.

⁵⁷ George Steckley, 'Collisions, Prohibitions and the Admiralty Court in Seventeenth Century London' (2003) 21 *Law and History Review* 41.

⁵⁸ E E Rich and C H Wilson (eds.), *The Cambridge Economic History of Europe* (Cambridge University Press, Cambridge, 1977) vol. 5, 530. Merchant ships had a total tonnage of 421,000 tons in 1751 compared with 115,000 tons in 1630. By 1760 there were 7,081 merchant ships with a tonnage of 486,740.

⁵⁹ Examples include: *Bayly v. Grant* (1699) Holt 48; *Ganne v. Grandee* (1706) Holt 49; *Ragg v. King* (1729) 1 Barn KB 297; *Reed v. Chapman* (1732) 2 Barn KB 160. For the role of the Admiralty Court in the case of sailors wages see, George Steckley, 'Litigious Mariners: Wage Cases in the Seventeenth Century Admiralty Court' (1999) 42 *Historical Journal* 315.

⁶⁰ Henry Bourguignon, *Sir William Scott, Lord Stowell* (Cambridge University Press, Cambridge 1987) 30, notes that the eighteenth century court, 'survived on scraps of litigation not tasty enough to tempt the common lawyers'.

⁶¹ For some indication of the scope of the jurisdiction in the late eighteenth century, see Arthur Browne, *A Compendious View of the Civil Law, Volume II* (Joseph Butterworth, London, 1798) ch 5.

⁶² Wiswall, above n 7, 26. For some figures see Bourguignon, above n 60, 61.

⁶³ Prize was the act of taking the cargo of an enemy ship. By the sixteenth century some of the prize was required to be paid over to the Crown and the Admiralty, Bourguignon, above n 60, 9. For the origins of the prize jurisdiction, see R G Marsden, 'Early Prize Jurisdiction and Prize Law in England' (1909) 24 *English Historical Review* 675.

⁶⁴ Bourguignon, above n 60; S M Waddams, *Law, Politics and the Church of England: The Career of Stephen Lushington 1782-1873* (Cambridge University Press, Cambridge, 1992).

the Civilian monopoly⁶⁵ before becoming completely absorbed into the rest of the court system as a division of the High Court in the 1870s.⁶⁶

The contribution of the Civilians to English legal history went beyond the work of the Civilian courts. Many of these men made significant contributions towards legal literature. Professor Coquillette, writing about the sixteenth and seventeenth centuries has made the point that, 'compared with the civilian literature, the works of the common lawyers were unadventurous, technical, and above all, limited conceptually'.⁶⁷ With varying degrees of success these writers presented the law as a rationale and ordered enterprise. This was a significant leap forward. The Civilians were much more receptive to ideas from the Continent.⁶⁸ Some of this writing may even have influenced the more open minded amongst the Common lawyers.⁶⁹ It would be many centuries before the literature of the Common law caught up.

A P Herbert in his inter-war satire on the divorce laws, *Holy Deadlock* described the jurisdiction of the courts which replaced the old Civilian Courts as 'wills, wives and wrecks'.⁷⁰ All three of these things were very important, but the history of these courts and the men who practised within them is much richer than a witty phrase can capture. There are few better examples of the ramshackled nature of English legal development and the ebb and flow of legal fortune. Dickens described the appearance of Doctors' Commons as 'an old quaint-looking apartment, with sunken windows, and black carved wainscoting'.⁷¹ In an increasingly rational and secular age it was not only the building that was viewed as quaint.

⁶⁵ Admiralty Court Act (1861) 24 & 25 Vict. c 10.

⁶⁶ Judicature Act (1875) 38 & 39 Vict. c 77.

⁶⁷ Daniel R Coquillette, *The Civilian Writers of Doctors' Commons, London* (Duncker & Humblot, Berlin, 1988) 44.

⁶⁸ *Ibid.*

⁶⁹ For example, Lord Mansfield: see Warren Swain, 'Lawyers, merchants and the law of contract in the long eighteenth century' in D Ibbetson and M Dyson (eds.), *Law and Legal Process* (Cambridge University Press, Cambridge, 2013) 186, 203.

⁷⁰ (Penguin, London, 1955) 102.

⁷¹ 'Doctors' Commons' in M Slater (ed.), *Dickens' Journalism* (J M Dent, London, 1994) 89, 90. The article had originally appeared in 1836.

The Sentencing of Duch in the Extraordinary Chambers in the Courts of Cambodia: A Failed Opportunity to Reinforce the Universality of Human Rights

Paul Kettle*

I INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) were established to bring to justice those responsible for the atrocities committed by the Khmer Rouge during the period of Democratic Kampuchea in the late 1970s. Particular criticisms of the ECCC – for example, in relation to the lack of judicial independence (especially regarding the most recent investigations), the slow progress and high cost of justice, and even the ECCC’s treatment of victims (who are permitted to take part in proceedings as ‘civil parties’) – have already been thoroughly canvassed elsewhere, and this article does not intend to traverse the same ground. After briefly explaining the history of the ECCC, this article will focus on a human rights issue raised by a decision of the highest appeals chamber which has garnered little scholarly attention – namely, the decision in Case 001 to impose a life sentence on the only person convicted so far, Kaing Guek Eav (known more commonly by his alias Duch), despite the acknowledgement that he had been illegally detained for a number of years before his detention was ordered by the ECCC. The article will analyse this narrow aspect of the decision, and will consider the negative impact it will likely have on the ECCC’s legacy in respect of the Cambodian justice system.

II BACKGROUND OF ECCC

A *Formation of ECCC*

The Communist Party of Kampuchea (“CPK”, more commonly known as the Khmer Rouge) lost power in January 1979, following the invasion by Vietnam. The path to seeking justice against those alleged of mass crimes has been a tortuous one.¹ Despite what was essentially a show trial in absentia in 1979

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¹ For articles fleshing out the steps taken, see generally Thomas Hammarberg, ‘How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN’ (Documentation Center of Cambodia, 2001) <http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm>; Cambodian Tribunal Monitor, ‘Composite Chronology of the Evolution and Operation of the Extraordinary Chambers in the Courts of Cambodia’ (Cambodian Tribunal Monitor, December 2001) <<http://www.cambodiatribunal.org/sites/>

against the former leader, Pol Pot, and his Deputy Prime Minister for Foreign Affairs, Ieng Sary,² the next concrete step was a letter to the United Nations (“UN”) on 21 June 1997 from First Prime Minister Norodom Ranariddh and Second Prime Minister Hun Sen requesting assistance in bringing to justice those responsible for atrocities during the Khmer Rouge regime, and noting that Cambodia did not have ‘the resources or expertise to conduct this very important procedure’.³ Much horse trading followed between Cambodia and international negotiators, with Prime Minister Hun Sen⁴ seeking to reduce the international role in judicial and prosecutorial decision making, while international negotiators attempted to ensure the independence of proceedings by having at least a majority international presence.

The result was a tribunal embedded in the national civil law system under Cambodian legislation,⁵ but with international support by way of agreement with the UN.⁶ The temporal jurisdiction of the ECCC is limited to 17 April 1975 to 6 January 1979 (the period of Khmer Rouge rule), and the ECCC are empowered to try ‘senior leaders’ and ‘those most responsible’.⁷ It comprises equal Co-Prosecutors and Co-Investigating Judges (one national and international of each), but has a minority international presence in the three judicial chambers (the Pre-Trial Chamber (“PTC”), Trial Chamber (“TC”) and Supreme Court Chamber (“SCC”). Disputes between the national and international Co-Prosecutors or Co-Investigating Judges are subject to review

default/files/documents/CTM%20Composite%20Chronology%20%2019942011%20%28Nov%29.pdf>.

² For background, see Tom Fawthrop and Helen Jarvis, *Getting Away With Genocide? Elusive Justice and the Khmer Rouge Tribunal* (UNSW Press, 2005) 40-51.

³ Relevant parts of the letter are cited in *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, 53rd sess, Agenda item 110(b), UN Doc A/53/850 (16 March 1999) [5].

⁴ Having gained control as sole Prime Minister, following a coup against First Prime Minister Norodom Ranariddh later in 1997: Thomas Hammarberg, ‘How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN’ (Documentation Center of Cambodia, 2001) <http://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm> 3.

⁵ The *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (“ECCC Law”).

⁶ Namely, the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 (entered into force 29 April 2005) (“UN Agreement”). Compare the International Criminal Tribunals for the Former Yugoslavia and Rwanda (“ICTY” and “ICTR”, respectively), which were set up by Resolutions of the UN Security Council.

⁷ Respectively, articles 1 and 2 new, ECCC Law; and articles 1 and 2(1) of the UN Agreement.

by the PTC.⁸ Judicial decisions can only be implemented by a ‘supermajority’ of the chamber – in each case, the equivalent of the full complement of national judges plus at least one international judge.⁹ A common complaint of observers of the ECCC – both during the negotiations¹⁰ and following the establishment of the ECCC¹¹ – is that this set-up has allowed the lack of independence inherent in the Cambodian judicial system to manifest itself in the ECCC’s decision-making.

B *Progress to date*

To date, the ECCC have only finalised one case – Case 001 against Duch.¹² The first ‘mini trial’ of Case 002 is at the trial stage with the TC due, at publication date, to hear closing statements in October 2013, having already sat for 212 hearing days. Although the accused persons in Case 002 originally comprised Ieng Sary, his wife Ieng Thirith (the former Social Affairs Minister), Nuon Chea (Deputy Secretary of the CPK, known as ‘Brother Number Two’ to Pol Pot’s ‘Brother Number One’) and Khieu Samphan (the former head of state - President of the State Presidium), the proceedings are currently only against the latter two, with Ieng Sary having passed away on 14 March 2013, and Ieng Thirith having been conditionally released on 16 September 2012 following a finding that she was unfit to stand trial due to a dementing illness.¹³ This first ‘mini trial’ is focused only on a small part of the allegations set out in the Closing Order (indictment) – namely crimes against humanity associated with two phases of forced movement of the population (including from

⁸ Regarding the Co-Prosecutors: article 20 new of the ECCC Law; articles 6(4) & 7 of the UN Agreement. Regarding the Co-Investigating Judges: article 23 new of the ECCC Law; articles 5(4) & 7 of the UN Agreement.

⁹ Regarding the PTC: articles 20 new and 23 new of the ECCC Law; article 7(4) of the UN Agreement. Regarding the TC and SCC: article 14 new of the ECCC Law; article 4 of the UN Agreement.

¹⁰ Christina Son and Grant Niemann, ‘Cambodian Extraordinary Chambers: A mixed tribunal destined to fail’ (2009) 33 *Criminal Law Journal* 105, 107 & 109-110.

¹¹ Hanna Bertelman, ‘International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia’ (2010) 79 *Nordic Journal of International Law* 341, 370-380.

¹² See *KAING Guek Eav alias Duch (Appeal Judgement)* (ECCC, SCC, Case File No. 001/18-07-2007-ECCC/SC, F28, 3 February 2012) (“SCC judgment”), which was the SCC’s final judgment in appeal from the TC’s decision: *KAING Guek Eav alias Duch (Judgement)* (ECCC, TC, Case File No. 001/18-07-2007-ECCC/TC, E188, 26 July 2010) (“TC judgment”).

¹³ See *IENG Thirith (Decision on Immediate Appeal against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith)* (ECCC, SCC, Case File No. 002/19-09-2007-ECCC-TC/SC (16), E138/1/10/1/5/7, 14 December 2012).

Phnom Penh), and the mass execution of soldiers from the former government at Tuol Po Chrey.¹⁴

Although there have been allegations of political influence in Case 002,¹⁵ the interfering effect of Cambodia's government has been much more plainly evident in Cases 003 and 004,¹⁶ which are against officially unnamed suspects (though their identities have been leaked).¹⁷ Prime Minister Hun Sen is widely reported to have told the visiting UN Secretary-General that there would be no further cases after Case 002,¹⁸ and both the national Co-Prosecutor and Co-Investigating Judge appear to be sticking very closely to the government's line that further prosecutions would threaten national reconciliation.

III PROCEDURAL HISTORY OF CASE 001

A *Crimes of which Duch was found guilty*

Turning the focus of the article to the background of Case 001, Duch was Deputy and then Chairman of S-21 (also known as Tuol Sleng), a security centre tasked with interrogating and executing perceived opponents of the CPK. No fewer than 12,272 victims were executed at S-21, the majority of whom were systematically tortured.¹⁹

¹⁴ See KHIEU Samphan and NUON Chea (*Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 – Summary of Reasons*) (ECCC, SCC, Case File No. 002/19-09-2007-ECCC-TC/SC(28), E284/4/7, 23 July 2013). The charges were separated following the addition of r 89 *ter* to the *Internal Rules* (*Ver* 7) (adopted 23 February 2011), which permits the severance of charges into discrete proceedings, in recognition of the complexity of the charges and the advanced age of the accused persons.

¹⁵ See, for example, the refusal of senior Cambodian government figures to testify to the Co-Investigating Judges in Case 002: John Coughlan, Sana Ghouse and Richard Smith, 'The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System' (2012) 4(2) *Amsterdam Law Forum* 16, 29.

¹⁶ Mark Ellis, 'The ECCC – A Failure of Credibility' (International Bar Association, March 2012) <http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Cambodia.aspx>; Open Society Justice Initiative, 'The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia' (October 2012) <http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf>.

¹⁷ Joe Freeman, 'Khmer Rouge court cases in danger: report', *The Phnom Penh Post* (online), 3 October 2012 <<http://www.phnompenhpost.com/national/khmer-rouge-court-cases-danger-report>>.

¹⁸ Cheang Sokha and James O'Toole, 'Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC', *The Phnom Penh Post* (online), 27 October 2010 <<http://www.phnompenhpost.com/national/hun-sen-ban-ki-moon-case-002-last-trial-eccc>>.

¹⁹ SCC judgment, [2]-[3].

Duch was found guilty of:

- the crimes against humanity of persecution, extermination (encompassing murder), enslavement, imprisonment, torture and other inhumane acts; and
- grave breaches of the Geneva Conventions of 1949, namely wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial and unlawful confinement of a civilian.²⁰

B *TC's and SCC's considerations regarding the 'base' sentence for Duch*

The TC had held that certain mitigating factors (described at one point as 'limited',²¹ but as 'significant'²² at another) applied in Duch's case, including his cooperation with the TC, admission of responsibility, expressions of remorse (although undermined by his request for acquittal during closing statements), the coercive environment in which he operated, and his potential for rehabilitation.²³ Because of these mitigating factors, the TC concluded unanimously that a finite term of imprisonment rather than a life sentence was appropriate, and considered (by supermajority) the appropriate sentence to be 35 years of imprisonment, before taking into account any remedy for the period of illegal pre-trial detention.²⁴ On appeal, the SCC found that the TC attached undue weight to mitigating circumstances and insufficient weight to the gravity of the crimes and aggravating circumstances (including Duch's leadership role and particular enthusiasm in the commission of his crimes), and unanimously decided to impose a sentence of life imprisonment,²⁵ before considering the issue of Duch's detention before the Cambodian Military Court ("Military Court"). This part of the SCC judgment to increase the 'base' sentence to life imprisonment is relatively uncontroversial, considering the gravity of the crimes committed by Duch.²⁶ Before examining the differing

²⁰ See the disposition in the TC judgment, [677] as amended by the disposition of the SCC judgment, 320.

²¹ TC judgment, [608] & [611].

²² Ibid [629].

²³ Ibid [629].

²⁴ Ibid [630]. Judge Lavergne (France) dissented on this point, finding that the law did not allow a fixed sentence of more than 30 years: *KAING Guek Eav alias Duch (Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence)* (ECCC, TC, Case File No. 001/18-07-2007-ECCC/TC, E188.1, 26 July 2010) [9].

²⁵ SCC judgment, [360]-[383].

²⁶ See, however, Lily O'Neill and Göran Sluiter, 'The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia' (2009) 10 *Melbourne Journal of International*

approaches of the TC and of the SCC judges to the effect of the breach of Duch's pre-trial rights on the ultimate sentence imposed on him, the relevant background to Duch's period of illegal detention will be summarised.

C *Period of illegal pre-ECCC detention*

Duch was taken into custody by the Military Court on 10 May 1999.²⁷ He was transferred to the ECCC Detention Facility on 31 July 2007 pursuant to an order of the Co-Investigating Judges.²⁸ The Military Court had detained and arrested Duch on various charges and ordered the extension of his provisional detention a number of times.²⁹ This period of detention, or at least the majority of this period, was acknowledged by the TC to have been illegal under Cambodian law, because the *Cambodian Law on Duration of Pre-Trial Detention of 1999* imposed a maximum ceiling of three years' provisional detention in relation to crimes against humanity charges.³⁰ Further, the TC found that during this period there appeared to have been no substantial and systematic investigation, there was a general lack of reasoning setting out the legal basis for various detention orders, the extension of detention was in some instances ordered by the prosecutor alone (not by the investigating judge), and at least one law on which the Military Court had relied appeared to have been applied retroactively.³¹ The SCC's judgment did not disturb the TC's finding that Duch had been subjected to a lengthy period of illegal detention. However, the TC, SCC majority and SCC minority differed in how to account for this in Duch's

Law 596, 618 & 623-628 for an argument that the imposition of a higher sentence by an appeals chamber, without allowing for a further review of this, is contrary to article 14(5) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ("ICCPR"). This aspect of the SCC judgment has also been criticised from the perspective that the SCC's attribution of limited weight to the relevant mitigating factors will only serve to make persons charged with international crimes less inclined to cooperate with the relevant court: Alexandre Prezanti, 'The Duch Appeal Judgement: Hidden Lessons on Mitigation' (iLawyer Blog – A Blog on International Justice, 27 February 2012) <<http://ilawyerblog.com/the-duch-appeal-judgement-hidden-lessons-on-mitigation/>>.

²⁷ SCC judgment, [389]; TC judgment, [623]. Duch had been uncovered by a journalist only months earlier: Steve Heder and David Boyle, 'The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments' (26 April 2012) <<http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf>> 16.

²⁸ *KAING Guek Eav alias Duch (Order of Provisional Detention)* (ECCC, Co-Investigating Judges, *Investigation No. 001/18-07-2007*, C3, 31 July 2007).

²⁹ For full details of the orders made by the Military Court, see *KAING Guek Eav alias Duch (Decision on Request for Release)* (ECCC, TC, *Case File No. 001/18-07-2007-ECCC/TC*, E39/5, 15 June 2009) ("TC Decision on Request for Release"), [2]-[5].

³⁰ TC Decision on Request for Release, [18]-[21]; TC judgment, [624].

³¹ TC Decision on Request for Release, [21].

sentencing, and this article will now examine the three different judgments on this aspect.

IV ECCC'S CONSIDERATION OF ILLEGAL DETENTION IN RELATION TO SENTENCING

A *TC judgment*

The TC judgment referred to the TC's earlier ruling that if Duch were to be convicted, he would be entitled to a remedy, to be decided at the sentencing stage, for the time spent unlawfully in detention.³² Starting from the previously discussed 35 year base sentence, the TC decided that a reduction of 5 years from Duch's sentence constituted an appropriate remedy.³³

B *SCC majority*³⁴

The SCC majority was not satisfied that any law applicable to the ECCC, including international jurisprudence, indicated that violations of Duch's rights should be redressed by the ECCC in the absence of evidence establishing either: (a) responsibility of the ECCC for the infringements; or (b) abuse of process, irrespective of the entity upon which the responsibility for violations may lie.³⁵ In looking at the abuse of process doctrine, the SCC majority referred to the TC's findings that Duch's case provided no evidence of torture, other very serious mistreatment or egregious violations of his rights by the Military Court, and excluded the possibility of abuse of process.³⁶ The more important point considered by the SCC majority was whether Duch's detention by the Military Court was attributable to the ECCC. Adopting the TC's own findings that the ECCC comprise a separately constituted, independent and internationalised court and that there was no evidence of any involvement by ECCC judicial authorities in Duch's Military Court file (and in particular in its decisions concerning Duch's detention), the SCC majority also excluded attribution of the Military Court's violations to the ECCC.³⁷ The SCC majority therefore found that this was not a case in which the ECCC should provide a remedy for the violations of Duch's rights.³⁸ In holding thus, the

³² TC judgment, [624], referring to TC Decision on Request for Release, [37].

³³ TC judgment, [625]-[627].

³⁴ The SCC majority comprised all the Cambodian judges (President Kong Srim and Judges Som Sereyvuth, Sin Rith and Ya Narin) plus Judge Noguchi (Japan). As a supermajority was reached, the SCC majority's decision was implemented.

³⁵ SCC judgment, [390] & [392].

³⁶ Ibid [394]-[395]; TC Decision on Request for Release, [16] & [34]-[35].

³⁷ SCC judgment, [393] & [395].

³⁸ Ibid [399].

SCC majority overrode even the Co-Prosecutors' submissions, which had recognised that a remedy was warranted in the circumstances.³⁹

C *SCC minority*⁴⁰

The SCC minority's analysis was limited to whether the deprivation of Duch's liberty was attributable to the ECCC and, if so, the remedy to which he was entitled.⁴¹ Despite agreeing with the SCC majority's statement that some link between the sentencing court and the illegality of detention was required for a remedy to be granted, the SCC minority disagreed with the SCC majority's 'mechanistic' application of the ICTY's and ICTR's approach to the facts of this case, given the unique structure of the ECCC.⁴² The SCC minority concluded that the conduct of the domestic authorities was attributable to the ECCC,⁴³ after considering that:

- the ECCC were established by and within the domestic system;⁴⁴
- the background of Duch's detention by the Military Court demonstrated the intimate connection between that period of detention and the case against Duch at the ECCC;⁴⁵
- the prejudice to Duch's liberty was extreme, having regard to the length of detention;⁴⁶ and
- the ECCC were uniquely placed to grant an effective remedy that would not frustrate the ECCC's mandate.⁴⁷

³⁹ See the submission that the life term should be reduced to 45 years to take account for the period of illegal detention: Transcript of Proceedings, *KAING Guek Eav alias Duch (Appeal)* (ECCC, SCC, Case File No. 001/18-07-2007-ECCC/SC, F1/3.2, 29 March 2011) 64 (lines 1-7) (Andrew Cayley).

⁴⁰ The dissentients were two international judges: Judges Klonowiecka-Milart (Poland) and Jayasinghe (Sri Lanka).

⁴¹ *KAING Guek Eav alias Duch (Appeal Judgement – IX. Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe)* (ECCC, SCC, Case File No. 001/18-07-2007-ECCC/SC, F28, 3 February 2012) ("SCC judgment – partially dissenting joint opinion") [2]. As such, the SCC minority did not consider it necessary to examine whether there had been abuse of process: SCC judgment – partially dissenting joint opinion, [3].

⁴² SCC judgment – partially dissenting joint opinion, [4].

⁴³ Ibid [3] & [8].

⁴⁴ Ibid [9]-[11].

⁴⁵ Ibid [12]-[13].

⁴⁶ Ibid [14].

⁴⁷ Ibid [15].

Having concluded thus, the SCC minority turned its focus to what would constitute an effective remedy, given the SCC's unanimous decision that the gravity of Duch's crimes warranted the imposition of a life sentence. In forming a response to this question, it was not possible to adopt the TC's approach of simply subtracting a fixed number of years from a finite term. Referring to article 31(1) of the *Constitution of the Kingdom of Cambodia* ("Cambodian Constitution"),⁴⁸ which states that Cambodia shall recognise and respect, inter alia, human rights as stipulated in the covenants and conventions related to human rights, and drawing on the right to an 'effective remedy' for the violation of any right guaranteed under the ICCPR,⁴⁹ the SCC minority was satisfied that a sentence reduction could be an appropriate remedy, provided it constituted adequate redress for the violation.⁵⁰

Although it had not had to consider the approach to be followed in the event of transforming a life sentence to a fixed term of imprisonment, the SCC majority had considered that article 39 of the ECCC Law would be the guiding provision, and consequently a term of anything between five years and life imprisonment would have been permitted.⁵¹ The SCC minority eschewed such an approach, and concluded that substantial weight should be accorded to domestic sentencing practices, including article 46 of the *2009 Cambodian Criminal Code*⁵² which imposed a maximum of 30 years' imprisonment for fixed term sentences, for the following reasons:

⁴⁸ Article 31(1) of the Cambodian Constitution states in full:

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.

⁴⁹ Article 2(3)(a) of the ICCPR states in full:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

...

⁵⁰ SCC judgment – partially dissenting joint opinion, [16]-[20]. The SCC minority also drew on decisions of the ICTY, ICTR and the European Court of Human Rights.

⁵¹ SCC judgment, [343]-[351]. Article 39 of the ECCC Law provides:

Those who have committed any crime as provided in Articles 3, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

⁵² SCC judgment – partially dissenting joint opinion, [24]. Article 46 (Definition of Felony) of the *2009 Cambodian Criminal Code* provides:

A felony is an offense for which the maximum sentence of imprisonment incurred is: (1) life imprisonment; (2) imprisonment for more than five years, but no more than thirty years.

- the range of punishment foreseen by article 39 of the ECCC Law is very broad and there is little guidance on sentencing elsewhere in the ECCC Law;⁵³
- sentencing guidelines at the international level are limited;⁵⁴
- the rationale for deferring to sentencing regimes at the domestic level is compelling in the case of the ECCC, established as they are within the existing court structure of Cambodia;⁵⁵
- a 30 year finite term would not be inconsistent with international standards;⁵⁶ and
- in contrast to the 45 year term requested by the Co-Prosecutors, the practical outcome of a 30 year term would mean that Duch may in fact live to an age at which he might benefit from the remedy granted, meaning that it would not be a purely symbolic remedy.⁵⁷

In the end, the SCC minority would have granted Duch a reduced sentence of 30 years' imprisonment as a remedy for the violation of his fundamental rights at the hands of the domestic authorities.⁵⁸

V ANALYSIS

A *Reaction to TC and SCC judgments*

Immediately following the TC judgment, there was criticism of the perceived leniency of the sentence among the Cambodian population,⁵⁹ including

⁵³ SCC judgment – partially dissenting joint opinion, [25].

⁵⁴ Ibid [26].

⁵⁵ Ibid [27].

⁵⁶ Ibid [28]. Among the international standards referred to was article 77(1)(b) of the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) which provides:

1. *Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:*

(a) *Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or*

(b) *A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.*

⁵⁷ SCC judgment – partially dissenting joint opinion, [29].

⁵⁸ Ibid [31].

⁵⁹ Alex Bates, 'Transitional Justice in Cambodia: Analytical Report' (Atlas Project, October 2010) <http://projetatlas.univparis1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITES_Feb2011.pdf> [39]; Mark Ellis, 'Safeguarding Judicial Independence in Mixed Tribunals: Lessons

especially by victims or civil parties.⁶⁰ Certain commentators also criticised the TC's sentence, albeit with most focusing on the TC's failure to inadequately account for the gravity of Duch's crimes.⁶¹ However, the TC judgment was praised from certain quarters because of its acknowledgement that Duch's rights had been breached and its reduction of his sentence in this respect.⁶²

Understandably, victims welcomed the SCC's increased sentence for Duch,⁶³ as did at least one author.⁶⁴ However, the human rights implications of the SCC majority's reasoning were noted by many observers to be a worrying aspect of the decision.⁶⁵ This article will expand upon the arguments raised by

from the ECCC and Best Practices for the Future' (International Bar Association, September 2011) <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=C098F60F-82E1-467B-9361-F1E080F83FD4>> 45; Paul Wilson, 'Observations of the Cambodian Trial of "Duch"' (2011) 22 *Current Issues in Criminal Justice* 473, 475-476; including criticism by the Foreign Minister, Hor Namhong: Robert Dubler, 'Kaing Guek Eav alias Duch, Judgment, ECCC, Case No 001/18-07-2007/ECCC/TC (26 July 2010)' (2010) 17 *Australian Journal of International Law* 247, 251.

⁶⁰ Phuong N Pham et al, 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 *Journal of Human Rights Practice* 264, 279; Eric Stover, Mychelle Balthazard and K Alexa Koenig, 'Confronting *Duch*: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) 93 *International Review of the Red Cross* 503, 537-540. However, see the study cited in the following article, which indicated that the TC's sentence was thought to be appropriate by many of the civil party applicants surveyed: Seeta Scully, 'Judging the Successes and the Failures of the Extraordinary Chambers in the Courts of Cambodia' (2011) 13 *Asian-Pacific Law and Policy Journal* 300, 348.

⁶¹ Richard L Kilpatrick, Jr, 'Prosecutor v Kaing Guek Eav alias Duch: In First Round of Proceedings, the Extraordinary Chambers in the Courts of Cambodia Convicts Former Chairman of Khmer Rouge Interrogation Center of Atrocity Crimes' (2011) 19 *Tulane Journal of International and Comparative Law* 669, 686; Duncan McCargo, 'Politics by other means? The virtual trials of the Khmer Rouge Tribunal' (2011) 87 *International Affairs* 613, 624; Michael C Witsch, 'Legitimacy on Trial at the Extraordinary Chambers' (2012) 26 *Temple International and Comparative Law Journal* 143.

⁶² Amnesty International, *Cambodia: Khmer Rouge judgment welcome, but raises human rights concerns* (4 February 2012) <<http://www.amnesty.org.au/news/comments/27781/>>; Bates, above n 59, 4; John D Ciorciari, 'The Duch Verdict' (Cambodia Tribunal Monitor, 28 July 2010) <http://www.cambodiatribunal.org/sites/default/files/resources/the_duch_verdict.pdf> 1; Coughlan, Ghouse and Smith, above n 15, 24; Dubler, above n 59, 251.

⁶³ Chhay Channyda, 'Life sentence gives comfort to victims', *The Phnom Penh Post* (online), 6 February 2012 <<http://www.phnompenhpost.com/national/life-sentence-gives-comfort-victims>>.

⁶⁴ Witsch, above n 61, 143. However, Witsch did not examine the treatment by the SCC majority of Duch's illegal detention.

⁶⁵ Amnesty International, above n 62; Alex Bates, 'Duch's Procedural Rights and the Final Judgment' (iLawyer Blog – A Blog on International Justice, 11 March 2012) <<http://ilawyerblog.com/duchs-procedural-rights-and-the-final-judgment/>>; Cambodian Center for Human Rights, 'Media Comment – Phnom Penh, 3 February 2012: Good and bad at the ECCC as Duch's prison sentence is extended to life' (3 February 2012) <http://www.cchrcambodia.org/media/files/press_release/218_200cmgabateadspstl_en.pdf>; Coughlan, Ghouse and Smith, above n 15, 25; Bridget Di Certo, 'Duch verdict worries', *The*

such observers, and will analyse the detrimental impact the SCC majority's decision will likely have on the ECCC's legacy.

B *Reasons for preferring SCC minority's approach*

As a starting point, this article acknowledges what some have viewed as the irony of a man who has been held criminally responsible for the deaths of at least 12,000 people claiming a remedy for a breach of his own rights.⁶⁶ However, this article also argues that the SCC minority approach is to be preferred for the following reasons:

- it was disingenuous of the SCC majority to grant credit for the period of pre-trial detention, while simultaneously not attributing the behaviour of the detaining authority to the ECCC;
- such an approach would have reinforced the universality of human rights;
- the legacy of the ECCC has been tarnished in other respects, and granting a remedy pursuant to human rights norms would have ensured at least some ongoing positive contribution to Cambodian society;
- the problem of pre-trial detention (including unlawful detention) within Cambodia's judicial system has been widely criticised, and a ruling on this point could have helped to ameliorate this state of affairs;
- although the public's and victims' interests will inevitably have some influence on a convicted person's sentencing, it is important not to disregard human rights principles, given that these disparate interests are never going to be entirely satisfied, irrespective of the sentence imposed; and

Phnom Penh Post (online), 6 February 2012 <<http://www.phnompenhpost.com/national/duch-verdict-worries>>; Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (February 2012) <<http://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20120223.pdf>> 11-12; Stan Starygin, 'Judge Motoo Noguchi's Imminent Departure and Lasting Legacy' (ECCC Reparations – blog, 7 June 2012) <<http://eccc reparations.blogspot.com.au/2012/06/supreme-court-chamber-judge-motoo.html>>.

⁶⁶ Indeed, Yesberg describes the wave of laughter from Cambodians in the public gallery that greeted such a submission by Duch's lawyer before the PTC: Kate Yesberg, 'Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal' (2009) 40 *Victoria University of Wellington Law Review* 555, 575.

- imposing a lower sentence by way of remedy would not have impacted on the deterrent effect of what would otherwise have been a life sentence, but for the breach of Duch's rights.

1 *Ignoring the history of Duch's detention*

The SCC had unanimously held that Duch was entitled to credit for the entirety of his time spent in detention from 10 May 1999 onwards, drawing upon the TC's finding that the allegations in the case before the Military Court were 'broadly similar' to those before the ECCC.⁶⁷ The SCC could hardly have decided otherwise, as the only alternative would have been to disregard the eight years and approximately three months of detention.⁶⁸ However, in being prepared to credit this period of detention in acknowledgement of the fact that Duch was being held for broadly similar allegations, it was disingenuous for the SCC majority to hold that the Military Court's conduct was not attributable to the ECCC.⁶⁹ Indeed, when Cambodia and the international community were still in negotiations regarding the set-up of the ECCC, Prime Minister Hun Sen indicated that Duch was merely being held by the Military Court in anticipation of the ECCC's establishment.⁷⁰ Against this historical background, the SCC majority's finding appears merely to be an attempt to relieve itself of any obligation to provide a remedy for the breach of Duch's rights.

2 *Negative impact on ECCC's legacy in respect of human rights*

In being held by the Military Court from 10 May 1999 to 31 July 2007, where no substantial investigation was being undertaken, where there was a limit of three years' provisional detention, and where non-judicial authorities were

⁶⁷ SCC judgment, [400]-[404].

⁶⁸ Although, as noted by DeFalco, with the imposition of the life sentence, the only practical outcome of granting credit for Duch's pre-trial detention will presumably be that Duch will become eligible to seek parole at an earlier date: Randle DeFalco, 'Case 001 Appeal Judgment: Duch Sentenced to Life' (Cambodia Tribunal Monitor, 3 February 2012) <<http://www.cambodiatribunal.org/sites/default/files/CTM%20Blog%202-3-12.pdf>> 6.

⁶⁹ Stan Strygin, 'Appeal Judgment of the ECCC Supreme Court Chamber in Case 001: More on the Summary of the Appeal Judgment and in Greater Detail (In Several Parts): Part VIII' (ECCC Reparations – blog, 14 February 2012) <http://ecccreparations.blogspot.com.au/2012/02/more-on-summary-of-appeal-judgment-and_430.html>.

⁷⁰ Stephen Heder and Brian D Tittmore, 'Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge' (War Crimes Research Office, Washington College of Law, American University and Coalition for International Justice, June 2001) <<http://www.wcl.american.edu/warcrimes/khmerrouge.html>> 23, quoting Hun Sen as claiming that the 'first job' for the proposed court would be trials of the only two officials then in custody: Duch and (the subsequently deceased) Ta Mok. See also Bertelman, above n 11, 372.

sometimes responsible for extending Duch's detention, the following rights contained in the ICCPR (and subsumed into Cambodian law)⁷¹ were breached:

- article 9(1) – right to be detained only in accordance with the law;⁷²
- article 9(3) – right to trial within a reasonable time or to release;⁷³ and
- article 14(3)(c) – right to be tried without undue delay.⁷⁴

The ECCC had the opportunity to recognise the importance of these rights, and to condemn their breach accordingly. This would have involved taking effective remedial action, which was unanimously recognised as a right under Cambodian law by the SCC, in its analysis of the appeals relating to the civil parties' reparations requests.⁷⁵

An important effect of granting a remedy for the breach of Duch's rights would have been the positive jurisprudential effect such a ruling may have had on Cambodia's national system. It is recognised that the legacy of the ECCC will be viewed as somewhat flawed in several respects – for example, the lack of judicial independence generally;⁷⁶ the undoubted political influence on

⁷¹ Article 31(1), Cambodian Constitution.

⁷² Article 9(1) of the ICCPR states in full:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

⁷³ Article 9(3) of the ICCPR states in full:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

⁷⁴ Article 14(3)(c) of the ICCPR states in full:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...
(c) To be tried without undue delay;

...

⁷⁵ SCC judgment, [645]-[653], referring also to article 9(5) of the ICCPR, which provides:

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

⁷⁶ Bertelman, above n 11; Suzannah Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers' (2006) 4 *Journal of International Criminal Justice* 327; Scott Luftglass, 'Crossroads in Cambodia: The United Nation's Responsibility to Withdraw

national staff and judicial officers with respect to the stalling of Cases 003 and 004;⁷⁷ allegations of corruption in the form of kickbacks;⁷⁸ the constraints placed on the role of civil parties;⁷⁹ and the long delays and costs involved in instituting trials.⁸⁰ However, in spite of these deficiencies, there were hopes that the benefits of the ECCC could extend more widely than the bringing to justice of perpetrators of mass crimes, and would include such things as: capacity-building within the national system (recognising the devastation of the legal profession wrought by the Khmer Rouge);⁸¹ the contribution towards national reconciliation;⁸² the involvement of victims as civil parties;⁸³ and (most relevantly) acting as a model court in respect of fair trial rights.⁸⁴

By denying a remedy to Duch, the SCC majority has made it more likely that accused persons' rights will continue to be sidelined in the domestic system. Although it is not suggested that adopting the SCC minority's stance would have acted as a panacea for the Cambodian judiciary's fair trial issues, the SCC majority's approach has undone the beneficial impact of the TC judgment in recognising and remedying procedurally unfair situations.⁸⁵ The failure to

Involvement From the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge' (2004) 90 *Virginia Law Review* 893.

⁷⁷ Padraig McAuliffe, 'The Limits of Co-operations and Judicial Independence: Resolving the Question of 'How Low Do You Go?' in the Khmer Rouge Trials' Bicephalous Prosecution' (2010) 29 *The University of Tasmania Law Review* 111; Ellis, above n 16; Open Society Justice Initiative, above n 16; Scully, above n 60, 325-332; *Khmer Rouge trials — Report of the Secretary-General*, 67th sess, Agenda Item 70(b), UN Doc A/67/380 (19 September 2012) [16]-[27], [54]-[55] & [68].

⁷⁸ Margaret deGuzman, 'Justice in Cambodia: Past, Present, and Future' (2008) 19 *Criminal Law Forum* 335, 336-337; Scully, above n 60, 334-338.

⁷⁹ David Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation' (2006) 4 *Journal of International Criminal Justice* 307; Maria Elander, 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia' (2013) 7 *The International Journal of Transitional Justice* 95; Mahdev Mohan, 'The Paradox of Victim Centrism: Victim Participation at the Khmer Rouge Tribunal' (2009) 9 *International Criminal Law Review* 733.

⁸⁰ Liz Boylan, 'Differing legal systems' (2008) 30(10) *Bulletin (Law Society of South Australia)* 10, 10-11.

⁸¹ Michael Lieberman, 'Salvaging the Remains: The Khmer Rouge Tribunal on Trial' (2005) 186 *Military Law Review* 164, 165.

⁸² Jörg Menzel, 'Justice delayed or too late for justice? The Khmer Rouge Tribunal and the Cambodian "genocide" 1975-79' (2007) 9 *Journal of Genocide Research* 215, 224-225.

⁸³ Brianne N McGonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 *Leiden Journal of International Law* 127.

⁸⁴ Helen Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5 *Melbourne Journal of International Law* 462, 482.

⁸⁵ See especially Bates, above n 59, [230]-[233], where Bates cites the TC judgment's treatment of Duch's Military Court detention as 'arguably the most widely applauded decision of the tribunal to date' (written before the SCC judgment).

account for Duch's illegal pre-trial detention is especially troubling given the ongoing reports detailing the lengthy periods of (sometimes unlawful) detention to which many Cambodian prisoners are subjected while awaiting trial, as a matter of course.⁸⁶

3 *Focusing on public perception, at the expense of human rights*

This article does not wish to take away from the fact that much of the Cambodian public, and especially victims, felt upset by the TC's initial sentencing of Duch to 30 years' imprisonment. However, in adhering to its conclusion that Duch should be sentenced to life imprisonment, no matter the circumstances, it appears as though the SCC majority acted in this manner partly as a means to satiate the popular sentiment for a harsher sentence. This article acknowledges that sentencing is a topic fraught with sensitivity, both at the domestic and especially at the international level.⁸⁷ However, the more defensible course of action would have been to recognise the reality of Duch's pre-trial illegal detention, and order a remedy accordingly. As there would still likely be lingering resentment towards the perceived leniency, the ECCC's public affairs and outreach unit would have been well equipped to explain the reasoning of the decision to the wider population. To strive for the public's approval is the pursuit of an unattainable goal, owing to the diverse views held by different people, and the fact that some will nevertheless seek harsher punishment for the perpetrators of such heinous crimes.⁸⁸ The SCC majority appears to have been improperly influenced by giving too much credence to the public's views at the expense of adherence to human rights norms.

4 *Deterrent impact of sentence would have remained the same*

As a final brief point, it is noted that the SCC minority's decision would have in no way detracted from the deterrent effect that is recognised to be one of the main focuses of the sentencing of such crimes. The result would have been the recognition that Duch's crimes were sufficiently serious and accompanied by various aggravating factors to have warranted the imposition of a life sentence.⁸⁹ The granting of a remedy would only have been an

⁸⁶ See the statistics and reports cited in Coughlan, Ghouse and Smith, above n 15, 20; and Open Society Justice Initiative, above n 65, 12-13.

⁸⁷ Daniel Naymark, 'Violations of Rights of Accused at International Criminal Tribunals: The Problem of Remedy' (2008) 4 *Journal of International Law and International Relations* 1, 14.

⁸⁸ See Tek's conversation with an elderly Cambodian man who lamented the lack of capital punishment (which is not permitted in Cambodia) and the (higher) international standards of the facilities at the ECCC Detention Unit: Farrah L Tek, 'Justice at the Extraordinary Chambers in the Court of Cambodia?' (2011) 23 *Peace Review: A Journal of Social Justice* 431, 435.

⁸⁹ SCC judgment – partially dissenting joint opinion, [30].

acknowledgement of the breach of rights occasioned to Duch, and could not be relied on by persons convicted of such crimes in the future, absent a similar breach of rights.

VI CONCLUSION

The first final judgment of the ECCC was an important historical decision, clearly outlining Duch's involvement in Khmer Rouge atrocities and confirming his criminal responsibility. Considering the age of the accused on trial in Case 002,⁹⁰ it is possible that the SCC judgment will be the only final judgment to render justice in respect of the crimes committed in this period. As such, it was incumbent upon the SCC to ensure that its ruling fully adhered to the law and human rights principles. The SCC majority's failure to provide a remedy to Duch for his period of illegal detention, on the basis that this detention was not attributable to the ECCC, detracts from the authoritativeness of this decision. The SCC minority's reasoning is to be preferred, largely because it recognised the realities of Duch's detention, and was willing to grant an effective remedy for the breach of his rights.

With regard to the legacy of the ECCC, this article recognises that this has already been badly tarnished in some respects (especially in relation to judicial independence in the context of Cases 003 and 004), but agrees with Staggs Kelsall's comment that '[f]inding discrete but positive ways to enhance the normative force of human rights standards within the [ECCC] itself is likely to be far more successful an enterprise than trying to push the institution as a whole to become something that it is not'.⁹¹ In a country with myriad problems with regard to the pre-trial detention of accused persons, a ruling along the lines of the SCC minority's reasoning or the TC judgment could have served as a useful prompt to the national judiciary to respect suspects' rights. Unfortunately, the SCC majority's decision on this point has even managed to weaken the ECCC's legacy in this small aspect over which the SCC still had the opportunity to leave a positive influence.

⁹⁰ Nuon Chea was born in 1926, Khieu Samphan in 1931.

⁹¹ Michelle Staggs Kelsall, 'Symbolic, Shambolic or Simply *Sui Generis*? Reflections from the Field on Cambodia's Extraordinary Chambers' (2009) 27(1) *Law in Context* 154, 172.



Professor Gillian Triggs

Art by Joyce Meiring

An Interview with Professor Gillian Triggs* on the Impact of International Human Rights on Domestic Law

PB: Professor Triggs, thank you so much for joining us. Much of the discussion of human rights law is couched in international law terms and vice versa. Why is this, and is this discourse helpful?

GT: Many of the fundamental human rights law principles actually derive from, broadly speaking, the common law. They arose in England and Europe in the twelfth and thirteenth centuries through the development of ideas by philosophers, courts and politicians. International law reflects this jurisprudence and philosophy. These principles were then articulated in international treaties that were subsequently ratified by individual countries. This process resulted in, for the first time, an international articulation of human rights principles. Conversely, the common law lacked an easily articulated description of these principles as they were buried in much of the case law.

Historically, international law has become the leader in describing these principles that were originally decided at the very local community level. In terms of our mandate at the Australian Human Rights Commission (AHRC), like other human rights institutions, our work is defined by the definition of human rights provided in the international treaties. Consequently, our work is dominated by the provisions of international law. The curious reality is that Australia has not implemented most of the international human rights treaties in Australian domestic law. Judges are confined to limited domestic sources whilst the AHRC talks in grandiose terms defined in international law. Thus, we have a phenomenon in Australian human rights law that could be described as “ships passing in the night”. We are not connecting. The discourse between international and domestic human rights law is not actually happening in Australia.

PB: Are there any bodies comparable to the AHRC internationally?

GT: Yes, there would be sixty or seventy other national human rights institutions internationally. I recently returned from Geneva where

* Professor Gillian Triggs is currently President of Australian Human Rights Commission. Professor Triggs was formerly Dean and Challis Professor of International Law at the University of Sydney Law School (2007-2012). This interview was conducted by Samuel Walpole and Allister Harrison on 24 May 2013 via telephone.

there was a meeting of human rights commissions from around the world. The development of these institutions has very much been a phenomenon of the last twenty years and Australia has been a leader in that.

PB: In what ways have Australian governments strived to implement our international human rights law obligations, and have these measures proved adequate?

GT: Australia has implemented some human rights documents domestically but relatively few in total. One would be the *Convention on the Elimination of All Forms of Discrimination against Women*¹ which is reflected in the *Sex Discrimination Act 1984* (Cth). Another example is disability law, which is now articulated in the *Convention on the Rights of Persons with Disabilities*.² Furthermore, the *Convention on the Elimination of All Forms of Racial Discrimination*³ was the first human rights treaty Australia implemented in domestic legislation, through the *Racial Discrimination Act 1975* (Cth). Australia has also taken a leadership position with regard to age discrimination, where no international convention exists.

The aforementioned three conventions are examples where Australia has given effect to international treaties in domestic law. However, all the other international human rights instruments remain, for the most part, without domestic implementation. For example, the *International Covenant on Civil and Political Rights*⁴ is not part of Australian domestic law, nor is the *Convention on the Rights of the Child*,⁵ the Geneva Convention and so on. Certain provisions of certain conventions, such as in the inclusion of parts of the Refugee Convention⁶ in the *Migration Act 1958* (Cth), have been incorporated into domestic law. However, these represent very sparse implementations of the agreed international human rights principles.

¹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 14 August 1980, 1249 UNTS 13 (entered into force 3 September 1981).

² *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

³ *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 149 (entered into force 4 January 1969).

⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

PB: How do these measures relating to human rights compare with Australia's implementation of international instruments on other matters? For example, there has been domestic implementation of the *Vienna Convention*,⁷ with respect to international commercial law.

GT: The *Vienna Convention* is hugely important because if you are not a party to it, you are locked out of its regime. Australia has implemented it domestically, and⁸ its domestic implementation illustrates that we are implementing many international treaties domestically but not in the human rights area. For example, we are the only comparable common law country without a Charter of Rights.

PB: Australia does stand alone amongst Western democracies in lacking a national Charter of Rights. Why has a Charter attracted so much opposition in Australia?

GT: That is not an entirely easy question to answer. During the early days of the first Rudd government Father Frank Brennan undertook a consultation on this. He recommended that Australia implement a Charter of Rights, however, he acknowledged the Australian public has not supported such a proposal. The key reason is the much touted opposition argument that the interpretation of the Charter will depend on judges. There is a deep scepticism in the Australian community about giving judges a creative law-making role. This is an interesting curiosity, given the human rights we enjoy today were first developed by judges through the common law. There is, nonetheless, a strong preference in Australia towards Parliament being in control of human rights. The Coalition have long resisted a Charter of Rights and this has been one of their reasons. Additionally, there has been an almost total lack of political leadership on the question. The Labor Party has not provided the leadership. Senior figures, like Bob Carr in New South Wales, for example, have vehemently opposed a Charter. Many politicians across all branches of politics, except the Greens, have opposed a Charter. My view now, having watched the situation for a long time, is that Australia will not implement a Charter of Rights unless we have strong political leadership.

PB: On a similar topic, many commentators often say Australia has a strong human rights record. Do you think this is the case?

⁷ *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

⁸ See, eg. *Sale of Goods (Vienna Convention) Act 1986* (Qld).

GT: I agree with that, and that is the irony. Although Australia is exceptional in terms of not giving domestic effect to international human rights law, as a society, and indeed in our behaviour internationally, Australia has been a relatively good international citizen with regard to human rights. There are some notable exceptions relating to our treatment of asylum seekers and indigenous policy. However, we have been a very active international citizen and our domestic human rights record is very good indeed.

PB: What are the biggest challenges for international human rights today? Are they substantive issues or is the key priority enforcing the existing obligations of state parties?

GT: I would say that the twentieth century was a century of articulation of human rights principles. The twenty-first century must be a century of effective implementation of these principles at the domestic level. That is really where international human rights law breaks down. Human rights are highly inspirational at the international level. However, when diplomats and politicians return home the treaties are not ratified or implemented. That is the problem. Domestic implementation is much more banal, of course. We would rather talk in abstract terms about human rights and encase them in a treaty. At the implementation level, governments must deal with much more complex law alongside domestic constitutional structures. When combined with deep resistance from conservative elements in the Australian community, this can frustrate proper domestic legal processes being put in place.

PB: What are your views regarding the Federal Government's recent steps to excise the Australian mainland from the migration zone?

GT: The excision of the Australian mainland from its own *Migration Act* is, at one level, a ludicrous test to prevent the rule of law applying to asylum seekers. I am astonished that the Australian public have not objected more strenuously. The primary concern at the AHRC is that Australia cannot avoid its international obligations to asylum seekers. All these measures cannot avoid the core point that Australia is in egregious breach of our human rights obligations to asylum seekers. We have now nearly 10 000 people in mandatory closed detention, including nearly 2 000 children. That is an extraordinary phenomenon in the Western world. Our research indicates that no other country incarcerates asylum seekers in the manner that we do. Furthermore,

we are the only country that has suspended totally, for nearly a year, any claim for asylum seeker status. Excision is aimed at stopping asylum seekers from accessing the courts. In my view, it is outrageous to exclude such access to people who have rights to due process and adjudication by the courts.

PB: How about the former Gillard Government's proposed, but now withdrawn, discrimination law reforms?

GT: The Anti-Discrimination Bill was an extremely disappointing failure of a reform initiative by Labor. We are disappointed, however, in that we feel we did not have the leadership in the Labor Party to support that Bill. In the end, it floundered alongside almost every other attempt to ensure Australians have proper domestic human rights legislation in place. The Bill would have constituted an important development in domestic human rights law but unfortunately it was reform legislation that was flatly ridiculed, very effectively, by the Coalition.

PB: Cases like *Minister for Immigration and Ethnic Affairs v Teoh*⁹ evince a judicial effort to interpret statutes, and develop the common law, in accordance with international instruments. Is judicial defence of human rights an effective and necessary safeguard, or is this task better left to the legislature?

GT: The judiciary and our courts have a very important role in ensuring that government behaviour is consistent with Australia's international obligations. The difficulty for the courts is that they have to rely on very broad concepts such as the principle of legality. They have no legislation on which to rely. If a particular statutory instrument exists, then judges are of course bound by the will of Parliament. The problem is that the judges do not have much capacity to ensure legislation complies with international instruments. One of the mechanisms developed by the Mason Court was the concept that the fact that Australia has entered into a treaty, whilst not binding on government officials, is a factor that government officials should take into account in decision-making. That is why *Teoh* was such an important case. The High Court has somewhat retreated from *Teoh* in *Lam*¹⁰ but the principle remains alive and some judges still refer to it. Returning to your core question, of course the legislature has the primary role in human rights law, but the judiciary has a significant

⁹ (1995) 183 CLR 273.

¹⁰ (2003) 214 CLR 1.

role in ensuring that principles of legality and fundamental human rights are abided by. The important point to note is that when legislation is contrary to these principles, judges cannot do anything. If the legislation is clear and unambiguous then the judges can do nothing. The *Malaysian Declaration Case*¹¹ was a recent example where the High Court was able to say the *Migration Act 1958* (Cth) contained a requirement that the state to which asylum seekers were transferred abided by international law. As Malaysia had not signed the *Refugee Convention*, the High Court found Malaysia would not satisfy the statutory provision and, consequently, the Minister could not sign off on the statutory requirements. The remaining problem is that it is very easy for Parliament to simply take such a statutory provision away. What Parliament has done in response to that case is to legislate so that such an outcome can never occur again. It is now purely a matter for the Minister's discretion. Thus, Parliament can keep amending legislation to remove courts' capacity to strike down particular government actions.

PB: Most Australian law schools offer international law courses as electives. Should the study of international law be compulsory?

GT: This is a question I have been asked since I first started teaching international law in 1975. I take a personal approach to this. Wherever I have taught international law, the number of enrolments has been enormous. I have always thought that, as it was voluntary and the enrolments were large, it would be quite churlish to make the course compulsory just to catch the few students that do not take the course. When I was Dean of Sydney Law School, I resisted the attempt to make the subject compulsory as I felt there was no need given the large enrolments. However, I do think the Priestley 11 needs to be reviewed. There are many subjects students have to study that they do not need to be taking. International law, particularly private international law, is a subject students ought to take, though I would rather not force them to do so.

PB: Professor Triggs, thank you for speaking with us today.

¹¹ *Plaintiff M70 v Minister for Immigration and Citizenship* (the "Malaysia Declaration Case") (2011) 244 CLR 144.

Australia: The Great Southern Land of Corporate Accountability?

Prospects of Human Rights Litigation Against Corporate Bad-Actors in Australian Courts

Jonathan Kolieb*

The April 2013 US Supreme Court's *Kiobel* decision has caused quite a flutter amongst many corporate lawyers and the executives they work for. The decision greatly diminishes the threat to their collective bottom-line of the Alien Tort Statute ("ATS") – a heretofore much vaunted weapon in the armoury of advocates pursuing compensation claims in US courts on behalf of victims of alleged corporate human rights abuses.

Some commentators have described the decision in fatalistic terms, for example labelling it 'the death knell' and 'zombification' of the ATS.¹ Whilst a significant setback for corporate human rights accountability in the US, I would submit that the death of the ATS has been greatly exaggerated. Regardless of the future of the ATS, this paper seeks to address a different question that arises out of the *Kiobel* case. One that many foreign victims of alleged corporate human rights abuses may be pondering: where to now? As the ATS may no longer be a viable avenue for these victims to pursue justice, they will look elsewhere. Not only to other causes of action in the American legal system, but also to other jurisdictions. I argue that they may find a visit to Australia and its courts rather worthwhile to consider. Our courts may be fertile ground for lawsuits against large multi-national corporations for abuse they have allegedly committed in far-flung regions of the world where they do business.

I THE ALIEN TORT STATUTE'S REVIVAL AS A GUARDIAN OF HUMAN RIGHTS

The Alien Tort Statute ("ATS") became law as part of the original Judiciary Act of the United States, passed by the first US Congress in 1789, largely in an effort to combat piracy and the harassment of foreign ambassadors.

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¹ See, eg. Michael Goldhaber, 'The Global Lawyer: The Zombification of the Corporate Alien Tort', *The Litigation Daily*, 21 April 2013, and Mia Swart, 'Alien Tort Ruling is a Snub for Global Justice', *Business Day*, 7 May 2013.

The ATS states that:

[US] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.²

The ATS lay in obscurity for two centuries, until it was successfully invoked by enterprising lawyers in the 1980s to pursue human rights abuse claims against foreign officials and state agencies.³ The 1995 *Kadic* case ruled that egregious violations of the law of nations such as genocide, war crimes and the like do not require state action to be actionable under the ATS.⁴ This unleashed a wave of ATS litigation targeting large multi-national corporations. The generous interpretation of the ATS seemingly allowed US courts to exercise universal jurisdiction in hearing cases for 'violation[s] of the law of nations'; the alleged victims need not be Americans, the misconduct or crime need not have been committed on American soil, and the alleged corporate perpetrator (or accomplice) need not have been an American company. Scores of ATS suits have been filed against US and non-US-based MNCs alleging gross human rights abuses in dozens of countries, and Australian companies have not been immune.⁵

II THE *KIOBEL* DECISION

The original claim that led to the Supreme Court case of *Kiobel v Royal Dutch Petroleum* (2013) was filed in a lower US court in 2002. It was brought by family members on behalf of Dr Barinem Kiobel and eleven other Nigerian citizens of the oil-rich Niger Delta region claiming compensation from Royal Dutch Petroleum, Shell and their local, wholly owned Nigerian-based subsidiary, claiming the companies aided and abetted the Nigerian government to commit crimes against humanity, torture and extrajudicial executions of local Ogoni people in the 1990s. Dr Kiobel and a group of fellow activists

² 28 U.S.C. § 1350 (2006).

³ *Filártiga v Peña-Irala*, 630 F.2d 876 (2nd Cir, 1980).

⁴ *Kadic v Karadzic*, 70 F.3d 232 (2nd Cir, 1995).

⁵ For a list and descriptions of the prominent ATS cases lodged in US Federal Courts, see: National Foreign Trade Council, *Alien Tort Statute*, US Engage <<http://usaengage.org/Issues/Litigation/Alien-Tort-Statute-/>>.

were detained, tortured and convicted of murder in an unfair trial in 1995.⁶ They were summarily hanged ten days later.⁷

A *The Judgements: Unanimous, but...*

The Supreme Court's decision to reject the Nigerians' claim for compensation was unanimous. However, agreement amongst the nine justices of the US Supreme Court vis-a-vis the determination in this particular case, belies the sharp disagreements between them on interpreting the legal principles at stake.

Relying heavily on a 2010 decision dismissing a claim alleging fraud against the *National Australia Bank*,⁸ Chief Justice Roberts wrote the Opinion of the Court and was joined by the other three "conservative" justices and Justice Kennedy, so often the swing vote on the court. Roberts decided the case on jurisdictional grounds. He quoted approvingly from the *NAB* judgment (written by Justice Scalia), agreeing that 'when a statute gives no clear indication of an extraterritorial application, it has none.'⁹ He concluded that nothing in the text of the ATS nor the history of its drafting rebuts the 'presumption against extraterritorially.'¹⁰

The minority opinion (of the four "liberal" justices), while reaching the same conclusion to dismiss the Nigerians' claim, reject Roberts' sweeping denial of the ATS' extraterritoriality. Instead, they narrowly determined that in the case before them 'the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction.'¹¹ Even Justice Kennedy who

⁶ *Kiobel et al v Royal Dutch Petroleum Co et al*, 569 US ____ (2013) slip op. (US Supreme Court, Docket No. 10-1491, Decided April 17 2013) (*Kiobel*). For a summary of the facts of the case, and links to court documents and commentaries see: Business and Human Rights Resource Centre, *Kiobel case: US Supreme Court Review of Alien Tort Claims Act* <http://www.business-humanrights.org/Documents/SupremeCourtATCARReview>.

⁷ The group was referred to as the "Ogoni 9" – and included the well-known writer and activist, Ken Saro-Wiwa. Incidentally, an ATS claim was also filed (in 1996) on behalf of Ken Saro-Wiwa against Shell along similar lines. After fighting the claim for thirteen years, Shell and their co-defendants settled the case in 2009, on the eve of trial. Reportedly, the settlement included a payment of \$15.5 million to Saro-Wiwa family – a payment characterized by Shell as a 'humanitarian gesture,' who continues to deny any culpability. See, eg. Jad Mouawad, 'Shell to Pay \$15.5 Million to Settle Nigerian Case', *New York Times* (New York, USA), 8 June 2009.

⁸ *Morrison et al v National Australia Bank Ltd et al* 561 US ____ (2010) slip op. NAB had been sued for fraud under US securities law, relating to the 2001 multi-billion dollar write-down of the value of assets of a Florida mortgage servicing company that it had recently purchased. The US Supreme Court held that US securities law does not apply to non-US securities – i.e. it does not apply extraterritorially, overturning a long-standing precedent to the contrary.

⁹ *Kiobel* slip op 4 (Roberts J).

¹⁰ *Ibid* slip op 7 (Roberts J).

¹¹ *Ibid* slip op 2 (Breyer J).

provided the crucial vote in support of Roberts' opinion was at pains to point out in a separate, one-page opinion that 'a number of significant questions regarding the reach and interpretation of the ATS' including its extraterritorial application remain unanswered and 'may require some further elaboration and explanation.'¹²

III RAMIFICATIONS NEAR AND FAR

The judgments will, no doubt, continue to be parsed by legal scholars and lower-court judges in the years to come.¹³ What seems clear is that the consequences for MNCs will differ, depending on where they call home. The Court has *prima facie* stripped the ATS of its extraterritorial reach, whilst leaving open the possibility that some ATS cases that sufficiently 'touch and concern' the United States with 'sufficient force [may] displace the presumption against extraterritorial application.'¹⁴

In practical terms, the Court's decision means that, as a general rule, foreign victims of human rights abuses cannot invoke the ATS to sue foreign companies for conduct in foreign lands in US courts any longer. However, American-based companies may still fall foul of the ATS, almost certainly for human rights abuses committed on American territory, and likely even beyond its shores.

The decision had instant ramifications for other ATS litigation. Subsequent to the *Kiobel* decision, the US Supreme Court declined to hear the appeal in the ongoing *Sarei v Rio Tinto* litigation, and instead returned the case to a lower court for review. That court, taking note of the *Kiobel* judgment promptly dismissed the entire claim. This brought to an end the 13 year litigation saga stemming from allegations of Rio Tinto's complicity in war crimes, genocide and related charges when the Papua New Guinean military attempted to quell an uprising on the island of Bougainville in the 1990s where Rio owned and operated the world's largest open-pit copper mine.¹⁵

¹² Ibid slip op 1 (Kennedy J).

¹³ And the Supreme Court has already telegraphed that it has more to say about the scope of the ATS, having granted certiorari to hear an appeal in another corporate accountability suit, *Daimler Chrysler v Bauman*, in the 2013-14 term.

¹⁴ *Kiobel* 569 US ____ (2013) slip op 14 (Roberts J).

¹⁵ *Sarei et al v Rio Tinto Plc* (9th Cir, No. 02-56256, 28 June 2013) slip op.

The quick dispatch of this case is suggestive of what is to come for many other ATS lawsuits, due to the sweeping judgment in *Kiobel* that pulls the US courts back from exercising universal jurisdiction.¹⁶

However, the decision in *Kiobel* is far from the end of the pursuit of corporate accountability. It will simply shift the focus to alternative bases of claims, and perhaps alternative jurisdictions. As the ATS door slams shut, accountability advocates and victims of human rights abuses will be seeking to push open new doors and find innovative avenues to pursue justice. In the absence of a robust international justice system that has the capabilities and jurisdiction to prosecute corporations, they will look to other countries with the means and willingness to do so. One such possibility is here in Australia. In fact, Australia could be a rather attractive venue for corporate accountability actions going forward.

IV PATHWAYS OF CORPORATE ACCOUNTABILITY IN AUSTRALIA

Australian courts are a potentially fertile, but largely untested, ground for pursuing human rights litigation against corporations, Australian or foreign. Nevertheless, potential criminal and civil legal claims are foreseeable in Australian courts against today's corporate wrongdoers. Rather than presenting an exhaustive review of these possibilities, the remainder of the article focuses on some of the more promising avenues for holding corporate actors accountable for serious human rights abuses in Australian courts.

A *Australia's International Crimes and Anti-Corruption Legislation*

Of particular pertinence to the regulation of corporate conduct abroad are the inclusions of anti-bribery and international crimes provisions into Australia's criminal code.¹⁷

The anti-corruption provisions were incorporated into the code in 1999 to fulfil Australia's international obligations as signatory to the *OECD Anti-Bribery Convention*.¹⁸ To date, there have been several high profile cases involving foreign corruption that were successfully prosecuted in the past decade: the *Australian Wheat Board* ('AWB') for the Iraqi "oil-for-food" bribery scandal, and

¹⁶ Julian Ku and John Yoo, 'The Supreme Court Unanimously Rejects Universal Jurisdiction' *Forbes* (online), 21 April 2013 <http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction/>

¹⁷ *Criminal Code Act 1995* (Cth), divs 70 and 268, respectively.

¹⁸ The *Criminal Code Amendment (Bribery of Foreign Officials) Act 1999* (Cth) was enacted in June 1999 to reflect Australia's obligations under the *OECD Convention on Combating Bribery of Foreign Public Officials* (signed by Australia in 1999).

more recently *Securrency* and *Note Printing Australia* who pled guilty and were fined for bribing government officials across Asia in exchange for lucrative bank-note supply contracts.¹⁹

Perhaps even more relevant to prospects for pursuing corporate accountability through Australian courts, are the “international crimes” provisions that were incorporated into the *Criminal Code Act 1995* (Cth) in 2002 in fulfilment of our obligations as a signatory to the *Rome Statute of the International Criminal Court*.²⁰ Whether it was deliberate act or accident, what is significant for our purposes, as Joanna Kyriakakis has pointed out, is that unlike the International Criminal Court which has its jurisdiction confined to natural persons, the Australian criminal code enjoys jurisdiction over natural *and* legal persons, namely corporations.²¹ Thus, a corporation, as distinct from its employees, managers and owners, can be held accountable for international crimes such as genocide, war-crimes and crimes against humanity, under Australian law.²²

Moreover, the presumption against extra-territoriality that the US Supreme Court has employed to gut the ATS of much of its force, is turned on its head in the Australian criminal context. That is, the anti-corruption and international crimes provisions of the *Criminal Code* (Cth) are *explicitly* extra-territorial in nature.²³ The intent behind their incorporation was precisely to proscribe certain conduct wherever it may occur around the globe in Australia or elsewhere, unbounded by Australian territorial jurisdiction. Although there are questions of whether Australian courts could and would choose to exercise universal jurisdiction, existing case law, including the war-crimes case of *Polyukovich v Commonwealth*, suggests there is strong likelihood that Australian

¹⁹ For an account of the *AWB* corruption case see: Commonwealth, Royal Commission of Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme, *Final Report* (2006) (‘the Cole Inquiry’). Australian and regional Asian newspapers continue to cover the ongoing *Securrency* and *NPA* scandal. For example, Adam Creighton, ‘Notes on a Scandal: RBA Sells Securrency’, *The Australian*, 13 February 2013, 29.

²⁰ *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

²¹ Joanna Kyriakakis, ‘Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code’ (2007) 5(4) *Journal of International Criminal Justice* 809.

²² *Criminal Code Act 1995* (Cth) part 2.5, s 12.1 states:

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

²³ *Criminal Code Act 1995* (Cth), s70.5 and 268.117, respectively.

courts would be willing to entertain the prosecution of grave international crimes, even if they were committed abroad.²⁴

Potential punishment could include hefty fines and imprisonment of individual executives. Moreover, in Australian criminal proceedings, the trial judge has discretion to also compel a guilty corporate party to make reparations to its victims as compensation for loss incurred.²⁵

To date, I am aware of only one case brought under these provisions; that against the Sri Lankan President Mahinda Rajapaksa in 2011, which serves as a salutary example of the obstacles, over and above the standard procedural and evidentiary requirements, that need to be overcome, before any successful prosecution under Division 268 could be made.

In the Rajapaksa case, a Sri Lankan born, naturalized Australian filed an indictment in the Melbourne Magistrates Court alleging crimes against humanity were committed by Sri Lankan President Mahinda Rajapaksa during that country's military's victorious 2009 campaign over the Tamil Tigers. Just days later, the Attorney-General Robert McClelland declined to approve the prosecution, thereby ending it before it had even begun.²⁶

According to the statute, the Attorney-General must approve any prosecution of "international crimes", otherwise it fails to go forward.²⁷ S/he need not publicly cite any reasons for disapproving such a case, there are no public criteria by which his/her choice is to be made.²⁸ It seems reasonable to surmise from the Rajapaksa case that the Attorney-General is aware of the diplomatic and legal implications of opening Australia's courts to war crimes claims against foreign heads of state. No doubt, a similar calculus, may factor against approving any such claims against MNCs as well, with the added factor of economic ramifications of any such prosecution to consider as well.

Nevertheless, gaining the Attorney-General's approval is not inconceivable for the pursuit of corporate accountability claims. In the age of social media and a

²⁴ (1991) 172 CLR 501. For further analysis see, eg. Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507.

²⁵ *Crimes Act 1914* (Cth) s21B.

²⁶ For background and reporting on the case, see, eg. Steve Butcher, 'War Crimes Charges Struck Out', *The Age* (Melbourne), 25 November 2011, 9.

²⁷ *Criminal Code Act 1995* (Cth) s268.121.

²⁸ *Criminal Code Act 1995* (Cth) s268.122. For a discussion of the AG's role in prosecuting war-crimes cases see: Monique Cormier and Anna Hood, 'Prosecuting International Crimes in Australia: The Case of the Sri Lankan President' (2012) 13(1) *Melbourne Journal of International Law* 235.

24/7 news cycle, the political pressure on the Attorney-General to allow a prosecution would be immense if there was damning, public evidence (think: shocking Youtube video or Twitter photos) that an Australian corporation had been directly involved or even complicit in war crimes while doing business abroad.

B *Australian Tort Law*

While Australia does not have a statutory equivalent to the ATS, ordinary judge-made tort law might be sufficient to offer promising avenues for victims of corporate human rights abuses to seek redress.²⁹

Well-established torts such as negligence, trespass of person or land, and wrongful death could potentially be employed to hold MNCs to account for human rights abuses committed abroad.³⁰ For example, victims could employ the tort of trespass of person for allegations of torture, and the tort of wrongful death for extrajudicial killing. Australian courts may also consider recognizing a separate and distinct common law cause of action to sue for grave human rights abuses. Prohibitions on genocide, war crimes and crimes against humanity constitute *jus cogens* – inviolable, non-derogable principles of international law. Beyond their criminalisation, it is reasonable to suggest that the most egregious crimes known to humankind should appropriately be considered the basis for tort claims as well, allowing victims to sue for compensation for any harm caused.³¹ Indeed, the *Kiobel* decision may have curtailed its extraterritorial scope, but the US' ATS remains a statutory recognition of a cause of action for violations against the law of nations.³²

Reflective of well-established principles of Australian law, and employing the same reasoning as in *Kiobel*, a strong presumption could be made that an Australian tort claim (especially, a violations of law of nations tort) would have extra-territorial applicability if a sufficient nexus exists between Australia, the parties and the alleged conduct.³³ Furthermore, it seems likely that crucial legal arguments that corporate defendants deployed in ATS-style lawsuits in the US and elsewhere, would receive a far less favourable hearing in Australian courts.

²⁹ International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path* (2008).

³⁰ Jane Stapleton, 'Civil Prosecutions – Part 2: Civil claims for killing or rape' (2000) 8 *Torts Law Journal* 1.

³¹ See, eg. Eric Mongelard, 'Corporate Civil Liability for Violations of International Humanitarian Law' [2006] *International Review of the Red Cross* 687.

³² See, eg. Francois Larocque, 'The Tort of Torture' (2009) 17 *Tort Law Review* 158.

³³ Justin Gleeson, 'Extraterritorial Application of Australian Statutes Proscribing Misleading Conduct' (2005) 79 *Australian Law Journal* 296.

For example, Australia has a more lax understanding of the *forum non conveniens* principle than the US and UK. Instead of placing the onus on the defendants to establish whether there is a more appropriate forum elsewhere as US courts do, Australian courts ask whether the Australian forum is ‘clearly inappropriate.’³⁴ The practical difference is that there is a far lower likelihood that an Australian court would dismiss a tort claim on the basis of *forum non conveniens*.

Civil and criminal corporate accountability pathways are not mutually-exclusive. Nevertheless, from the perspective of the victims, there are several advantages that civil lawsuits have over criminal prosecutions. Tort cases require the lower “on the balance of probabilities” standard of proof rather than the stricter “beyond reasonable doubt” standard of criminal trials. The victims themselves remain in charge of the process rather than ceding the prosecution to political authorities, such as the Attorney-General.

Significantly, a civil suit is framed in the currency of modern business: money. The compensatory and punitive damages that a tort claim may give rise to exposes a corporation to potentially considerable financial risks. Whilst Australian courts do not have a tradition of massive punitive and compensatory damage awards comparable to the US, the deterrence effect upon entire industries that a handful of high-profile prosecutions may have on corporate activities and human rights due-diligence could be substantial.

1 *Precedent Exists*

Australia is largely virgin ground for these types of large-scale tort-based compensation claims against major multinationals. Indeed, the sole prominent Australian case against a corporate defendant whose fact-pattern reflects a stereotypical ATS claim, was a \$4 billion civil lawsuit launched against BHP Billiton in the mid-1990s in the Supreme Court of Victoria alleging environmental destruction and human rights abuses committed in the course of operating its Ok Tedi open-pit copper and gold mine in the Fly River region of Papua New Guinea. After two years of litigation, BHP settled out of court agreeing to a reported \$500 million settlement deal, including \$110 million in compensation to local landholders.³⁵ Illustrative of the approach of Australian

³⁴ See: *Voth v Manildra Flour Mills* (1990) 171 CLR 538; *Oceanic Sun-Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

³⁵ For more information on the lawsuit see: Stuart Kirsch, ‘Cleaning Up Ok Tedi: Settlement Favours Yonggom People’ (1996) 4(1) *Journal of the International Institute* 1; Glenn Banks and Chris Ballard (eds.) *The Ok Tedi Settlement: Issues, Outcomes and Implications* (National Centre for Development Studies and Resource Management in Asia-Pacific Project, ANU, 1997).

courts, the jurisdictional question of *forum non conveniens* was not even raised in the Ok Tedi Litigation against BHP.³⁶

Formally, the out-of-court settlement prevented any meaningful legal precedent from being established. Nevertheless, insofar as victims of corporate misconduct were recompensed, it should be considered a successful civil action brought against an Australian-based MNC. There seem little judicial impediments for more of the same.

V CONCLUSION

Commencing and winning human rights litigation against corporate giants are two very different things, and the ATS experience is informative in this regard. Evidentiary and logistical problems are large, as many of the witnesses and physical evidence could be thousands of miles away in politically-fragile regions of the globe, or may have even been destroyed and killed. Moreover, most of the accountability pathways outlined here are untested. Their viability remains unproven. And even if such a suit ultimately ends with a victory in the courts, the time and cost to attain that victory would be considerable. ATS suits, for example, have often taken over a decade to wind its way through the US courts until reaching a final determination, accruing monumental legal fees along the way. These factors offer strong deterrents that may dissuade all but the strongest of claims.

Perhaps in the future international judicial mechanisms will be developed that can legitimately exercise universal jurisdiction to hold corporate actors liable for serious human rights violations across the globe. This would diminish the foreign policy concerns that the several Western governments, including our own, have voiced in regards to the reach of the ATS, and ensure a level playing field in terms of global trade and investment. In the meantime, there appears a global trend towards extending liability for international crimes to corporations in domestic courts. And whilst the curtailing of the ATS by the US Supreme Court in its *Kiobel* decision was a significant setback, the trend continues.³⁷

To note: Allegations leveled against Australian-Canadian mining company, Anvil Mining, regarding a 2004 massacre in the Democratic Republic of Congo, were investigated by the Australian Federal Police but did not eventuate in prosecution. Whilst a civil claim was entertained on behalf of the victims, none was pursued in Australia. A civil case in Canada was dismissed on *forum non conveniens* grounds.

³⁶ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 124.

³⁷ International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, above n 29.

Australian civil litigation and criminal prosecutions are far from the most efficient means to regulate and improve corporate behavior in the world's "hot spots" and fragile states. Nevertheless, the blunt instrument that is corporate litigation remains appealing. It raises the stakes for corporations that ignore well-established international human rights and criminal law norms. And it seems to be working. The rise in human rights lawsuits, including ATS lawsuits in the US, has exerted pressure upon companies across the globe to adopt more rigorous human rights due diligence processes to avoid the so-called "zone of legal risk", especially when doing business in fragile or conflict-affected regions of the world.³⁸

While the US Supreme Court has choked off the bulk of litigation launched under the Alien Tort Statute in their *Kiobel* decision, the search for more welcoming legal environments to pursue justice for victims of egregious corporate misconduct in developing countries will continue. Ready or not, Australia is on the list of possibilities.

³⁸ Ibid 7.

Protection of Civilians – an International Humanitarian Law Perspective

Eve Massingham*

In November 2010, in a Statement to the United Nations Security Council, Yves Daccord, the Director-General of the International Committee of the Red Cross (ICRC), noted that '[w]hile there may still be divergent views as to what protection actually is, there can be little doubt about what happens when there is no protection'.¹ The sad reality of our world is that we see the results of failures to protect civilians everyday on our nightly news. In 2013 we can point, most notably, to Syria to see civilians in besieged areas in urgent need of protection and relief. However, there are also many other conflicts, less likely to attract the attention of the nightly news bulletin, where civilian lives and livelihoods are the greatest casualties of conflict.

There are a number of starting points at which a discussion of the protection of civilians could begin. Traditions of warfare in many communities around the world had ways of keeping the fighting away from civilian populations. Like in the Solomon Islands, where traditional stories tell us that warnings were sounded so that villagers knew a fight was to commence, and those who were not taking part in the fight could run away.² The 1998/9 discourse at the United Nations which led to the United Nations Secretary General's First Report on the Protection of Civilians³ and Security Council Resolution 1265 of 1999 on the protection of civilians in armed conflict⁴ is another significant point in the history of the protection of civilians. This discourse has seen the United Nations 'express its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed'.⁵ Such response from the United Nations can include a range of measures, and in some cases, including in Libya

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¹ ICRC, *Statement by director-general of the ICRC. UN Security Council, New York* (22 November 2010) <<http://www.icrc.org/eng/resources/documents/statement/protection-civilian-statement-2010-11-22.htm>>.

² ICRC, *Under the Protection of the Palm: Wars of Dignity in the Pacific* (ICRC Suva, 2009) 31.

³ United Nations, *Report of the Secretary General to the Security Council on the protection of civilians in armed conflict*, UN Doc S/1999/957 (8 September 1999) <http://www.un.org/ga/search/view_doc.asp?symbol=S/1999/957>.

⁴ UN Doc, S/Res/1265 (17 September 1999) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/267/94/PDF/N9926794.pdf?OpenElement>>.

⁵ Ibid.

in 2011, the Security Council has authorised the use of force in a bid to protect civilians.⁶

From an international humanitarian law, or laws of war, perspective however, it was the aftermath of World War II, which saw atomic bombs dropped on the cities of Hiroshima and Nagasaki in August 1945 – causing 230,000 deaths by the end of 1945⁷ – and saw carpet bombing of major cities such as London and Dresden, which provided an environment in which international agreement on protecting those persons not taking part in hostilities was attainable.⁸ As such, we see Common Article III to the Four Geneva Conventions of 1949 and the Geneva Convention Relative to the Protection of Civilians Persons in Time of War of August 12, 1949 (the Fourth Geneva Convention, hereinafter GC IV) provide the building blocks for protections of civilians in armed conflict.

Common Article III to the Four Geneva Conventions of 1949 is the most fundamental of the provisions of IHL, applying to all situations of armed conflict, and binding on all nation States as well as non-state actors. It provides that:

(1) Persons taking no active part in the hostilities, ..., shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of

⁶ UN Doc, S/Res/1970 (26 February 2011) <[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970(2011))>.

⁷ T Ruff, *Nuclear Weapons: a threat to survival and health*, (2011) Australian Red Cross IHL magazine, 10.

⁸ A proposal by the Red Cross and Red Crescent Movement between the two world wars to conclude an agreement on the protection of civilians was not adopted by States at that time. See further, ICRC, *Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent. Tokyo, 1934* (14 May 2012) <<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=85EE9A58C871B072C12563CD002D6A15&action=openDocument>>.

executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

GC IV then introduces the notion of a civilian (as opposed to their inclusion in the group protected by Common Article III as persons taking no active part in hostilities).

The notion of who is a civilian is, perhaps surprisingly, not entirely simple. That said, essentially, the laws of war prescribe that a civilian is everyone who is not, in the case of international armed conflict, a member of the armed forces of a party to the conflict; or in the case of a non-international armed conflict, everyone who is not a member of State armed forces or an organised armed group of a party to the conflict.⁹

The provisions of GC IV include a range of protections for civilians in so far as provisions for the establishment of hospital and safety zones and neutralized zones, special protections for the wounded, sick, infirm and expectant mothers and special protections for children. The concept of family news is worth particular mention. Article 25 provides that:

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

A particular focus of GC IV is provisions for civilians in the hands of the enemy in situations of occupation.¹⁰ Civilians in occupied territory are protected from inhumane treatment, torture, corporal punishment,¹¹ collective punishment¹² and enlistment¹³ and have rights including the right to leave,¹⁴ right to employment¹⁵ (article 39), and the right to spiritual assistance.¹⁶ The

⁹ See further H Durham and E Massingham 'Who is protected under international humanitarian law? Finding a Definition for 'Direct Participation in Hostilities' in D Lovell and I Primoratz (eds) *Protecting Civilians During Violent Conflict* (Ashgate, 2012) 103, 109-112.

¹⁰ GC IV Part III, Section 1.

¹¹ GC IV art 32.

¹² GC IV art 33.

¹³ GC IV art 51.

¹⁴ GC IV art 35.

¹⁵ GC IV art 39.

¹⁶ GC IV art 58.

occupying power also has duties with regards to matters such as hygiene and public health.¹⁷

Basic civilian internee protections are dealt with in Section IV of GC IV.

Perhaps the most important provisions for civilian protection are however found in Additional Protocol I to the Geneva Conventions of 1949 (hereinafter AP I). Applicable in times of international armed conflict, part IV of AP I provides for protection against the effects of hostilities for the civilian population. Central to this protection are the notions of the prohibition of not only direct attacks on the civilian population,¹⁸ but also indiscriminate attacks which are of such a nature as to strike military and civilian objects without distinction.¹⁹

Protection of objects indispensable for the survival of the civilian population is also included. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value, to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.²⁰

The 2005 ICRC Customary International Humanitarian Law study concluded that these provisions are established as rules of customary international law applicable in both international and non-international armed conflict.²¹ AP I also provides protection for not only the physical but also the mental integrity of persons detained,²² special protections for women and children, and the protection for wounded, sick and shipwrecked civilians is also clearly spelt out.

In Additional Protocol II to the Geneva Conventions of 1949 (hereinafter AP II), which applies in non-international armed conflict,²³ fundamental guarantees including respect for person, honour and convictions and for human treatment can be found,²⁴ as well as protection of the civilian

¹⁷ GC IV art 56.

¹⁸ AP I art 48.

¹⁹ AP I art 51(4).

²⁰ AP I art 54(2).

²¹ J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (ICRC, 2005) part 1.

²² AP I art 11.

²³ See further AP II art 1.

²⁴ AP II art 4.

population against attack, starvation and forced displacement (unless required for imperative military reasons).²⁵ Children and persons whose liberty has been restricted are also afforded special protections.²⁶

Another important aspect of IHL protections for civilians are the provisions of GC IV and AP I and II which provide for the free passage of essential relief supplies including medical stores, essential foodstuffs, clothing and ‘tonics intended for children under fifteen, expectant mothers and maternity cases’,²⁷ the fulfillment of basic needs in situations of occupation – clothing, bedding, shelter and other supplies essential to the survival of the civilian population²⁸ – and the entry of exclusively humanitarian and impartial relief supplies with State consent where civilians are suffering undue hardship in situations of non-international armed conflict.²⁹

The provisions mentioned above concern protection of civilians from imminent threats of physical harm and from acts that would prevent the survival of the civilian population – in particular, the right to life, respect for family unity, dignity, physical and psychological integrity, the prohibition on starvation and the right to essential relief supplies are central to these obligations. Yves Daccord’s quote which opens this paper alerts us to the notion that different organisations have different approaches to protection of civilians and indeed different understandings of what constitutes protection. There is of course a significant difference between physical protection, in the sense of the use of force, or the threat of use of force (by peacekeepers or other military or armed actors), and other activities that also come within the scope of protection, including that which the International Committee of the Red Cross is charged by the international community with, namely protection by promoting compliance with the law. However, as the Red Cross points out, for these humanitarian ends, ‘protection and assistance go hand-in-hand’.³⁰ As well as promoting compliance with IHL, the Red Cross also seeks to ensure that civilians have the necessities of life such as access to medical care and safe and effective water and sanitation systems.

Since the late 1990s, in the aftermath of some significant protection failures by the international community in places like Rwanda and Srebrenica, increased interest in and commitment to achieving the important end of the protection of civilians has been a very welcome development for those caught up in

²⁵ AP II art 13,14 and 17.

²⁶ AP II art 4(3) and 5.

²⁷ GC IV art 23, see also art 55 regarding situations of occupation.

²⁸ AP I art 69.

²⁹ AP II art 18.

³⁰ ICRC, above n 1.

conflict. This is coupled with an increasing understanding that all actors benefit from being familiar with each other's mandates and approaches to protection of civilians. Resources such as the ICRC Professional Standards for Protection Work³¹ support this increased understanding and commitment to protection. Sadly, the challenge continues to be obtaining full respect for the rights of civilians through ensuring that authorities and arms bearers act in accordance with the relevant bodies of law. The principles of distinction, proportionality and the prohibition on unnecessary suffering, as well as access to relief supplies and humanitarian assistance enshrined in the conventions discussed here demonstrate that the law is not the downfall. Rather, it is ensuring respect for the law that remains the challenge.

³¹ ICRC, *Professional Standards for Protection Work* (October 2009)
<<http://www.icrc.org/eng/resources/documents/publication/p0999.htm>>.

Litigiousness in Japan: Land of the Rising Law Suit?

Leon Wolff*

For over two decades, Japanese politicians and bureaucrats have struggled to resurrect a lifeless economy. With the 1990s marred by crippling financial crisis, a spate of corporate insolvencies, ongoing scandals in Japan's premier economic ministries, rising unemployment and low to negative growth, policy-makers responded with successive legislative reforms aimed at restructuring public administration and private governance of the economy. The Big Bang financial reforms, large-scale reform of Japanese corporate law, and a restructured bureaucracy are representative examples of this reform effort.

One surprising element to this reform effort is civil justice reforms aimed at nearly tripling the population of lawyers by 2018. This surprises because it contradicts a longstanding government practice of tightly restricting access to the legal profession.¹ Currently, 18,000 lawyers serve a population of 125 million people, about 3 for every 20,000 citizens. Nearly 30% of Japan's court districts have one lawyer (or none) practising in the region. Large commercial law firms are uncommon.² The reason for these meagre figures is that the government has controlled the numbers who pass the national bar exam. Pass rates have never surpassed 5% of takers and have usually hovered around the 2-3% range.³

Unsurprisingly, then, with so few lawyers, Japan has low litigation rates. In the mid 1990s, for example, there were only 9.3 cases per 1,000 people in Japan compared to 123.2 cases in Germany, 74.5 in the United States, 64.4 in the United Kingdom and 40.3 in France.⁴ Even by Asian standards, the rate is low. Based on statistics for new civil cases filed for trial in district courts in Japan, South Korea and Taiwan in 1995-1996, South Korea had five times as many filings and Taiwan about twice as many.⁵ Some commentators are claiming that litigation rates are steadily increasing, especially since the beginning of the 21st

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¹ J Mark Ramseyer and Minoru Naazato, *Japanese Law: An Economic Approach* (University of Chicago Press, 1999), 6-7.

² Bruce Aronson, 'The Brave New World of Lawyers in Japan' (2007) 21 *Columbia Journal of Asian Law* 45.

³ Ramseyer and Naazato, above n 1, 6-7.

⁴ Iwao Sato, 'Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law' (2002) 5(1) *Social Science Japan Journal* 71, 71.

⁵ John O Haley, 'Litigation in Japan: A New Look at an Old Problem' (2002) 10 *Willamette Journal of International Law & Dispute Resolution* 121, 124.

century.⁶ However, others explain that most of the increase is attributable to the surge in expedited debt recovery cases following the bursting of the economic bubble; ordinary contested cases — a better barometer of litigiousness — still remain at relatively low levels.⁷

Why is litigation so much lower in Japan compared to other modern democratic economies? Scholars have long debated this issue.

One of the more popular explanations is the cultural model of Japanese civil justice. This model attributes low levels of litigation to Japanese national traits of harmony and groupism.⁸ As far back as the 1960s, Japanese socio-legal scholar Takeyoshi Kawashima argued that Japanese pre-modern culture meant a low demand for legal professional services. As Japan modernises, Kawashima predicted, more Japanese would eventually accept litigation as a means to resolve their disputes.⁹ Several scholars have endorsed Kawashima's thesis, although with different normative conclusions. For example, Chin and Lawson¹⁰ agree that Japanese are culturally averse to law. Japanese attitudes to law have been shaped through geographic isolation, ethnic homogeneity and religious thought. Instead of law, the authors submit, non-legal forces ensure social order. Like Kawashima, the authors suggest that only social change will bring about a change of legal consciousness; but, whether change happens or not, they evaluate Japanese attitudes to law quite positively as 'law of the subtle mind'. By contrast, Inoue assesses Japanese legal culture more darkly. The communitarian ethic — which carries with it an aversion to the individualism of rights-talk — carries real social costs, Inoue warns.¹¹

Comparative law researchers have strongly criticised the cultural model and offered alternative explanations. One of the first counter-explanations stresses institutional factors over cultural attributes. Specifically, this model points to a number of institutional disincentives in the legal system which deter litigation.¹² For example, Hayley, while acknowledging that Japanese file

⁶ Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 *Journal of Legal Studies* 31.

⁷ Takao Tanase (trans Luke Nottage and Leon Wolff), *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity* (Edward Elgar, 2010) 158.

⁸ Kenneth L Port, 'The Case for Teaching Japanese Law at American Law Schools' (1994) 43 *DePaul Law Review* 643, 659-670.

⁹ Takeyoshi Kawashima, 'Dispute Resolution in Contemporary Japan' in Arthur von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, 1963) 41.

¹⁰ Chin Kim & Craig M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 461.

¹¹ Tatsuo Inoue, 'The Poverty of Rights-Blind Communitarity: Looking Through the Window of Japan' (1993) *Brigham Young University Law Review* 517.

¹² Port, above n 8, 659-670.

proportionately fewer civil suits compared to citizens in other industrialised countries, points to evidence that the Japanese are not reticent about asserting their legal rights. Rather, institutional incapacity — few lawyers and judges, discontinuous nature of trials, and an inadequate range of remedies and enforcement powers — sets up a barrier to bringing suit in Japan.¹³ Other institutional barriers include a lack of pre-trial discovery procedures, high contingency fees, prohibitive court costs and the absence of a jury system.¹⁴

Yet another counter-explanation is that the Japanese civil justice system is politically manipulated. Under this view, political elites — notably, the bureaucracy — manage the pace and direction of social change by channelling disputes away from the courts and into the hands of government-annexed informal dispute resolution facilities. Adherents of this view submit that lower levels of litigation in Japan have nothing to do with a cultural aversion to law; it is more a result of deliberate conservative government policy.¹⁵ Japanese political conservatives prefer informal resolution of disputes because, it is submitted, they view litigation as a threat to the political and social status quo and, therefore, take calculated steps to discourage litigation.¹⁶

A more controversial explanation for low litigation rates in Japan is advanced by economic rationalists. They advance economic rationales for Japanese litigating behaviour. Under this view, Japanese prefer to settle because damages verdicts are predictable and it is cheaper — or economically “rational” — to bargain in the shadow of the law rather than pursue litigation. A cultural aversion to law, argue economic rationalists, is pure myth.¹⁷ Ramseyer and Nakazato, for example, contend that the Japanese preference to settle cases out of court is not culturally pre-determined nor compelled by structural impediments in the legal system.¹⁸ Japanese settle because they can predict what damages they might get if they pursued their dispute in court and, therefore, simply bargain ‘in the shadow of the law’. Settling is cheaper and quicker than pursuing a court case. This shows that the Japanese are bound by rationality, not culture, because they will maximise — not forsake — their self-interest. And it proves that the Japanese legal system works, because, if disputants are settling their disputes in light of expected litigated outcomes,

¹³ John O Haley, ‘The Myth of the Reluctant Litigant’ (1978) 4 *Journal of Japanese Studies* 359.

¹⁴ Nobutoshi Yamanouchi & Samuel J. Cohen, ‘Understanding the Incidence of Litigation in Japan: A Structural Analysis’ (1990) 17 *Southern University Law Review* 171.

¹⁵ Port, above n 8, 661-662, 669-670.

¹⁶ Frank K Upham, *Law and Social Change in Postwar Japan* (Harvard University Press, 1987) 16-27, 124-165.

¹⁷ Port, above n 8, 661-662, 668-669.

¹⁸ J Mark Ramseyer & Minoru Nakazato, ‘The Rational Litigant: Settlement Amounts and Verdict Rates in Japan’ (1989) 18 *Journal of Legal Studies* 263.

then clearly law is structuring behaviour.¹⁹ Consider, for example, noise pollution from karaoke machines, a big problem in congested Japan.²⁰ According to case law databases, only about 40 disputes result in litigation brought before Japanese courts. By contrast, nearly 100,000 cases are heard each year by pollution complaint counsellors, an informal dispute resolution service established by the Dispute Law. Under the law, counsellors have strong, judge-like powers to consult with residents, investigate pollution incidents, and provide guidance and advice. Filing a complaint involves no direct monetary cost, does not preclude filing a concurrent (or subsequent) law suit, and allows complaints to be heard and dealt with relatively swiftly due to the lack of formalities.

Today, the debate about Japanese litigiousness has taken a new turn. Now, it is less about explaining why litigation rates are *low*; it is more about whether or not Japanese society should embrace *more* litigation. This is quite unlike the nature of the litigiousness debate in Australia and the United States!

Even more unusually, the Japanese government has accepted that more lawyers, more litigation — that is a more robust civil justice system — is key to Japan's economic recovery. So much is clear from the 2001 report by the Justice System Reform Council ('Recommendations of the Justice System Reform Council — For a Justice System to Support Japan in the 21st Century, the Justice System Reform Council'). In the opening chapter, for example, the Report highlights Japan's 'difficult conditions', especially in the management of the political economy, and the need to restore 'rich creativity and vitality to this country.' The Report goes on to suggest that state-based economic planning must give way to a more participatory market economy built on open and transparent rules. 'The justice system,' the Report submits, 'should be positioned as the 'final linchpin' of a series of various reforms concerning restructuring of the shape of our country.'²¹

Lawyer numbers and legal education are strongly positioned within this agenda to kick-start economic growth through law. The objective is obvious: to expand the pool of talent capable of working through the complexities wrought by Japan's integration into a global economic order. Thus, the proposals envision a more rigorous training in law in graduate law schools, as

¹⁹ Ibid.

²⁰ Mark West, *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes* (University of Chicago Press, 2005) 90-91. See also Mark West, 'The Pricing of Shareholder Derivative Actions in Japan and the United States' (1994) 88 *Northwestern University Law Review* 1436.

²¹ For a summary of the Justice System Reform Council report, see Daniel H Foote, 'Introduction and Overview: Japanese Law at a Turning Point' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press, 2007) xix.

opposed to the current system of undergraduate interdisciplinary education in politics, economics, languages and law. Graduates of law schools would then sit for a revised bar examination and substantially more — as many as 70-80% — would be allowed to pass. The Legal Research and Training Institute, the legal training arm of the Supreme Court of Japan, would grow in institutional capacity to groom those successful in the bar examination for careers in private practice, the judiciary or the procuracy. The end result — an expanded population of technical experts proficient in the art of complex problem-solving.

This cuts against prevailing orthodoxy. Most economists argue that lawyers *inhibit* economic growth. Indeed, empirical studies have shown an inverse relationship between the number of lawyers and the vibrancy of the economy. Lawyers, many economists conclude, are a drag on the economy. Unlike entrepreneurs and engineers, lawyers do not generate wealth; they are rent-seekers who contribute complexity and other costs to completing transactions.²²

Clearly Japan does not think so.

²² Curtis Milhaupt and Mark West, 'Law's Dominion and the Market for Legal Elites in Japan' (2003) 23(2) *Law and Policy in International Business* 451.



Dr Craig Forrest

Art by Joyce Meiring

An Interview with Dr Craig Forrest* on '*International Law and the Protection of Cultural Heritage*'

PB: Dr Craig Forrest, thank you for joining us today. Firstly, what is cultural heritage and how has it been defined under international law?

CF: Cultural heritage is really anything that you want it to be. Culture can be everything from language to traditional dress to what you traditionally do or use. Heritage is nothing other than what you want to pass onto the next generation. The reality is that the international conventions are designed to address particular problems relating to particular heritage. Each convention has a separate definition for a different purpose, all of which go to something called cultural heritage, a very opaque and ambiguous construct.

PB: Why has it been necessary for international law to intervene to protect cultural heritage?

CF: Basically because there are elements of cultural heritage, however you define it, which have clearly been under threat. The first threat was to cultural heritage in times of war. This is a threat that has existed since antiquity - those who won the war paraded the other country's heritage and took it for themselves. During the First and Second World Wars, there was significant damage in Europe of important architectural sites. In World War II, there not just damage to architectural sites, such as the Monastery of Monte Cassino, but also the Nazi pillage and looting of art and destruction of antiquities in museums. The Second World War was really the first impetus for protection of cultural heritage. Other issues have arisen, an important one being the illicit excavation of archaeological sites and the trafficking of those archaeological materials. There was also recognition of the need to protect major iconic sites such as the Parthenon in Athens and the Egyptian Pyramids. Then there was recognition of the need to protect underwater cultural heritage and even more recently raised awareness regarding the intangible cultural heritage. Intangible cultural heritage really closes this concept of heritage as being about meaning and value.

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PB: In your book you discuss the five major UNESCO conventions relating to cultural heritage. Could you tell us what they are and outline their objectives?

CF: The first, the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*¹ (and its accompanying protocol about occupation) was a reaction to World War II that aimed to protect cultural heritage during armed conflicts. The second, the 1970 Convention,² recognised that many nations, such as Egypt, Turkey and Greece, had an enormous store of cultural artefacts that were being excavated and sold on the art and antiquities market. The convention was adopted stop illicit recovery and export of these goods. This was closely followed by the World Heritage Convention in 1972.³ There was then a gap until the Underwater Cultural Heritage Convention in 2001⁴ which was really a reaction to the technological ability to reach deep sites under the oceans. Finally, there is the intangible cultural heritage convention from 2003⁵ which came back to recognising something existing in the World Heritage Convention in 1972: the intangible value given to anything protected by the other conventions.

PB: There are many conflicts, such as the Balkan Conflict and Gulf Wars, where damage has occurred to cultural heritage. Have militaries respected obligations imposed by the 1954 Hague Convention?

CF: Good question. Yes and no. The important thing to note first of all is that states are only bound by the Convention if they are a party to it. The United States only recently became a party to the Convention and was not a party to it during the Gulf War or much of the occupation of Afghanistan. In many cases the military have taken these conventions into account. However, this is always subject to an overriding concept of military necessity, which means heritage can be damaged if there is a military imperative, usually to protect troops.

¹ Opened for signature 14 May 1954, 249 UNTS 216 (entered into force 7 August 1956).

² *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).

³ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

⁴ *Convention on the Protection of the Underwater Cultural Heritage*, opened for signature 3 November 2001, 2562 UNTS 3 (entered into force 2 January 2009).

⁵ *Convention for the Safeguarding of Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006).

There are examples where the military has not given as much attention to protection as they could have. The most obvious example is the sacking of the Baghdad Museum. There are other examples where the United States, Australia and United Kingdom have gone to great lengths in protecting certain sites in Afghanistan and Iraq. Usually, it is not national armies that are problematic. It is usually groups of militants in civil wars and similar conflicts that present the greatest threat to cultural heritage.

PB: Does the 1954 Convention apply in internal conflicts, or does conflict have to be “international”? The conflict in Afghanistan comes to mind, as does the current conflict in Mali where the French have intervened.

CF: The convention is an international convention between state parties. It was designed after World War II where States formally declared war on one another. That situation does not occur any more. Article 19 of the 1954 Convention tries to apply the Convention to non-international armed conflict. Mali is a party to the 1954 Convention and is bound by it. Although not at war with another nation state it still owes the world at large an obligation to protect the heritage within its borders. The Convention tries to make non-state parties in a civil war subject to this obligation as well. This is difficult to do though, as these groups are not entities in international law.

PB: So, if we look at conflict in Mali, there are reports of much destruction of cultural heritage in the media. This seems to suggest the regime is not effective...

CF: Yes and no. What is important about the conflicts in Mali is that there are two overlapping regimes, the World Heritage Convention and the 1954 Convention. The 1954 Convention suffers from problems of enforcement. The World Heritage Convention is limited as it tries to promote co-operation between states rather than imposing stringent obligations. Together, however, these conventions provide a basis for international scrutiny and bringing pressure to bear on those who might be able to protect this heritage.

PB: Return of cultural heritage is a contentious issue. There are many examples of international disputes regarding return of antiquities. The Parthenon Marbles brought to the British Museum by Lord Elgin are one such dispute. You note in your book that this taking was not illegal. If not illegal, then what are return claims based on?

- CF: When discussing illegality, we must look at the situation at the time. In the case of the Parthenon Marbles, this was a time when Greece was under occupation. The occupiers effectively gave Lord Elgin permission. Thus, illegality cannot be established. Was it a moral taking? Perhaps at the time, but where we stand today becomes a moral issue rather than a legal one. Prior to the 1970 Convention there was no international regime regarding movable cultural heritage. States had to rely on domestic laws and it is difficult to enforce these in other countries. Additionally, many countries did not have protection regimes at the time. Many of the requests for return now are simply recognition that what might have been legal in the past is now tainted by concepts of colonialism and domination. It is really a political issue. The Elgin marbles are probably a unique case because they are so iconic but there are so many other cases where developing nations have lost cultural heritage to colonising countries.
- PB: Do you feel that the political, or moral, pressures to return can be as effective or more effective than legal obligations?
- CF: Absolutely. What's interesting is that the rate of returns is increasing. Political pressure certainly provides a greater impetus for these returns. Admittedly, many returns are on an ad hoc basis simply because there has been a certain amount of pressure. The great museums of the world really fear this because they fear giving one artefact away will lead to them emptying their showrooms. This has not been the case, but there is a greater recognition of the moral pressure to return these artefacts. There are also a lot of returns happening of antiquities that were taken illegally. The Getty Museum provides a fantastic example. The Getty is being forced to give back huge amounts of material to Italy which has recently been shown to have been illegally exported.
- PB: Now, we might move onto the World Heritage Convention. This sets up a different regime to the conventions we have discussed so far. Could you tell us a little about the regime it establishes?
- CF: The World Heritage Convention started off as a Convention that endeavoured to protect iconic natural and cultural sites. Most World Heritage sites in Australia are natural. The cultural sites protected under the Convention were iconic sites such as the Pyramids and Acropolis. That has now changed. The Convention has instead become a list of representative items of cultural heritage. This allows nations to represent themselves by including a site on the World

Heritage List. The Convention itself is nothing other than a mechanism to create co-operation in protecting these sites. It has few binding norms and does not impose stringent obligations.

PB: Looking at the Underwater Cultural Heritage Convention now, prior to this convention much of underwater cultural heritage was governed by the maritime law of salvage. This led to the rise of 'treasure hunting'. Why has it been necessary for a convention to intervene over the law of salvage?

CF: Essentially, the law of salvage is designed to recover commercially valuable property, return it to the owner and give the salvor a salvage reward. It is designed to entitle salvors who save a vessel in peril to a reward. The issue is that wrecks are not necessarily in danger. They have likely been sunk for a very long time. Furthermore, salvors do not need to apply to a court or to the shipowner to undertake salvage. They may simply do it. For archaeologically important wrecks, such as an old Spanish galleon, the context of the find is extremely important and allowing haphazard recovery of items from the wreck destroys this context and what can be learnt from it. However, salvage law requires recovery of goods from the wreck to entitle the salvor to a reward. What was happening was that, particularly in the United States and the Caribbean, salvors were finding underwater archaeological sites, extracting the valuables and destroying other artefacts. The salvage reward was often the artefacts themselves as the wreck had no economic value. Therefore, there was recognition that there was a need to protect underwater cultural heritage by making it impossible to interact with wrecks unless there were archaeological guidelines and government oversight.

PB: You said earlier that the wreck of *RMS Titanic* played a role in this...

CF: In a sense. It became the 'poster' wreck for the Convention as the wreck of the *Titanic* lay so far beyond nation states' maritime boundaries. There are number of domestic regimes to protect wrecks. Australia has had a *Historic Shipwrecks Act* since 1976⁶ and Australia was one of the first countries to protect wrecks around its coastline. However, this domestic legislation only applies to maybe 24 nm, possibly 200 nm, from the coastline. The *Titanic* lay far beyond territorial boundaries and there was recognition that there was no applicable law. Any country was entitled to go and recover the

⁶ *Historic Shipwrecks Act 1976* (Cth).

material. Thus, the *Titanic* became an important example of the need to protect vessels that lay so far away from shore.

PB: Interestingly, you note in your book that the convention has a 'non-commercialisation' clause yet it allows salvage. You also criticise the complete rejection of economic utilisation in the Convention. Could you perhaps explain the issues with the Convention's approach?

CF: Salvage is not just motivated by the recovery of artefacts themselves but the money that those artefacts are worth. In the salvage of the *Atocha*, a wreck of a Spanish vessel discovered off Florida, the salvors made millions of dollars from the sale of the artefacts. However, in recovering the material they destroyed the archaeological context. There was concern that the commercial motivations of salvors may lead to destruction of archaeologically significant material. There is a well-known case of a sunken Chinese Junk that contained Chinese porcelain worth a huge amount of money. The boxes containing the porcelain had export manifesto-like writings on them which would have been of importance to archaeologists. However, the divers just ripped these off and they floated away in the current. During negotiations for the Underwater Heritage Convention, many countries dominated by archaeologists thought these artefacts should never be made commercially available. They believed recovered artefacts should go to a museum and never be able to be privately owned. Others recognised that knowledge is what is needed to be gained from the artefacts. A private person can own the material so long as they allow study of it. The salvage clause was an attempt to compromise between nations allowing commercial salvage and those that do not.

PB: Do you feel the laws of salvage are antithetical to the idea of cultural heritage?

CF: Absolutely. They cannot coexist. Salvage essentially drives somebody to recover material in a way that is not consistent with protecting the knowledge we obtain from underwater sites. In Australia, salvage law is not applied to wrecks over 75 years old.

PB: So it's not as if the convention contradicts many nations' domestic law...

CF: Exactly. The Convention was driven by recognition of the fact that many nations had this domestic law. All it did was extend this to international law. The biggest issue was posed by the large salvage

industry in the United States. As long as salvors can take one artefact from a wreck to the United States, wherever in the world the wreck lies, then United States courts will exert jurisdiction.

PB: Moving onto the Intangible Cultural Heritage Convention, how has it approached the definition of intangible cultural heritage?

CF: This is probably the most difficult definition to deal with. Cultural heritage is difficult to define. Adding intangible cultural heritage adds another difficulty. The Convention addresses this by allowing each state party to define intangible cultural heritage. The kinds of heritage that come up are traditional songs, traditional dances, traditional skills (clothing, weapons, musical instruments), certain forms of art and so on. The Convention is based on the World Heritage Convention. It does not impose obligations. Instead, it establishes a system of co-operation to encourage protection. There is a great deal of controversy as to whether a Convention is necessary to do this. However, the Convention is a mechanism to highlight the issue within states.

PB: How effective have the UNESCO Conventions been?

CF: The World Heritage Convention has been very effective. It is the most ratified, with only five states that are not parties. The reason for this is likely because it does not impose stringent obligations. I think you have to look at success in terms of what the convention was designed to achieve. Some are more successful than others. What they have all done collectively is raise the issue of cultural heritage in the consciousness of states. The more states that become a party the more this awareness is enhanced. The degree to which states adhere to the detail of the conventions is perhaps less important than the degree to which they embrace and internalise the concepts of the conventions.

PB: Another issue you note is that the conventions were designed to be separate agreements. Does this create conflicting obligations?

CF: Not necessarily. Importantly, as all of these conventions come out of UNESCO, they are all driven by an overarching design to protect cultural heritage. Where they do overlap this can create difficulty, though it does not necessarily create conflict. The key example once again is in Mali. The 1954 Convention and the World Heritage Convention are operative. There are ways in which Mali might have protected their World Heritage Sites using the 1954 Convention - there is a way to designate some sites as being so important that they

should never be used in a military capacity. However, this mechanism was not employed. I am not sure it would have worked in Mali in any event, but it does illustrate the overlaps between conventions. However, the conventions generally work in the same direction so there are no cases where completely incompatible duties arise.

PB: What do you foresee as the future of the international law of cultural heritage and what further developments are most critical?

CF: The conventions really cover the field. They are designed to address specific problems but in total they cover the concept in a number of different manifestations. The challenge is continuing to give effect to these conventions. I do not think there is scope for any more law. Effect now needs to be given to this law, through states becoming parties and implementing these conventions. Slow impetus to do this exists. There may also be attempts to amend some of the conventions, particularly the 1970 Movable Cultural Heritage Convention. The 1954 Convention was amended in 1999 by way of a protocol.

PB: Finally, Dr Forrest, how did you become interested in the law of cultural heritage?

CF: By a slightly odd route. I worked on wrecks as a diver for years and was a diver in the Navy. I then worked on salvage and wreck matters when I was working in maritime law. From there I ended up working at UNESCO as the legal advisor to the South African delegation to adopt what became the Underwater Cultural Heritage Convention. The South African delegation ended up taking the lead as a member of the African Union and forming an important part of the Group of 77 nations. It was interesting seeing how these conventions are actually made and this required me to look at the other UNESCO cultural heritage conventions. If you go back to the salvage clause, the amount of work that went into a four line article in that Convention was extraordinary. It was an attempt to compromise between a view supporting commercialisation and one completely rejecting it. We knew that if we did not compromise the United States would not sign up. If the United States did not sign up, many other countries would not. The only way to do that was to construct an ambiguous article that had interpretations within it that allowed interpretation to the satisfaction of both sides. Through this experience, I sought to more clearly understand how these cultural heritage conventions operated as international law.

PB: Dr Forrest, thank you for speaking to Pandora's Box.

CF: It was a pleasure.

Gorillas in our Midst: Expanding the Human Rights' Rhetoric

Jordan Sosnowski*

*The river remains, though the water
of which it is composed changes.*¹

I INTRODUCTION

The aftermath of World War II saw the United Nations recognise that there were 'fundamental liberties and constitutional rights of people and individuals'² that would be protected by international law in times of war and peace. This articulation of essential entitlements was the catalyst for the proceeding expansion of international human rights law which resulted in the UN Charter, the Universal Declaration of Human Rights ('the Declaration') and other important treaties.³ The Declaration Preamble provides recognition of 'the inherent dignity and of the equal and inalienable rights of all members of the human family'.⁴

This paper will concern itself with the rhetoric that international human rights law has adopted in order to promote its cause. Specifically, the contention that rights in international law should be extended to include members outside the 'human family'.⁵ At first, this statement may seem perplexing and practically inconceivable. International human rights law concerns itself with humans, therefore why should it broaden its scope to include other beings such as animals? Would this extension delegitimise humans' struggle for universal recognition of rights?

These points are valid and will be answered throughout the course of this paper. However, a starting point in answering these arguments is this: the

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¹ Heracleitus cited by Thomas H. Huxley, 'Evolution and Ethics' (speech delivered at the Romanes Lecture Series, the Sheldonian Theatre, 18 May 1893).

² United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, 192-193 (1948).

³ Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford, 3rd ed, 2001) 7.

⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) Preamble ('UDHR').

⁵ In this paper, the terms 'other beings', 'non-humans', 'sentient beings' and 'animals' are all used interchangeably. Please note that when these terms are referred to, it is only those beings who are rational, self-conscious and have the capacity to feel pleasure and pain that I am arguing to extend rights to. These would therefore only include chimpanzees, gorillas and orangutans. See, Peter Singer *Practical Ethics* (Cambridge, 2nd ed, 1993) 131-132.

Declaration states that the aforementioned rights are 'the foundation of freedom, justice and peace in the world'.⁶ Therefore, 'foundation' could be taken to mean that the Declaration was not meant to be exhaustive, but provide a starting point for which other rights could be built upon. This argument is supported by the subsequent creation of treaties that protect civil, political, economic, social, cultural rights, and rights specifically for the child, as well as prevent genocide, racial discrimination and torture.⁷ These various treaties all build upon the foundation of rights as articulated in the Declaration. Therefore, it could be argued that the Declaration marked the beginning of a 'rights' rhetoric' that is continually expanding, and the language of rights could also be utilised to provide non-human beings with 'freedom, justice and peace in the world'.

This paper is divided into two main parts. First, the religious and philosophical origins of the international human rights movement will be considered. In this way, it will be ascertained whether moral considerations which called for the recognition of human rights, can also be employed to argue for the recognition of rights for non-human beings.

Second, the legal justification for recognition of international human rights will be analysed. This is undertaken in order to understand whether the legal concepts that contributed to the universality of rights for humans, could be employed to extend the concept of the human family.

Thus, it will be seen that it could be possible to extend the rights' rhetoric to other sentient beings without affecting the validity of human rights. In this way, the 'river' that is the human rights' debate, which is currently now flowing at a swift pace, would not be slowed or diluted by the addition of rights for non-humans. Rather, new streams of thought and discussion will add to the

⁶ UDHR, Preamble.

⁷ See, for example, *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 2106 (XX) (entered into force 4 January 1969); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 2200A (XXI) (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 2200A (XXI) (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 17 July 1980, 34/180 (entered into force 3 September 1981); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 39/46 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 44/25 (entered into force 2 September 1990).

human rights' source in an effort to further the original goals of the Declaration.

A *Origins of Human Rights Law*

In essence, what grew into international recognition of fundamental human rights in the form of the Declaration, started with a debate about 'what is right'.⁸ As unsophisticated as this may sound, it was discussion regarding what it meant to live a 'good life' and whether we have an obligation to help those who are not living this ideal, which evolved into what we now know as international human rights law. This section will analyse these religious and philosophical underpinnings, in order to evaluate whether these arguments could also be used as the moral foundation upon which the human rights' rhetoric could be extended.

1 *Religious Origins*

The various religious edicts that have informed international human rights law centre on our responsibility to others and the general premise that life is sacrosanct. Ancient Middle Eastern religions such as Hinduism and Buddhism speak widely of the sanctity of life, and stress that even though there may be many differences between us, each living being should be loved and respected. The founder of Buddhism, Siddhartha Gautama, promoted 'universal brotherhood and equality' by teaching 'right thought, right speech, right action and right effort' to all beings.⁹ Thus, even those who had caused injury to the Buddhist were treated with compassion, as illustrated by this prayer:

In short may I, directly and indirectly, offer benefit and happiness to all beings; may I secretly take upon myself the harm and suffering of all beings!..¹⁰

Therefore, Buddhism teaches that the ability to empathise with others' suffering is the key to achieving perfection and happiness. This concept serves to promote the idea that all beings are interdependent and interconnected with

⁸ 'There is an obvious distinction between 'what is right' and 'having a right', but one cannot imagine having a right that is not based on 'what is right'. Daniel Warner, 'An Ethics of Human Rights: Two Interrelated Misunderstandings' (1996) 24 *Denver Journal of International Law & Policy* 395, 414.

⁹ Paul Lauren, 'My Brother and Sister's Keeper' in *Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, 1998) 4, 6.

¹⁰ *The Eight Verses on the Training of the Mind*, written in the 11th century by the Tibetan Saint Langri Thangpa. HH Dalai Lama in Howard C. Cutler, *The Art of Happiness: A Handbook For Living* (Griffin Press, 2nd ed, 1998) 182.

one another.¹¹ The modern reflection of this notion is demonstrated by the UN's insistence on the universal nature of human rights, despite there being obvious cultural differences between people.

Confucianism sought to establish particular obligations that people owed to each other. It was thought that if the capacity for selfishness could be set aside, then people would treat each other equally, thus bringing 'goodness, benevolence, love and human-heartedness'¹² to all our relationships. Goodness was also heavily tied with honour and responsibility, with Confucians believing that their obligations to others, encompasses not just their immediate family, but all men as brothers.¹³ That states can now override other states' sovereignty and hold them accountable under international law, stems from the Confucian thought concerning our duties to others. For example, even though acts may take place outside our state, to those who are not in our immediate presence, our ethical and legal obligations determine that these people still come within our moral sphere.

While Eastern religions tend to focus more upon the rights of all beings to be protected from harm, the Judeo-Christian tradition forged a new line of thought which emphasised human supremacy. For example, the Torah places particular importance on the special nature and qualities of man as formed by a supreme being in the image of Adam. As Islam and Christianity stem from Judaism, this concept of a commonality of man linked by a divine source is now widespread. For example, the Talmud states:

A man may coin several coins with the same matrix and all will be similar, but the King of Kings, the Almighty, has coined every man with the same matrix as Adam and no one is similar to the other.¹⁴

In one sense, this teaching vouches for both the homogenous nature of mankind, while at the same time expressing that humans as molded in the image of Adam have a 'divine stamp',¹⁵ thus implying that humans have a higher value than other beings. Further, by accepting that all people are connected by one supreme source, this creates both a sense of brotherhood and an obligation to help others. However, this obligation only exists provided

¹¹ Ibid 75.

¹² Lauren, above n 9, 7.

¹³ Ibid.

¹⁴ Sanhedrin 38:1 (Adin Steinsaltz ed., Random House 1989).

¹⁵ Jerome J. Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 *Human Rights Quarterly* 201, 202.

those in need have been marked by God. Thus, put plainly, there is no obligation to help non-human beings who are suffering.

These various religious ideals of responsibility to others and of life being sacrosanct are embedded in international human rights law. For example, Article 1 of the Declaration states:

All human beings are born free and equal in dignity and rights.
They are endowed with reason and conscience and should act
towards one another in a spirit of brotherhood.

It can now be seen that the language employed in the Declaration partly stems from the aforementioned Confucian concept regarding brotherhood. Article 1 also articulates the authority of humans over other beings, and justifies this due to the fact that 'they are endowed with reason and conscience'. This articulation of the word 'endowed' also invokes religious undercurrents, as the verb suggests that someone (God) must have endowed humans in the first place.

Thus, the religious stream of thought that places emphasis on human supremacy has profoundly influenced the way concepts such as human behavior and justice are construed. The following section will discuss how philosophers furthered these religious concepts to a rational and logical plane, which was a crucial step for their eventual integration into international human rights law.

2 *Philosophical Origins*

While religious thought can be seen as noble in theory, ethics is concerned with formulating theories that can be put into practice. Many philosophers 'treat ethics as entirely independent from religion',¹⁶ even though much philosophical thought may have originated from religious values.

Philosophers generally agree that one of the fundamental requirements of an ethical argument is that it is possible to be applied universally.¹⁷ As well,

[D]espite their many differences of perspective and diverse approaches to these matters, they (philosophers) all sought understanding not through divine revelation or inspired scripture, but through secular inquiry and human reason.¹⁸

¹⁶ Singer, above n 5, 3.

¹⁷ Ibid 318.

¹⁸ Lauren, above n 9, 10.

Plato first appealed to this sense of reason when he asked people to give up any pursuit of individual happiness, in favour of the good of the state:

Greek thought down to Aristotle is dominated by religious and patriotic devotion to the city; its ethical systems are adapted to *citizens* and have a large political element.¹⁹

This notion of sacrificing immediate pleasures for a greater good can be seen in modern illustrations. For example, in order for society to function properly, laws that curtail instinctual urges such as revenge, sexual desire and violence, are enacted and implicitly agreed to as part of our social contract with the state.²⁰ However, it can also be seen that non-humans have no meaningful part to play in Plato's ideal state, for they do not have the capacity to actively give up their immediate desires – they are simply expected to.

Thomas Hobbes' *Leviathan* argues that left in a state of nature without government, people will strive only for self-preservation.²¹ Hobbes argues that in order for people to live a just life, it is necessary that they form communities, governed by a central authority:

The covenant is not, as afterwards in Locke and Rousseau, between the citizens and the ruling power; it is a covenant made by the citizens with each other to obey such ruling power as the majority shall choose.²²

In this way, non-humans do not have a part to play in the Hobbesian world. Animals cannot agree to abide by the covenant and thus, have lives similar to that of man before government – 'nasty, brutish and short'.²³

Contrary to this, John Locke, viewed as the founder of empiricism, set out to prove that all knowledge is derived from experience.²⁴ Locke made the novel step of reasoning that 'things are good or evil only in relation to pleasure or pain'.²⁵ From this starting point, he reached the conclusion that humans do not need laws to restrain them and if given the choice, people will act to promote the general good rather than personal goals because these 'interests are

¹⁹ Bertrand Russell, *A History of Western Philosophy* (George Allen and Unwin, 1946) 12.

²⁰ Teresa Godwin Phelps, 'Narrative Capability: Telling Stories in the Search for Justice' in *Capabilities and Justice* (Kluwer Academic, 2007) 1.

²¹ Russell, above n 19, 572.

²² Ibid 573.

²³ Ibid 572.

²⁴ John Locke, *Essay Concerning Human Understanding* (Book IV, Chap xvi, sec. 4) cited in Russell, above n 19, 639.

²⁵ Ibid.

identical in the long run'.²⁶ In this way, rather than acting a particular way because the law dictates, people would live virtuously because natural law commands it. Locke's arguments regarding natural law become relevant to a discussion about rights, when one begins to analyse his idea of the state's role in protecting the individual. Locke argues that:

the state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.²⁷

This expression of individual and inalienable rights in the form of natural law, and the social contract that involves the state stepping in to protect these liberties, is one of the first obvious expressions of a rights' rhetoric being formulated. However, as Locke's basis for equality is that people are God's property,²⁸ non-humans do not share the same natural liberties.

For reasons of brevity, much of the history of philosophy has not been discussed. However, it can still be seen that the main notions derived from key thinkers such as Plato, Hobbes and Locke involved our obligations to others and, crucially, the protection of liberties. While these logicians may have differed in their ethical approaches, each in their own way contributed to the formation of international human rights law and also, to the idea that only humans were capable of having inherent rights.

3 *Can similar ethical considerations be applied to non-humans?*

The discussion now turns to whether the religious and philosophical arguments that laid the foundation for international human rights law also have relevance in the context of non-humans. The ethical concerns that gave rise to international human rights law focussed on our obligations to one another, and in particular, the state's obligations to protect individual rights. However, when we consider what these inherent freedoms are, they invariably lead back to religious connotations that relate to the right to life and the right to be free from suffering.

When Locke talked of pleasure and pain, he was articulating what would become the modern utilitarian movement as articulated by John Stuart Mill. This philosophy poses the idea that our own interests do not count for any

²⁶ Ibid.

²⁷ Ibid 650.

²⁸ 'Of men being all the workmanship of one omnipotent and infinitely wise Maker... they are his property' John Locke cited in Russell, above n 19, 219.

more than anyone else's.²⁹ Utilitarianism requires a weighing up of interests, so the option that maximises the most amount of happiness should be adopted. Thus, in a very basic sense, the interests of all sentient beings should be taken into account, because all share the capacity to feel pleasure and pain. In this way, both utilitarianism as well as the Hindu teachings that promote non-injury to all beings,³⁰ could be used as a basis for arguing an extension of rights to animals.

However, the notion of moral supremacy that runs throughout predominant religions serves as the basis for the legal distinction between humans and non-humans. The rationale is that if all humans are connected by a common divine source, then this delineates *us* from *them*. That is, Adam was at the top of the non-divine hierarchy, thus any being which is not human is categorised as being further down the moral chain. This marked delineation makes it difficult to make the ethical leap of considering other subjects' interests over our own. This long-held belief that humans are of a 'higher' origin began with Judeo-Christian thought, runs through philosophy, and thus it is not surprising that it is also present in modern law. Similarly, that animals cannot contribute to the betterment of a state in Plato's sense, also adds to the issue of them not being viewed as deserving subjects of rights.

Thus, while the Declaration provides that rights are to be applied 'without distinction'³¹ of any sort, this presupposes that all those considered are of the same species. Daniel Warner notes that, '[T]he fundamental misunderstanding concerning the nature of human rights is related to the ambiguity within one's understanding of ethics'.³² Connected to this is the problem that the subject of international human rights is unclear.³³ While Warner relates this issue to non-human entities such as corporations, the argument is equally applicable to non-human animals.

Therefore, it can be seen that depending on which religious backdrop the rhetoric of rights was created, the law invariably could have taken a very different path. If Hindu and Buddhist notions of non-injury to all beings had been taken into account, then the subject of rights may well have included other sentient beings. Yet, it is clear that the Platonic and Hobbesian

²⁹ Singer, above n 5, 13.

³⁰ 'Noninjury (ahimsa) is not causing pain to any living being at any time through the actions of one's mind, speech, or body'. See Lauren, above n 9, 5.

³¹ 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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'. UDHR, art 2.

³² Warner, above n 8, 400.

³³ Ibid 398.

arguments tend to be more predominant in international human rights law than the Eastern philosophies. However, as it can now be seen that human rights law rests on the archaic religious notion of human moral supremacy, it is incumbent to look upon a more contemporary, secular view of rights, based on the empiricist idea of capacity for feeling. Therefore, it is entirely appropriate to broaden our moral compass and extend rights to all beings who have the capacity to experience pleasure or pain.

B *Legal Formation of International Human Rights Law*

Until quite recently, international law only governed the behavior of states between states, and had little to say in regards to how particular states treated their citizens.³⁴ However, after World Wars I and II, international law developed and began to formulate limits upon which a government could act in relation to its own people and this body of law became known as international human rights law.³⁵ This final section will discuss the legal justification for the recognition of human rights in an effort to understand whether the same rationale could be employed to extend the subject of human rights to other sentient beings.

1 *Why were human rights first recognised in international law?*

While state-sanctioned persecution has occurred throughout history, the Holocaust was thought to represent a new level of criminality, deserving of international attention. Out of the Nuremberg trials emerged the now infamous 'crimes against humanity', which was created *ex post facto*, for the purpose of incriminating individuals for crimes that were of a particular magnitude. The International Military Tribunal at Nuremberg ('the IMT') was the first articulation, in a formal legal sense, of international criminal justice.³⁶ 'This international response to the atrocities perpetrated by the Nazis signified the beginning of the modern human rights movement'.³⁷

Whilst the prosecutions at Nuremberg marked the first trial of their kind in history, much of the actual law that was employed did not even exist before the war took place. Before then, the principle of '*nullum crimen nulla poena sine lege*: a defendant may be convicted only on the basis of legal rules that were

³⁴ 'Internal sovereignty was, until early in the twentieth century, nearly complete and insulated from the law of nations.' Ratner, Abrams & Bischoff, above n 3, 4.

³⁵ Ibid 5.

³⁶ Mark Findlay and Clare McLean, 'Emerging International Criminal Justice' (2007) 18 *Current Issues in Criminal Justice* 457, 458.

³⁷ Ibid.

clearly established at the time of offense',³⁸ was seen as a fundamental attribute of the criminal justice system. Thus, one of the defendant's pleas was that at the time of the offence, they were not aware that their conduct would result in criminal liability. However, the IMT's response to this charge of breaching the principle of legality was that 'the law of war was to be found not only in treaties, but in the customs and practices of states and the general principles of justice'.³⁹

Chief Prosecutor at Nuremberg, Justice Robert Jackson, admitted that there was no judicial precedent for the Charter,⁴⁰ yet he also invoked justice and morality in order to rationalise what was, in effect, recently invented law:

The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.⁴¹

Thus it seems that the general justification for disregarding the entrenched principle of legality was that the Nazi crimes were of such a magnitude that it would be ludicrous to assert that they were not illegal, as they were such an affront to common notions of morality. The twin concepts of morality and justice that were invoked as the justification for the retroactive law, were clearly based on the aforementioned religious and philosophical obligations towards other human beings. Until this time, there had been no legal articulation of these concepts of responsibility towards others and it unfortunately took the atrocities of the Holocaust for the international community to express these rights in a legal sense.

Thus, in a rather short space of time, the Nuremberg trials led to the formal expression of international criminal laws, the creation of the Charter and the UN and a few years later, the adoption of the Declaration. The Declaration thus marked the starting point of a formal rights' rhetoric, even though its inherent notions stem from thousands of years of religious and philosophical thought. What began as a religious duty to others, developed into a moral or civic responsibility, and finally a legal onus towards our fellow human beings. Thus, fundamental freedoms for humans are, and continue to be, solidified in

³⁸ Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *American Journal of International Law* 817, 817.

³⁹ Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, 218.

⁴⁰ Ibid 146.

⁴¹ Ibid 154.

international law, however, the question we must now ask is whether our obligations should extend beyond our own species to help others.

2 *Can the same legal reasoning be applied to non-humans?*

As we have seen, what sparked the human rights movement was not a strictly legal development, but the atrocities that occurred in World War II. The reasoning, very basically, brings us back to the aforementioned premise: it seems 'right' to infer that people 'have a right' not to suffer. However, what actually occurred during this event so as to affront our notion of morality in such a way as to lead to the articulation of legal rights? In order to understand whether the same rationale can be applied to non-humans, let us consider a few practical examples.

As part of their philosophy regarding the supremacy of the Aryan race, the Nazis undertook various experiments upon Jews, blacks, gypsies and homosexuals. Experimentation on concentration camp inmates by the infamous Nazi scientist, Joseph Mengele is well documented. Some of the various experiments undertaken in Auschwitz include operations on twins such as castration, amputation of limbs, injections of typhoid and injections of dye in the eye in order to make them blue. Women were subject to various sterilisation techniques such as the injection of caustic substances to the uterus which caused internal sepsis.⁴² Other scientists carried out hypothermia tests, subjecting people to freezing ice baths, or left in the elements of a Polish Winter, strapped to a stretcher. In one experiment to understand how soldiers stranded at sea could survive, one scientist forced subjects to drink only sea water for up to 12 days. Witness reports detail victims of this experiment licking the mopped floor, before finally succumbing to the effects of dehydration.⁴³ These various acts of cruelty were documented meticulously and were used as the evidentiary basis for many of the prosecutions at Nuremberg.

It is not the intention that these recounts should needlessly shock or distress the reader. However, it is necessary to understand the type of conduct that was specifically considered so morally offensive as to give rise to the legal formation of rights, in order that we may objectively consider the contention that the rights' subject should be extended.

⁴² David Bogod, 'The Nazi Hypothermia Experiments: Forbidden Data?' (2004) 59 *Anaesthesia* 1155, 1155.

⁴³ Ibid.

As part of our current philosophy regarding the supremacy of the human race, scientists undertake various experiments upon non-human animals. In order to understand how nerve gas affects pilots' flight capability, the Brooks Air Force Base in Texas undertakes testing on primates. The experiment involves restraining a monkey into a chair that is affixed to a platform which rolls and tilts in movements similar to that of flying a plane. The monkey must learn to use a control stick to ensure the platform reaches a horizontal position, or else they are subject to electric shocks. Once the monkeys are competent at 'flying', they are exposed to chemical agents and radiation. They still must keep the platform straight, whilst nauseous and vomiting, otherwise they receive more shocks.⁴⁴ Professor Harry F. Harlow also developed various strategies for utilising higher primates as research tools. One experiment involves inducing psychopathology in monkeys by keeping them in total isolation from birth. The monkeys are housed in stainless steel chambers and are then subject to monitoring whilst a mechanical surrogate 'mother' rejects them. Harlow's fait accompli was the development of a 'well of despair' – a stainless steel chamber with sloping sides – in order to induce and study the effects of depression. Young monkeys were placed in the rounded bottom of the 'well' for up to forty-five days and often would never fully regain normal behavior patterns, even months after their release.⁴⁵

Unlike the Nazi experiments, these tests upon animals are lesser known, however should they be looked upon as any less affronting to our sense of morality? If the tests on primates are developed in order to understand the effects on humans, the physiological connection between our two species is, therefore, scientifically conceded. Thus, if an inherent notion of 'what is right' does not compel one to consider rights for non-humans, then, at the very least, their capacity to suffer should.

The Nazis maintained that the supremacy of the Aryan race allowed them to commit the aforementioned atrocities on supposed 'sub-humans'. So too does the current regime maintain that the supremacy of the human race allows for atrocities to be carried out on non-human animals. Therefore, the reasoning that was employed in order to argue for the initial development of human rights can also be utilised to argue for an extension of the rights' subject to non-human animals.

⁴⁴ U.S. Air Force, School of Aerospace Medicine, Report No. USAFSAM-TR-87-19, October 1987 cited in Peter Singer, *Animal Liberation* (Harper Collins, 2009) 26-30.

⁴⁵ Stephen J. Soumi and Harry F. Harlow, 'Depressive behaviour in young monkeys subjected to vertical chamber confinement' (1972) 80 *Journal of Comparative and Physiological Psychology* 11, cited in Peter Singer, *Animal Liberation* (Harper Collins, 2009) 26-30.

3 *Would an extension of the rights' subject delegitimise the human rights movement?*

Some basic legal rights for animals have already been recognised on a domestic level, without causing any harm to the international human rights movement. For example, in 2008, a committee of the Spanish parliament voted in support of a declaration that 'an animal could be granted the legal status of a person with rights'.⁴⁶ This resolution sought to protect chimpanzees, bonobos, gorillas, and orangutans and give them the right to life, liberty and freedom from torture. These are the very same fundamental rights that served as the basis for the initial recognition of human rights.

If we take the opening speech of Justice Jackson as an indicator of what led to global recognition of human rights, it was that:

[T]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.⁴⁷

While this opening speech is fashioned to invoke a dramatic response, it also allows a glimpse into the interesting, but less documented reason why the first trial in history for crimes against humanity was staged: *because civilization cannot survive their being repeated*. This is a blatant acknowledgement that acting for self-preservation is a valid motivation for invoking rights. It is not this paper's intention to demonstrate that this is a negative reason for acting or holding someone accountable. It is, however, the intention to show that if self-preservation is the justification that is employed for evoking rights, then extending the rights' subject is perfectly reasonable. That is, it is clear from plain observation that animals act instinctually for reasons of self-preservation, thus both humans and non-humans have a common objective – to carry on living. Yet, must we experience an event on the same scale of atrocity in order to recognise rights for our non-human counterparts? When the catalysts of morality and justice are employed, as they were after the Holocaust, it is straightforward to see how an extension of rights could further validate the human rights movement, rather than delegitimise it.

Further, while animals do not have the capacity for reason, they nevertheless share the same interests as humans to experience pleasure and be free from suffering. This fact alone presents a strong case for the extension of basic rights, such as the right to life, and the right to be free from slavery and

⁴⁶ Ibid xiii.

⁴⁷ Opening speech of Justice Robert Jackson, Chief Prosecutor at Nuremberg, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg* (vol II) 98.

torture.⁴⁸ However, as non-human beings do not have the capacity to form a government or articulate these rights, it is incumbent upon humans to express these basic entitlements for them. The very basic rights such as the right to life should be extended to non-humans because we would expect these rights to be given to us, were the roles reversed.

While the Declaration has been subject to criticism for not taking into account different cultural perspectives, these objections have not rendered it completely invalid. These types of concerns have served as useful guides for the formulation of subsequent treaties that focus more upon the subjective cultural interpretation of various rights. In the same way, the adoption of basic rights for non-humans would not impact significantly on the rights that are already set down for humans. An extension would add to the current rights' rhetoric, not take away from the rights already entrenched for humans.

II CONCLUSION

As it can be seen, what is now recognised as international human rights law has been many years in the making. Many religious notions have been inherited by the movement, such as reciprocity, equality, and the concept of human supremacy. Adopting a contemporary and more secular perspective, it is clear that it is not rational to assume that the human species is supreme due to a special 'singling out' by God. Further, the more Eastern tradition that focusses on kindness to all beings, sits more comfortably with modern notions of 'what is right'. With philosophy came the capacity for logical thought, and while animals cannot form a centralised authority, they do share our capacity for pain and suffering. From a utilitarian perspective, if we agree that decreasing the amount of suffering will add to the overall enhancement of happiness in the world, then extending our consideration to animals is entirely appropriate. It can now be seen that the Nazi atrocities committed throughout World War II are not so dissimilar to the experiments that are currently inflicted on our closest non-human relatives. Thus, extending the rights' subject to include those who feel pain and happiness in a similar way to humans does not invalidate human rights, it widens the capacity of the movement. If we envisage once again international human rights law as the culmination of many streams of thought, the recognition of other subjects who are capable of holding rights merely adds to the already strong current. Therefore, let us not be 'bound in the fetters of inherited orthodoxy'⁴⁹ and recognise that non-human animals are also valid subjects of rights under international human rights law

⁴⁸ UDHR art 3, 4, 5.

⁴⁹ Russell, above n 19, 21.

Book Review: '*Mullahs without Mercy*'

Lauren Dancer*

I INTRODUCTION

Nuclear devastation, from accident or mistake, has never been more likely and there is no effective law or treaty to prevent it.

So begins Geoffrey Robertson's latest book, '*Mullahs Without Mercy*', in which the acclaimed human rights lawyer and former host of the television show *Geoffrey Robertson's Hypotheticals* paints a terrifying new hypothetical: the possibility that nuclear weapons will be acquired by a government cruel or irrational enough to use them. In exploring this theoretical scenario, Robertson concentrates on the potential for Iran to develop nuclear weapons, because as he puts it, 'Iran is the country currently closest to the nuclear weapons starting block and its human rights record makes its acquisition of the bomb a frightening prospect.'¹

While in the months since Robertson's book was first published Iran's nuclear program has received less attention, today, it is once again at the forefront of international security concerns. The prospect of Iran obtaining nuclear weapons clearly formed part of the backdrop to the United States' deliberations over whether to intervene in Syria, with Secretary of State John Kerry arguing that if the United States did not carry out a military strike to punish the Syrian government for the chemical weapons attack near Damascus, it would embolden Iran to proceed with its nuclear program.² As such, Robertson's book is well-timed, arriving just as the world needs to renew its focus on the issue of nuclear proliferation.

II AN OVERVIEW OF *MULLAHS WITHOUT MERCY*

Robertson is highly critical of the failure of human rights organisations and lawyers to engage with the issue of nuclear disarmament. '[W]here have all the protestors gone', and 'whatever happened to the Ban the Bomb movement?'

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¹ Geoffrey Robertson, *Mullahs Without Mercy: Human Rights and Nuclear Weapons* (Biteback Publishing Ltd, 2012) 6. Geoffrey Robertson QC is a British-Australian human rights lawyer, who is founder and joint head of Doughty Street Chambers, London.

² Michael Gordon and Isabel Kershner, *In Wake of Syria Deal, Kerry Emphasizes Iran*, *The New York Times* (online), 15 September 2013 <<http://www.nytimes.com/2013/09/16/world/middleeast/kerry-seeks-allies-support-on-syria-and-1st-stop-is-israel.html>>.

he asks.³ Robertson argues that the possession and the use of nuclear weapons must be viewed through the prism of human rights, and that nuclear weapons must be recognised as a human rights issue – as ‘the ultimate threat to human life.’⁴

Accordingly, Robertson begins his book by examining Iran’s human rights record. In Part I, titled ‘Iran’, Robertson traces the rise of Iran’s theocratic regime, and documents three separate episodes of crimes against humanity by the regime: the massacre of political prisoners in 1988; the assassination campaign targeting Iranian dissenters in foreign countries between 1986 and 1996; and the torture and killing of ‘Green Movement’ protestors and their lawyers after 2009.

In Part II, titled ‘the Bomb’, Robertson examines the development of the nuclear bomb and the international community’s efforts to control nuclear proliferation. He writes scathingly of the Treaty on the Non-Proliferation of Nuclear Weapons, arguing that it encourages proliferation by giving states an inalienable right to a nuclear fuel cycle whilst allowing them the freedom to withdraw to ‘break out’ and build nuclear weapons.⁵

Finally, in Part III, Robertson considers ‘the Law’, and argues that the possession of nuclear weapons should now be considered a crime against humanity.

III NUCLEAR WEAPONS AND THREATS TO INTERNATIONAL PEACE AND SECURITY

Although Robertson persuasively marshals evidence to suggest that Iran will acquire nuclear weapons in the near future, he is less convincing in predicting what Iran might do with them. Robertson is dismissive of contentions that Iran wants to obtain nuclear weapons in order to destroy Israel. He acknowledges the numerous anti-Israel statements that have been made by Iran’s former President, Mahmoud Ahmadinejad, but concludes that this rhetoric falls far short of a serious threat to attack Israel. Robertson notes that after Israel, Iran is home to the second-largest Jewish population in the Middle East, and that its Jewish community is protected under Islamic law. Robertson also deems it unlikely that Iran would supply nuclear weapons to terrorist groups like Hezbollah, arguing that Iran has been careful to avoid provoking an invasion by the United States.

³ Robertson, above n 1, 340.

⁴ Ibid 25.

⁵ Ibid 22.

For Robertson, there is a much more credible reason to deny Iran's nuclear weapons, namely, that its leaders are capable of crimes against humanity. However, he does not go on to speculate as to what future atrocities Iran might commit. Instead, Robertson writes that Iran will 'acquire it for domestic political purposes' and 'boast of it', leading to a proliferation of nuclear weapons in the Middle East, Asia and Latin America.⁶

But, in a passionate epilogue, Robertson later asserts that:

[T]he leaders of Iran are about as rational as a group of serial killers, and it is their criminality, rather than their rationality, that matters, if and when they acquire a weapon of demonic destructiveness. They are mullahs without mercy, without the slightest spark of human feeling for those people and states they regard as their enemies.⁷

Robertson's lack of clarity on this issue is perhaps because of the limited treatment security studies and deterrence theories receive in his book. Robertson rejects nuclear deterrence at the outset, writing that today nuclear weapons are already in the hands of regimes that are unstable (Pakistan), irresponsible (North Korea) and hypocritical (Israel), and will soon be available to one that is criminal (Iran).⁸ While Robertson may well be correct to reject the continuing relevance of nuclear deterrence strategy, and to conclude that the growing number of nations with nuclear weapons poses unacceptable risks, the issue demands far greater attention than he gives it.

As Henry Kissinger, George Shultz, Sam Nunn and Bill Perry recognized in a 2011 opinion piece in *The Wall Street Journal*, many leaders and public advisers still rely on nuclear weapons and nuclear threats to maintain international peace and security.⁹ The reasoning behind nuclear deterrence strategies must therefore be carefully examined. Moreover, as these authors point out, and as Robertson briefly concedes in his introduction,¹⁰ the real risks of nuclear proliferation are more likely to be an accident or mistake involving nuclear weapons, or nuclear terrorism fuelled by the spread of nuclear weapons, nuclear materials, and nuclear know-how.

⁶ Ibid 233.

⁷ Ibid 336.

⁸ Ibid 2.

⁹ Henry Kissinger, George Shultz, Sam Nunn and Bill Perry, *Deterrence in the Age of Nuclear Proliferation*, *The Wall Street Journal* (online), 7 March 2011 < <http://online.wsj.com/article/SB10001424052748703300904576178760530169414.html>>.

¹⁰ Robertson, above n 1, 10.

IV NUCLEAR WEAPONS AND INTERNATIONAL LAW

Similarly, Robertson's discussion of the application of international law to the possession and use of nuclear weapons is at times mixed. In his introduction, Robertson observes that at present there is no law against a sovereign state possessing nuclear weapons, and proposes that a norm of international law be developed which would prohibit 'states with appalling and unrequited human rights records' from acquiring nuclear weapons.¹¹

However, Robertson does not go on to explore this idea, instead arguing in Part III that customary international law has developed since the 1996 *Nuclear Weapons* case,¹² such that the acquisition of new nuclear weapons, by any state, is unlawful.¹³ While there is certainly a case to be made that international law has changed in the 17 years since the *Nuclear Weapons* case was decided, Robertson does not provide detailed examples of state practice which would support this claim, observing only generally that the international community 'has begun to treat Iran as if its acquisition of a nuclear weapon would be illegal'.¹⁴

In his final chapter, Robertson goes even further, and argues that the acquisition of nuclear weapons is now a crime against humanity. But, he seems to lack confidence in his own assessment of how far international law has progressed, proposing that a Nuclear Weapons Abolition Convention be adopted, which would make it an international crime for any state or person to design, develop, manufacture, stockpile, transfer, use or threaten to use a nuclear weapon.¹⁵ Similarly, he proposes that the list of war crimes within the jurisdiction of the International Criminal Court (ICC) could be amended to add the crime of acquiring, testing or using a nuclear weapon. However, such an amendment was taken off the agenda at the Rome Conference in 1998 when the Statute of the ICC was established, illustrating that state practice in this area may be more muddled than Robertson suggests. Absent any successful amendment, it may be premature to suggest that the acquisition of nuclear weapons is already a crime against humanity.

A final issue is that Robertson focusses on international human rights law, without exploring its relationship to IHL. According to Robertson, the legality of the possession of nuclear weapons is governed by international human rights law. He does not however, consider whether principles of international

¹¹ Ibid 26.

¹² *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] 1 ICJ 226.

¹³ Robertson, above n 1, 327.

¹⁴ Ibid 328.

¹⁵ Ibid 331.

human rights law may overlap with or depart from principles of IHL. The issue may be a moot point if IHL and international human rights law equally prohibit their use and their possession. But, it should not be assumed that both bodies of law can always be easily reconciled.

V CONCLUSION

Robertson's book is at once both fascinating and frustrating. It is fascinating because it raises questions of international law that are of undoubted relevance given the recent use of chemical weapons in Syria and renewed reports that Iran is a year away from nuclear weapons capability. However, it is frustrating because it fails to engage deeply with some of those questions. Those with a more extensive background in international humanitarian law or international human rights law are likely to feel dissatisfied with the level of detail Robertson attaches to his discussion of the development of international customary law, the legality of humanitarian intervention and the relationship between international humanitarian law and international human rights law.

Still, at 341 pages, Robertson's book provides a fascinating overview of many of the political and legal challenges raised by the acquisition of nuclear weapons, and serves as a useful starting point for further reading. It is not a lifeless textbook, but a compelling narrative which explores the history of human rights abuses in Iran, the advent of nuclear weapons, the existing non-proliferation regime and the potential for international law to 'establish the basic architecture for a nuclear-free world'.¹⁶ Furthermore, its interdisciplinary style and human-rights centred approach to the issue of nuclear proliferation will interest and challenge both legal specialists and those without any background in international law.

¹⁶ Ibid 340.

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