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AUSTRALIA, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS: COMPARISONS AND CONTRASTS

Mr Chancellor, Mr Vice-Chancellor, Professor Fairall, distinguished guests, our Malaysian friends on CCTV link with Kuala Lumpur, Ladies and Gentlemen.

It is a great honour for me to be invited to give the second in this biennial series of lectures. The first — and many of you will have been present on that occasion — was given by the distinguished scholar, counsel and teacher for whom these lectures are named. Professor James Crawford, SC, FBA is acknowledged throughout the international law world as a towering intellect. He is also recognised as an immensely effective and skilful advocate before international and national courts and tribunals, as well as being an inspiring teacher and a caring supervisor of students. I am proud to count him as a friend as well as a colleague.

I also acknowledge with special pleasure the presence with us of James's mother, Mrs Josephine Crawford, and of my own mother, Mrs Iris Shearer, accompanied by my sister and brother-in-law. It is therefore something of a family occasion as well as an academic one.

My topic is deliberately broad. It builds upon the first of these lectures, given by James himself.[1] It is important to attempt in these days of fast-moving events that are affected by international law to attempt to gain a sense of the sources from which decision-makers are deriving their notions of international law as relevant to international affairs. My approach will be impressionistic and to an extent subjective. This will not be a careful and learned article bristling with footnotes. In the time available I shall only be able to touch on a few topics which indicate what I believe to be general trends in the approaches of our own country and that of the US. In deference to our Malaysian colleagues (if they are still listening at that

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[1] James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 1.

point!) I shall also make brief reference to the situation of South East Asian countries in relation to the international institutions of human rights.

I THE RULE OF LAW IN INTERNATIONAL AFFAIRS

When we speak of the rule of law in international affairs we mean something similar to, but in significant ways different from, the rule of law in our national society. My contemporaries and I at Adelaide Law School in the late 1950s were given a good grounding in our general constitutional law course of the meaning of the rule of law, especially as expounded by Dicey: 'no man (sic) may be made to suffer, in body or in goods, except for a distinct breach of the law established before the ordinary courts of the land'.[2] We learned of the rule of law as protecting members of society against unchecked abuse of power. We studied the case of *Liversidge v Anderson*[3], in the House of Lords, among others. That was a case of internment in war time. Current Australian law students will be studying, from a similar perspective, the views of our own High Court in the recent decision in *Al-Kateb v Godwin*,[4] *('Al Kateb')* in which the issue of indefinite detention of an asylum seeker was raised, where there was no present possibility of returning him to any place outside Australia. The question here was whether the applicable legislation was sufficiently clear to override the presumptions of the common law protective of individual liberty. By a majority of 4:3 it was held that it was.[5]

Liversidge v Anderson was decided in 1941, during the most desperate days of World War II in Britain. International law was not thought worthy of mention, even in the powerful dissent of Lord Atkin. Human rights as a value protected by international law had not then been recognised as it is now. By contrast, in *Al-Kateb* international law was regarded as highly relevant by Justice Kirby and as relevant enough by Justice McHugh to provoke a robust debate between the two judges as to the limits of its relevance in national law.

With the changes announced recently to our national security laws, the relevance of international law as a yardstick by which those laws may be judged will surely fall for consideration. I shall return to this point later.

In international affairs the rule of law assumes aspects that must contend with the reality that, unlike under a national system of law like Australia's, there is no system of coercive enforcement in the shape of courts of compulsory jurisdiction or

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2 A V Dicey, *Law of the Constitution* (10th ed, 1959) 202–3.
3 [1942] AC 206 (HL).
4 (2004) 219 CLR 562.
5 Ibid. McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow J and Kirby J dissenting.

legislative and executive organs having direct power. Instead, the international rights and duties of states (and through the mediation of states the rights and duties of individuals) arise out of essentially voluntary acceptance — of membership of the United Nations and other international bodies, of adherence to conventions and treaties, and observance of customary international law in the formation of which Australia plays a role along with other states, if not always directly at least by acquiescence.

How does Australia see itself in relation to the international rule of law?[6] How does the US? Time does not permit a full exploration of these questions.[7] I shall therefore touch on just a few of the more important points, as I see them.

II INTERNATIONAL LAW AND AUSTRALIA

International law as a significant influence on Australian law, or governments, did not appear until the Second World War. Even after federation in 1901 Australia continued to shelter behind the protective shield of the British Empire. Until 1939 virtually all treaties applying to Australia were British treaties extended to Australia by consent. There was no separate Australian citizenship until 1948. Before then we travelled (if we did at all) on British passports. It was true that Australia was a separate signatory of the Treaty of Versailles in 1919, its international stature recognised by reason of the huge losses of men (including my maternal grandfather) sustained in the Great War. Australia also gained separate membership of the League of Nations, and it participated in the work of other organisations also, notably the International Labour Organisation. But policies were essentially the common and coordinated policies of the Empire, brokered through London, following the understandings reached at the Imperial Conferences of 1923 and 1929. Australia did not establish embassies of its own until the eve of World War II (with China, Japan and the US).

The watershed occurred in 1941. On 3 September 1939 it had been Prime Minister Menzies' 'melancholy duty' to inform us that 'Great Britain is at war with Germany. As a result Australia is also at war.' In December 1941, with a change of government and the sharp deterioration of the strategic situation, Australia issued a declaration of war against Japan separately from Britain. Australia also adopted, in

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6 See generally Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

7 For an excellent and balanced review, see John F Murphy, *The United States and the Rule of Law in International Affairs* (2004). For a more polemical review see Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005). See also M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003).

early 1942, with retroactive effect, the Statute of Westminster 1931, which formalised Australia's status as an independent nation within the association of the British Commonwealth. It so remains to this day.

Even so, the realisation that Australia was separate from Great Britain came only slowly to the Australian courts. The potential significance of Australia's treaty relations were first seen, not so much in terms of Australia's separate place in the world community as in terms of how the recognition of those relations as 'external affairs' enlivened a constitutional head of power to the advantage of the federal authorities over the States: *R. v Burgess; Ex parte Henry.*[8] A rule of customary international law was first considered by the High Court in the wartime case of *Polites v Commonwealth*[9] where it was held that the rule forbidding the conscription of resident aliens into the armed forces could not stand in the way of a statute that clearly directed the contrary. Nor was international law an implied limitation on the plenitude of powers enjoyed by the Commonwealth Parliament. This decision is still thought to be correct in principle, and it was applied more recently in *Horta v Commonwealth*[10] (where the High Court rejected the view that the Commonwealth could not legislate under the external affairs power contrary to a rule of customary international law, even a rule having the peremptory force of *jus cogens,* as the right to self-determination). The possibility that international law is a relevant factor in the interpretation of the Constitution has only recently been advanced in several cases, notably *Al-Kateb,* by Justice Kirby of the High Court.

In the High Court in 1948, in the case of *Chow Hung Ching v The King*,[11] involving the status of visiting armed forces under customary international law and its relevance to immunity from the jurisdiction of Australian courts, it is notable that several of the judges, including Sir Owen Dixon, assessed the status of the suggested rule, including the constituent elements of state practice and *opinio juris,* entirely in terms of the practice of Great Britain. This case stands as authority for the proposition that 'international law is not automatically part of Australian law, but is a source of that law'. It is a proposition maintained by the High Court to the present day. But since 1948 the Australian courts have become more comfortable with exploring international law as a 'source' and more knowledgeable as to the methodology of international law (eg, the '*Tasmanian Dam Case*'[12] and '*War Crimes Act Case*'[13] cases in the High Court; and the *Nulyarimma*[14] case in the Federal Court.)

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8 (1936) 55 CLR 608.
9 (1945) 70 CLR 60.
10 (1994) 181 CLR 183.
11 (1948) 77 CLR 449.
12 *Commonwealth v Tasmania* (1983) 158 CLR 1.
13 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
14 *Nulyarimma v Thompson* (1999) 96 FCR 153; 165 ALR 621.

Before we come to some contemporary issues of international law facing Australia and the US, I should like to advert briefly to the teaching of international law in Australian law schools.[15] From the foundation of faculties of law in the oldest universities international law, both public and private, was part of the compulsory curriculum until the early part of the twentieth century. Adelaide was no exception. Professors Jethro Brown and Coleman Phillipson were notable teachers of it. In Sydney their counterparts were Pitt Cobbett and A H Charteris. But then came a gap. With the exception of Sydney, international law did not reappear until the 1950s. Even with the arrival of D P O'Connell (after whom the international law collection in the Law Library is named) in Adelaide in 1953, it took until 1960 for the subject to be restored to the (elective) curriculum. Why did this happen? It seems that the approach of the end of each century focuses attention on the exciting prospects of the next. The UN has recently debated, among other things, the UN Millennium Goals. At the end of the nineteenth century the possibilities of international cooperation were opening up. There was a great Hague Peace Conference in 1900 jointly sponsored by Czar Nicholas II and Queen Wilhelmina of the Netherlands. The laws of war were codified in 1907. The Peace Palace was built in The Hague for the Permanent Court of International Arbitration. A growing sense of nationalism, which accompanied the journey to federation, encouraged an early awakening to the possibilities of Australia's role in the world. The Great War of 1914–18, however, seemed to extinguish these lights. Even the creation of the League of Nations failed to spark as much interest as it should have. Australia slipped back into the comfortable cocoon of Imperial protection.

The relatively recent advent of international law to the curriculum of Australia's law schools has been remarked by Justice Finkelstein in his introduction to the web guide to sources of international law established for Federal Court judges. Even some of the present judges have escaped an immersion in the subject, although this is becoming less common since the move to its compulsory status in several law schools, and due to its increasing popularity as an optional subject in others.

III THE UNITED STATES

By contrast with Australia, the United States emerged into full membership of the international community after independence in 1776. It thus became directly involved in issues of international law, such as war, neutrality, piracy, maritime and territorial claims, sovereign immunity, and so on. Treaties made by the US were declared by Article VI of the Constitution to rank equally with federal statutes. Customary international law was regarded as a compelling factor in the interpretation of statutes. As Chief Justice Marshall said, in 1804, 'an Act of

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15 This is a subject I have explored in more detail in (1983) 9 *Adelaide Law Review* 61.

Congress ought never be construed to violate the laws of nations [international law] if any other possible construction remains'.[16]

A similar rule of construction has also been applied by the British and Australian courts.[17] But what of the interpretation of the Constitution, a matter hotly debated recently in the High Court between Justices Kirby and McHugh? This question is also controversial in the US. The Supreme Court has never explicitly upheld the use of international law as a guide to interpreting the Constitution. Indeed some judges are vehemently opposed to such a notion, notably Justice Scalia. But some judges have favoured it. In the case of *Boos v Barry*[18] the issue was whether a congressional statute forbidding demonstrations within 500 feet of foreign embassies violated the right of free speech protected under the First Amendment. By a decision of 5:3 the Court held that the statute was invalid, but on grounds that managed to avoid the relevance of international law. The three dissenting judges, however (who interestingly included Rehnquist CJ) would have upheld the validity of the statute on the ground that it gave effect to a rule of customary international law (ie, the duty to protect foreign diplomats from insult) and was thus not incompatible with the First Amendment.

These examples are rather rare, however. As we shall see, American courts tend to ignore international law and to rely entirely on domestic law, above all the Constitution. Very often the result is the same. But there is a disinclination to look beyond the borders of the US.

This parochialism is also evident in the curricula of law schools. The great law schools (where there are also a number of distinguished scholars in the field) still teach the subject, but it is an elective rather than a compulsory subject. In the middle and lower ranking schools it is either ignored, or it finds a small place only in the context of courses on trade law or international business transactions.

I turn to some particular areas of comparison and contrast between Australia and the US.

IV THE USE OF FORCE

The orthodox view among international lawyers is that it is lawful for a state to resort to the use of force in international relations only in two circumstances: (a) in self-defence against armed attack, as reaffirmed in article 51 of the UN Charter; and

16 *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804).

17 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8 (Mason CJ and Deane J).

18 485 US 312 (1988)

(b) when authorised by the UN Security Council as an enforcement measure under Chapter VII of the Charter.

Taking this view, the attack by the US and its allies, including Australia, against Afghanistan in 2001 was lawful, and the attack against Iraq in 2003 was unlawful. The attack on Afghanistan was a lawful measure of self-defence because, following the events of 11 September 2001, which were quickly attributed to Al-Qaeda and not denied by that organisation, the Taliban government of Afghanistan was called on to hand the group's leaders over to the US. The Taliban refused. They not only refused, but made statements supportive of Osama bin Laden, the leader of Al-Qaeda, thereby endorsing his actions. Thus the attack by the US and allied forces was made after due warning and an opportunity for the Taliban to avoid the use of force against it.

It is not necessary for the Security Council to authorise actions in self-defence. This is acknowledged by the Charter to be an inherent right of states; and one, moreover, that may have to be exercised immediately and with no time to refer the situation to the Security Council. But actions in self-defence must be reported to the Security Council, which may then authorise subsequent measures, including, if applicable, a finding that the purported action in self-defence was not justified in the circumstances. In the case of Afghanistan, the Security Council, through its subsequent resolutions, has in effect validated the US and allied actions.

It is otherwise in relation to Iraq. The build-up to the invasion of March 2003 was marked by extreme recalcitrance on the part of Saddam Hussein in his refusal to cooperate with the weapons inspections mandated by the Security Council. It is sometimes forgotten in the 'told-you-so' condemnations of the invasion following the failure to find the suspected weapons of mass destruction (WMDs) that Iraq, for a long period between 1991 and early 2003, behaved as though it had something to hide. It was playing a very dangerous game. That alone might not have been sufficient to warrant a conclusion that an armed attack by Iraq on the US and its allies was about to occur, warranting immediate action in self-defence, although that indeed was given by President Bush in broad justification.

It is here that we find a significant difference in approach between Australia and the US. Australia did seek a justification specifically in international law for its participation in the invasion. The US did not. It offered only the political justification that the regime of Saddam Hussein and his possession of WMDs constituted a threat to the rest of the world.

The US Administration's attitude towards international law in this instance was expressed by John Bolton, then Under-Secretary for Arms Control and International Security at the State Department, and now US Ambassador to the UN. In a speech to the National Lawyers' Convention, sponsored by the Federalist Society, on 13

November 2003, he effectively dismissed international law as a necessary element in the justification of foreign policy. He sees the basis of state power as lying in the consent of the people governed, expressed through *national,* not international law:

> Indeed, there's a fundamental problem of democratic theory for those who contend, implicitly or otherwise, that the proper operation of America's institutions of representative government are not able to confer legitimacy for the use of force. Make no mistake: not asserting that our constitutional procedures themselves confer legitimacy will result over time in the atrophying of our ability to act independently … This has been fundamentally misunderstood in the UN system. Many in the UN Secretariat and many UN member governments in recent Security Council debates have argued directly to the contrary. Increasingly, they place the authority of international law, which does not derive directly from the consent of the governed, above the authority of national law and constitutions.

So there we have it: international law is 'undemocratic'. There have been, it must be admitted, some echoes of this view in Australia, although not in relation to international law generally as a restraint on government actions. The setting up of the Joint Standing Committee on Treaties of the federal parliament must be regarded as a means of countering the perceived democratic deficit in treaty-making; although that rather strengthens the importance of international law than weakens it. As for the rest, it seems that only journalists such as P P McGuinness and Janet Albrechtsen are worried about smuggling international law into the domestic law of Australia through the back door of interpretation by 'activist' judges, such as Justice Kirby of the High Court.

Australia certainly sought a legal opinion that it was right to join the alliance against Iraq. The UK did as well. It will be remembered also that the UK urged the US before the invasion to attempt to gain specific Security Council endorsement. When, however, it became clear that China, France and Russia would veto any such resolution, the matter was not put to the vote. In similar opinions, the UK Attorney-General and the Australian Government (Campbell QC and Moraitis)[19] advised that a basis for the invasion lay in the pre-existing Security Council Resolution 1441, which threatened Iraq with 'serious consequences' if it failed to allow UN weapons inspectors to complete their work without hindrance.

I have argued elsewhere[20] that this is not a convincing legal opinion. I prefer to locate legal authority for the use of force in circumstances other than self-defence, such as law enforcement (as in the case of Iraq), or humanitarian intervention, in

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19 Memorandum of Advice, 18 March 2003 in (2005) 24 *Australian Yearbook of International Law* 415–18.

20 Ivan Shearer, 'In Fear of International Law' (2005) 12 *Indiana Journal of Global Legal Studies* 345.

article 2(4) of the Charter which imposes only a qualified prohibition on the use of force. But now is not the time to elaborate this thesis, which I confess is a minority view.[21] What I do think is of importance to my present theme is that Australia found it necessary to act on legal advice; the US did not.[22]

V PRE-EMPTIVE SELF-DEFENCE

Much has been made of the alleged promotion by the US government of a novel doctrine of 'pre-emptive attack'. It is necessary to examine exactly what has been said in relevant documents. What the US has announced — which might be regarded as new doctrine — is that it may take pre-emptive action against *terrorists*. It is not expressed as an extension of the right of self-defence against *states*. In *The National Security Strategy of the United States of America,* published by the White House soon after the 9/11 attacks, it is stated thus:

> We will disrupt and destroy terrorist organizations by … defending the US, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country. ... The US will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. … We will always proceed deliberately, weighing the consequences of our actions…. [23]

This statement was clarified in January 2003 by the Legal Adviser to the State Department:

> The US, or any other nation, should not use force to pre-empt every emerging threat or as a pretext for aggression. We are fully aware of the delicacy of this situation we have gotten into. After the exhaustion of peaceful remedies, and after careful consideration of the consequences, in face of overwhelming

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21 A majority of my international law colleagues in Australia condemned the invasion of Iraq in March 2003 as contrary to international law. A number of international lawyers in the UK, including James Crawford, expressed a similar view.

22 Belatedly, and in a law journal, not a government publication, the Legal Adviser to the State Department offered a legal opinion similar to that given by the UK and Australian governments: W H Taft IV and T F Buchwald, 'Preemption, Iraq and International Law' (2003) 97 *American Journal of International Law* 557.

23 (2002) 41 *International Legal Materials* 1478.

> evidence of an imminent threat, though, a nation may take pre-emptive action to defend its nationals from catastrophic harm.[24]

Note the prudential character of the words 'overwhelming', 'imminent' and 'catastrophic'. Although not stated to be in accordance with international law, they are consistent with a conservative reading of the right of self-defence in an era of weapons of mass destruction, whether we are speaking of actions against terrorists as such, or against hostile states.

In the case of actions against terrorists, operating from bases (as they must) within sovereign states, in the first place one should rely on the adherence of those states to the international conventions prohibiting various forms of terrorism,[25] and the rule of customary law that forbids a state from allowing its territory to be used in order to launch attacks on other states. Where that reliance proves ineffective, I am persuaded by the thesis that victim states may resort to a species of self-defence described by a leading scholar of the law of armed conflict, Professor Yoram Dinstein, as 'extraterritorial law enforcement'.[26] (Professor Dinstein locates this notion within self-defence, and thus article 51 of the Charter. I prefer to find it in article 2(4) of the Charter, for the reasons stated above.) He considers that where a terrorist has committed criminal acts in one state and is found in another, the authorities of the latter state are to be called on by the victim state to surrender, or itself prosecute, the terrorist in accordance with international law. If that state is unwilling, or through weakness is unable, to take these measures of law enforcement, then the victim state may itself undertake the task of capturing the terrorist, or destroying the terrorist base, as the case may be. Clearly, the doctrine cannot be applied except where the state from which the terrorist attack has been launched or directed has been given sufficient opportunity to enforce the law itself. And it must be exercised only with the utmost care for observance of the rules of international humanitarian law, especially for the protection of innocent civilian lives and property.

Much was made, at the time, of this doctrine of pre-emption as a novelty. I do not regard it as such. It has been expressed in highly prudential terms. Australia, moreover, was linked to this doctrine through some remarks attributed to Australia's Prime Minister, John Howard, that Australia could be regarded as the

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24 Speech to the Foreign Policy Association, 'Pre-emptive Force: When Can it be Used?', available at <http://www.fpa.org>.

25 Despite the lack of progress made in the UN on a comprehensive definition of terrorism, there is a sufficient range of instruments available to make criminal, and mandate international cooperation, most acts of terrorism. What is holding up a comprehensive definition of terrorism is the insistence of a number of Arab states on excluding from the definition acts directed against 'foreign occupation'.

26 Yoram Dinstein, *War, Aggression and Self-Defence* 213–17 (3rd ed, 2001).

'Deputy Sheriff' in the region of South East Asia and the Pacific. This caused unnecessary alarm in countries like Indonesia and Malaysia. The badge of 'Deputy Sheriff' has been disavowed by the Australian Government. Further, it is inconceivable that Australia would launch pre-emptive strikes against terrorists, or any other threats, in the region without warning. Australia's recent record of diplomacy in the region, including its adhesion to the ASEAN Treaty of Amity, have indicated clearly that enforcement action would be carried out in full cooperation with the governments concerned.

VI HUMANITARIAN INTERVENTION

A great disappointment at the recent UN Summit was the failure to adopt a set of principles based on the notion of the responsibility to protect. The origins of this idea came out of the need to protect the Kurds in the north of Iraq after the First Gulf War in 1991, the experience of genocide in Rwanda, a failed state in Somalia, and ethnic cleansing in Kosovo. All of these, and many other examples, are cases where international law has been struggling to reimagine the Charter in face of the reality that most humanitarian disasters, and grave abuses of human rights, occur within the borders of sovereign states, traditionally protected by the doctrine of state sovereignty against intervention by other states. This doctrine is reflected in article 2(7) of the UN Charter. Although that doctrine became subject to the interpretation that what is 'inherently' a matter of domestic jurisdiction depends on the development of human rights law — as the actions by the UN against apartheid in South Africa showed — there was no agreement on when forcible intervention to stop grave harm *should* be regarded as lawful. The US and its NATO allies intervened in Kosovo in 1999 to stop ethnic cleansing by Serbia. No authorisation was given by the Security Council because of a threatened veto by Russia (which would probably have been supported by China also). What was the legal justification?

At the time the UK offered a legal justification in terms of pre-existing UN resolutions which, it stated, gave the necessary, if only implied, authority — rather as in the later case of Iraq. Prime Minister Tony Blair was more forthright. He stated that 'we intervened in Kosovo because it was right to do so'. That is, morally right. By contrast, the US offered no specific legal justification.

Many legal commentators criticised the intervention, though in terms less strident than later in relation to Iraq. In his study *Just War or Just Peace? Humanitarian Intervention and International Law*[27] the Australian scholar Simon Chesterman argues that forcible intervention, no matter how humanitarian the motives, is illegal

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[27] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001).

in the absence of authorisation by the Security Council. He was able to cite many authorities in support of his view. But what if the Security Council considers the situation, as it did in relation to Kosovo, but one or more of the Permanent Members casts, or threatens to cast, a veto? Or what if the Council acts too little and too late, as it did in relation to Rwanda? Must the rest of the international community stand by and do nothing? Chesterman admits the moral problem, and answers it by saying that in exceptional circumstances such intervention would be 'illegal but excusable'. His mentor, Professor Ian Brownlie of Oxford, is to a similar effect. In a curiously titled article, 'Thoughts on Kind-Hearted Gunmen',[28] Brownlie offers by way of analogy the practice of prosecutorial discretion in relation to mercy killings, where some who commit euthanasia are either not prosecuted or are given a light sentence. One is also reminded of Israel's President Barak in an advisory opinion of the Israel Supreme Court on the legality of police torture in cases of extreme need (the 'ticking bomb' scenario). He said that torture was always and everywhere illegal and anyone committing it must be charged and put on trial. Only then could extreme necessity be considered as a possible defence.[29]

But the difference between the use of torture to establish the location of the ticking bomb and humanitarian intervention is that, ultimately, in the first there is the possibility, albeit very narrow, of finding legal justification. In the latter there is, if Brownlie and Chesterman are right, a glaring contradiction between the law and morality.

This gap was sought to be filled by the Report of the International Commission on Intervention and State Sovereignty, co-chaired by former Australian foreign minister Gareth Evans and Ambassador Mohamed Sahnoun of Algeria. That Report, sponsored and published by the Canadian Government in 2001, makes a powerful case for humanitarian intervention, but as a responsibility, not a right. The Report stresses the need to base humanitarian enforcement actions on Chapter VII of the Charter, and calls upon the Security Council to exercise its powers and duties responsibly and on an objective view of the facts of each case. Nevertheless, the Report does envisage, even while deploring the prospect of, actions by states or coalitions of states intervening where the Security Council fails to act owing to a veto cast for unmeritorious reasons.[30]

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28 Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen', in R B Lillich (ed), *Humanitarian Intervention and the United Nations* (1973) 139.

29 *Judgment Concerning the Legality of the General Security Service's Interrogation Methods,* (1999) 38 *International Legal Materials* 1471, 1488.

30 Report of the International Commission on Intervention and State Sovereignty, '*The Responsibility to Protect*', [6.28]–[6.40] (2001). See also the web site of the International Crisis Group: <http://www.icg.org>.

Whether directed only at the Security Council's responsibility to protect, or applied also to my liberal view of the scope of article 2(4) of the Charter, the International Commission's specification of the precautionary conditions for taking action to intervene gives valuable guidance. These are principally: right intention, last resort, proportional means, and reasonable prospects of success (in other words, the cure should not be worse than the disease). If any here think that they have encountered these principles before, they would be right. They have been lifted by the Commission right out of Saint Augustine's theory of just war, without attribution.

Humanitarian intervention was not a ground of justification for the intervention in Iraq, although it has been proffered on several occasions by President Bush as a secondary ground or desirable by-product. No-one defends the regime of Saddam Hussein or fails to acknowledge the horrific abuses of human rights inflicted by his regime on the people of Iraq. Whether the invasion could have been justified on that ground alone involves weighing up a number of factors, including the prudential considerations outlined above. Almost certainly the intervention would not have met those tests. But for the future it is enough to say that humanitarian intervention as an exception to the prohibition of the use of force under the Charter has inevitably demanded renewed consideration, following events in Somalia, Rwanda, Kosovo, Sierra Leone, the Democratic Republic of the Congo, and East Timor, among others.

It is a great pity that these issues were not resolved at the UN summit in 2005. Australia favoured a strong outcome. The US did not. It did not want to be tied down by any formulae inhibiting its future freedom of action. This has been the position it has adopted in numerous other spheres of international law making, including international humanitarian law (Additional Protocols to the Geneva Conventions), the law of the sea, and climate change.

VII HUMAN RIGHTS

Human rights were for a long time regarded as lying outside the province of international law. A state's sovereignty was regarded as exclusive with regard to the ways in which it treated its own citizens. This changed after the Second World War with the adoption of the UN Charter, and the proclamation of the Universal Declaration of Human Rights in 1948. Certain human rights and fundamental freedoms were proclaimed as valid for all. Great care was taken by its principal authors, Renée Cassin, Eleanor Roosevelt, Charles Malik and John Humphrey, to make the Declaration compatible with the major religious traditions of the world. The history of its genesis[31] belies the claim that the Declaration promotes

[31] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

exclusively western concepts. The so-called Bangkok Declaration, setting forth alleged 'Asian values' and the notion of cultural relativity in human rights, sank without trace at the Vienna Conference of 1993.

Indeed, when one looks at the list of 154 states which have become parties to the International Covenant on Civil and Political Rights (ICCPR) of 1966, which expanded upon, put into binding treaty form, and attached supervisory machinery to the rights set forth in the Universal Declaration, one sees many countries outside the western tradition, including Islamic and Asian countries. In our own region it is disappointing that Malaysia, Papua New Guinea and Singapore do not figure in that list, but encouraging that Cambodia, the Philippines, Thailand Vietnam (and very recently Indonesia) do.

Both Australia and the United States are parties to the ICCPR, Australia since 1981 and the United States since 1992. The US came relatively late to the Covenant. This was, in part, because of its very success in being an early leader of the human rights movement through its Bill of Rights and the jurisprudence of its courts. In becoming a party to the Covenant it had to issue an extensive list of reservations and declarations in order to preserve its own law. This gave an unfortunate impression of equivocation and evasion. This is also the reason why the US has not subscribed to the Optional Protocol to the Covenant, which allows for individuals to approach the Human Rights Committee with complaints of violations, where they have exhausted all avenues of redress at the domestic level.

Australia, by contrast, has more heartily embraced the international system of human rights protection and monitoring, even if it has had occasion in the recent past to criticise the results in certain cases pertaining to itself.

Former Chief Justice Sir Gerard Brennan noted, in a prescient obiter dictum in the *Mabo* case that:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of human rights.[32]

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32 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42. See also *Dietrich v R.* (1992) 177 CLR 292.

There have been numerous occasions on which reference has been made to international human rights law in Australian courts,[33] not only in the judgments of Justice Kirby.

The influence of international human rights law is further strengthened in Australia through the institution of the Human Rights and Equal Opportunity Commission ('HREOC'). The HREOC Act (1986, No.125) directs the Commission to have regard, inter alia, to all the international conventions on human rights to which Australia is a party. The current President of the Commission is the Chancellor of this University and is with us this evening. The president of the first Commission was another notable South Australian, Dame Roma Mitchell.

There is continuing debate in Australia regarding the desirability of a written Bill of Rights. The United States has one. Canada, New Zealand, South Africa and the UK all have them (although in the case of the UK, the Human Rights Act is based on the European Convention on Human Rights). Should Australia continue to be the exception? Justice Kirby, for one, was previously an opponent of the idea, preferring the flexibility of the common law and reliance on the ability of the judges to draw on international law and the jurisprudence of other democratic states. He has since changed his mind. But his earlier thoughts remain valid. If we are to have our own Bill of Rights it must not be cast in such a form as to be impervious to positive influences from outside. The ICCPR and the European Convention largely coincide in content and we would be unwise to try to better these formulations.

The US, by contrast, is largely cut off from any influence from the rest of the world in the development of human rights. It is true that much of US domestic human rights law coincides with international human rights law, but expressions of that law are usually unaccompanied by references to international standards. Last year the US Supreme Court handed down its decisions in a trilogy of cases involving the detention of terrorist suspects, including the case of Australian detainee David Hicks. These decisions upheld the rights of all, whether citizens or aliens, and whether detained in the US proper or outside the territorial jurisdiction of the US, such as at Guantanamo Bay, to have the validity of their detentions tested on a writ of habeas corpus.

In one of those cases, *Padilla,* Justice Stevens said:

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of

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33 See, eg, the decision of the Full Federal Court in *Minister of Immigration v Al Masri* (2003) 126 FCR 54.

> investigating and preventing subversive activity is the hallmark of the Star Chamber.[34]

There was no reference to international law there, but no rejection of it either.

In another Supreme Court case, where international law was briefly mentioned as a reason why the execution of a mentally retarded criminal should be regarded as a 'cruel and unusual punishment' under the Eighth Amendment, Justice Scalia in a scathing dissent said:

> But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal … to the views of assorted professional and religious organizations, members of the so-called 'world community'…. Equally irrelevant are the practices of the 'world community' whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution of the United States of America we are expounding.[35]

This exhibits extreme hostility towards outside influence. It remains to be seen what attitude the new Chief Justice Roberts will take in particular cases. The initial indications are not promising. At his confirmation hearings in the Senate in September 2005, he was questioned about the use of foreign law in US domestic cases. Under provocative questioning he expressed support for the contention that US judges should only consider local law, despite the fact that many foreign superior courts, including the High Court of Australia, refer to the US Supreme Court's decisions in their judgments at various times. However, his comments were somewhat equivocal.[36] In the case of *Hamdan*, another of the Guantanamo Bay detainees, heard before the US Court of Appeals for the DC Circuit on 15 July 2005, Justice Roberts, then a member of that court, was reported to have exhibited great interest in arguments based on the Geneva Conventions, but no mention was made of them in the single joint opinion rejecting the contention that trial by military commission would be unlawful.[37] This case is now under appeal to the Supreme Court. It will affect David Hicks's case also. Naturally Justice Roberts will not be permitted to take part.

International law does at least seem to have had an effect on the Executive Branch of government in its definition of torture. A secret memorandum prepared for

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34 Slip opinion, at 11.

35 *Atkins v Virginia* 536 US 304, at 370 (2002).

36 'Roberts gives his verdict, rejecting foreign laws in US', <http://www.theaustralian.news.com.au/printpage/0,5942,16614857,00.html>.

37 (2005) 44 *International Legal Materials* 1276. As this article was going to press, the Supreme Court handed down its decision on 29 June 2006 holding that the proposed military commissions were unconstitutional.

Defense Secretary Rumsfeld in March 2003 by a special working group defined torture in terms of 'excruciating and agonizing' pain or pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'. This document was leaked to the *Christian Science Monitor* newspaper and led to outrage. The Justice Department overruled it in its own statement of legal standards relating to torture, drawing on the definitions of the International Convention against Torture, in a public memorandum dated 30 December 2004.[38]

VIII POWERS OF EMERGENCY DETENTION

Neither in the US nor in Australia has much notice been taken of the relevance of international law to the debate concerning detention powers and other measures proposed to deal with the threat of terrorism.

The US and Australia are both parties to the ICCPR. The Covenant contains provisions which run parallel to relevant common law presumptions (and in the US constitutional protections) such as the right to liberty and security of person, protection against arbitrary arrest and detention, the right if arrested to be brought promptly before a judge, and the right to be tried within a reasonable time (article 9). The Covenant further provides for fair trial safeguards, including the right to be informed of the nature and cause of the charge, to communicate with counsel of his or her own choosing (or to be provided with legal assistance in serious cases where indigent), and to be tried without delay (article 14).

Article 4 of the Covenant allows the Parties, 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', to take measures derogating from their obligations under the Covenant. Some articles, such as those relating to arbitrary taking of life, and torture, are stated to be non-derogable, but the protections of articles 9 and 14 (above) are not.

So first, having regard to the measures enacted in Australia in response to terrorism, including the ASIO Act (2003, No. 77) has such an official proclamation of emergency been made in justification of those measures? The US and the UK have made such declarations, following the events of 9/11 (the UK additionally in relation to the similar provision of the European Convention of Human Rights). But Australia has not done so to this date.

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38 Memorandum for James B Comey, Deputy Attorney General: Legal Standards Applicable Under 18 USC §§ 2340–40A, US Department of Justice, Office of Legal Counsel, December 30, 2004.

But second, even if that initial step were to be taken, does an emergency justify wholesale departure from the human rights secured under the Covenant? The emergency clause of the Covenant itself provides the first answer. That is that measures of derogation may be taken only 'to the extent strictly required by the exigencies of the situation'. Thus, even those provisions which are in principle derogable (such as under articles 9 and 14) are not to be departed from except as strictly necessary.

This imports the principles of necessity and proportionality into the determination of the validity of any derogation. The Human Rights Committee, in its General Comment No 29 (2001), expanded on the meaning of article 4 at some length, stating that the onus lay on the derogating state to justify its measures in detail. In particular, the Committee stated:

> The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for the States Parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.[39]

It will be interesting to hear what Australia's answer will be. Its fifth periodic report to the Committee was due in July 2005.

The US second periodic report was due in 1998 and is now seven years late. Several reminders have been sent by the Committee, and it is now agreed that the report will be submitted by the end of this year. There will be a public hearing, possibly in July next year. Additionally, in the case of the US, there will be the question of whether the detention of the detainees held as 'enemy combatants' in the war against terrorism will be regarded as subject to the human rights regime of the Covenant or only to the laws of war. In its General Comment No 31 (2004), the Committee took a very firm view that, in times of armed conflict, the laws of war (international humanitarian law) and human rights law were complementary, not exclusive, bodies of law, the former yielding to the latter only where directly incompatible. In this respect the US report will be additionally interesting.

IX CONCLUSIONS

Australia has been generally receptive and responsive to the claims of international law, in the legislative, executive and judicial spheres. It has, however, shown itself to be defensive, and even evasive, when faced with what it perceives to be a threat to the integrity of its immigration controls. There are signs of some relaxation of the harsher aspects of this regime. Further steps should be taken, having regard to the

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39 UN Doc CCPR/C/21/Rev.1/Add.11 [6]. Text available at <http://www.unhchr.ch>.

principles of necessity and proportion in derogation of human rights obligations, to bring Australia into conformity with the Covenant.

Might national security be an issue occasioning similar defensiveness in the coming decades? Can the right balance be found between human rights and the measures necessary to defend the Australian community against terrorist threats? Knee-jerk reactions of horror at any inroads whatsoever on traditional freedoms are as unconvincing and misguided as strident calls for 'tough new laws' and 'crackdowns' on terror suspects. The former are naïve; the latter play into the hands of terrorists by feeding a sense of persecution and frustration among minority population groups. The middle way is pointed by the principles of necessity, proportion, and reasonableness. These principles are common to both domestic and international law. They are not alone sufficient to give precise guidance; they must be applied to the particular circumstances. There must be evidence of the threat, considered argument as to the effectiveness of the proposed measures, and an understanding of the causes of alienation in the population groups from which terrorists spring. Such measures may be made compatible with existing international human rights law, even short of a declaration of national emergency. The Human Rights Committee's General Comment No 29 gives valuable guidance.

The influence of international law in the US is presently weak. It has regard almost exclusively to its own laws, institutions and traditions. Robert Kagan has written that the US is generally more result-oriented and Europe more process-oriented: that the US is averse to the need to find external justification for actions which it considers necessary in its national interest, while Europe seeks peace through law and diplomacy.[40] In this spectrum Australia lies closer to Europe than to the US. However, there are some signs that the second Bush Administration, unlike the first, may be moving towards a more multilateral approach to dealing with terrorism, in particular, and other matters of international concern, such as climate change. The influence of the State Department in the counsels of government has become stronger under Condoleezza Rice. It is there that the need for international cooperation in facing common problems is more keenly felt.

Former Foreign Minister Gareth Evans has recounted a conversation he recently had with former President Bill Clinton.[41] President Clinton said that America now faced two choices: to strive to maintain at all costs its present position in the world as Top Dog, or to strive to achieve a world order in which the US could comfortably live when it is no longer Top Dog. Which will it take?

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40 Robert Kagan, 'Power and Weakness' (2002) 113 *Policy Review* 3.

41 Gareth Evans, 'The Global Response to Terrorism' (The Wallace Wurth Lecture, University of New South Wales, 27 September 2005).