'It's A Jungle Out There': The Legal Implications of *Underbelly*

The banning of the broadcast of the real-life crime drama series, *Underbelly,* in Victoria in 2008 raises important issues about the impact of globalisation on the local administration of criminal justice. In this article David Rolph and Jacqueline Mowbray canvass the challenges presented by two significant globalising tendencies – internet technologies and human rights – through a case study of *Underbelly* and the related litigation.

Introduction

It is perhaps no overstatement to suggest that Underbelly has been a cultural phenomenon. Based on the best-selling non-fiction book, Leadbelly, by journalists, John Silvester and Andrew Rule (2004), this televisual dramatisation of Melbourne's notorious gangland wars became one of the highest rating television programmes of 2008, notwithstanding the fact that it was not screened in its entirety on television in one of the largest markets in Australia – the State of Victoria. Underbelly has generated opportunities not only for the authors and the actors involved but also the real-life participants – at least, those who have survived the gangland wars. The subsequent DVD release of Underbelly resulted in unprecedented pre-sale orders and promises to be one of the most successful Australian television programme DVDs. An Underbelly prequel began broadcasting in February 2009.

Underbelly and its impact on domestic and international legal processes highlight the challenges the administration of criminal justice confronts in a globalised world

However, it is not only the cultural impact of Underbelly that warrants attention. The actual and potential legal issues raised by Underbelly are important and worthy of serious analysis. It is submitted that Underbelly and its impact on domestic and international legal processes highlight the challenges the administration of criminal justice confronts in a globalised world. These challenges are twofold. The first is presented by internet technologies. Arguably, the banning of the broadcast of Underbelly on terrestrial television has been rendered ineffective not only by the possibility of 'hard copy' bootleg copies on video or DVD being circulated but also by the possibility of downloading digital copies from web servers located outside Victoria or, indeed, from outside Australia. The second challenge is presented by the growing importance of human rights, both domestically and internationally, and the accompanying trend towards internationalisation of the legal framework within which criminal justice issues are to be determined. The extradition from Greece to Australia of leading Underbelly figure Tony Mokbel, for example, gave rise to human rights claims before the Greek, European and Australian courts, which arguably complicated the process of bringing Mokbel to trial in Australia.

This article seeks to examine how these challenges manifested themselves in relation to Underbelly. The first part of the article explores the efficacy of established principles of contempt of court to prevent prejudice to criminal trials when internet technologies allow jurisdictional borders to be transcended so readily. The second part of the article analyses the way in which processes of globalisation, by bringing different legal systems into contact with one another, complicate the administration of justice in individual jurisdictions. In particular, it considers how the growth of human rights jurisprudence contributes to the internationalisation of the legal framework within which criminal justice issues play out.

Underbelly – Just the Facts

Underbelly was a thirteen-episode Australian drama series which screened nationally on the Nine Network from February 2008 (except in Victoria). The series charted the course of Melbourne's notorious 'gangland wars', commencing with the assaults by Alphonse Gangitano and Mark Moran in the Star Bar nightclub in 1995 and Alphonse Gangitano's murder in 1998 and culminating with the arrest of Carl Williams in 2004. Between these events, the series traces the complex connections and antagonisms between a range of Melbourne underworld figures, including the Morans, Carl and Roberta Williams, Lewis Caine, Mario Condello, Dino Dibra, Zarah Garde-Wilson, Mick Gatto, Graham Kinniburgh, Tony Mokbel and Andrew Veniamin. It also traces the efforts of Victoria Police's Purana Taskforce to put an end to the gangland killings.

Underbelly was a docudrama. It depicted a significant number of real people and it represented actual events. In doing so, it derived dialogue from transcripts of recorded conversations obtained by police through the use of listening devices. However, notwithstanding this factual basis, there were strong fictional elements to Underbelly. For instance, the central police officers, Steve Owen (played by Rodger Corser) and Jacqui James (played by Caroline Craig), were amalgams of a number of actual police officers on the Purana Taskforce. In addition, there was understandably the need for creative licence in depicting those events which were not recorded by police.[1] In this way, Underbelly blended factual and fictional elements.

While the blend of fact and fiction that was Underbelly played out on television, the 'real lives' of the characters depicted in the series continued to make headlines. In response to the publicity associated with Underbelly, Carl and Roberta Williams have become media celebrities, with Carl's Facebook page making news (and thousands of Facebook friends), while Roberta hosted an 'Underworld dinner' and did a bikini shoot for Zoo Weekly magazine.[2] Meanwhile, Tony Mokbel, who was arrested in Greece in June 2007, having skipped

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bail while facing charges of cocaine smuggling, was challenging his extradition to Australia to face murder charges in relation to the deaths of Lewis Moran and Michael Marshall, together with additional charges of drug trafficking.[3] Mokbel argued that for various reasons, including the publicity associated with Underbelly, he would not receive a fair trial in Australia. When this argument was rejected by the Greek Supreme Court in March 2008, and later confirmed by the Greek Justice Minister, Mokbel lodged an application with the European Court of Human Rights for orders preventing Greece from extraditing him to Australia. In May 2008, before his application to the European Court was determined, Mokbel was extradited amid still more media publicity, and the ongoing legal proceedings continue to attract media attention.[4] The role of the media in relation to the Underbelly story thus extended beyond the screening of the series itself and into the coverage of the real life events associated

with it. In this way, the phenomenon that was Underbelly blurred the boundaries between fact and fiction in an extraordinary way, a fact that became important in the way judges treated the risk posed by the broadcast of Underbelly contemporaneously with the trials of persons portrayed therein.

Contempt of Court, Suppression Orders and *Underbelly*

Underbelly highlights the difficulties surrounding the making of effective suppression orders so as to prevent an apprehended contempt of court at a time when internet technologies have become pervasive. Only days before Underbelly was scheduled to screen in February 2008, the prosecution in a related criminal matter applied for a suppression order. It was feared that, if the broadcast were not stopped, the fair trial of A on the charge of the murder of B would be prejudiced.[5] Both A and B, as well as A's involvement in B's murder, were depicted in Underbelly. Channel Nine undertook not to broadcast Episode 12, the episode in which B was murdered. The primary judge, King J, rejected this as insufficient, given that B featured throughout the other episodes and was given somewhat sympathetic treatment. Moreover, the depiction of B's murder tended to corroborate the version of events given by one of A's accomplices, X, who would be giving evidence for the Crown at A's trial (at [4]-[7]). King J granted the suppression order sought by the Crown (at [12]-[14]). Her Honour ordered that all thirteen episodes of Underbelly not be broadcast in Victoria and furthermore suppressed:

> in Victoria any publication on the Internet of the series together with any publication on the Internet of the part of the site that shows the history, the interrelationship of the individuals between each other, the cast of characters and their associations.[6]

The latter part of this order was directed particularly at the official Underbelly website, which at that time contained a feature, 'Family Tree Site – Inside the Underbelly'.

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Following media reports that a South Melbourne hotel was playing a recording of Underbelly, made interstate, for its patrons,[7] the DPP applied for a variation of the order. King J recast the relevant order in the following terms:

> The transmission, publication, broadcasting or exhibiting of the production referred to as "Underbelly" be prohibited in the State of Victoria, until after the completion of the trial and verdict in the matter of R v [A].[8]

On appeal, the Victorian Court of Appeal found that King J had the jurisdiction to make the orders she did and was entitled to exercise her discretion to make the orders.[9] Their Honours accepted that the primary judge had implicitly found that the broadcast of Underbelly would constitute sub judice contempt. They did not accept that King J had failed to consider the public interest in the broadcast of Underbelly, being 'information pertaining to the role of police in preventing and responding to organised crime'. Indeed, their Honours concluded that the public interest in the broadcast was limited (at [43]) because Underbelly was a docudrama, the primary purpose of which was entertainment (at [39]). Related to this, the Victorian Court of Appeal did not accept that the primary judge erred by balancing the commercial interests of the Nine Network in the broadcast of Underbelly against the public interest in the protection of the administration of criminal justice (at [43]). However, their Honours found that the terms of the orders made by King J were broader than were strictly necessary. In terms of the first order, as recast by King J, they held that it was only necessary to restrain the Nine Network from broadcasting Underbelly in Victoria (at [65]). Their Honours suggested that any person who broadcast Underbelly with knowledge of the order imposed upon the Nine Network might be held liable for contempt of court for deliberately frustrating a court order, notwithstanding the fact that he or she was not directly bound by the order. In terms of the second order, their Honours held that an order directed only to the 'Family Tree website – Inside the Underbelly' was all that was strictly necessary (at [69]-[70]). The presence of potentially prejudicial material elsewhere on the internet could be dealt with, at least in part, by appropriate directions from the trial judge (at [70]-[73]).

In late May, A (Evangelos Goussis) was convicted of killing B (Lewis Moran).[10] This meant that the ban on publication in Victoria lapsed. However, the prosecutions in the Victorian courts arising from the 'gangland wars' have not yet finished. For instance, as noted previously, Tony Mokbel has been extradited back to Australia from Greece to face charges of murder and drug trafficking. In addition, in early September 2008, X, an accused person in a pending criminal trial, applied to the Supreme Court of Victoria to restrain General Television Corporation Pty Ltd from broadcasting Underbelly in Victoria until his trials had been completed. Vickery J permitted the Nine Network to broadcast the first five episodes,[11] albeit in edited form, (at [14]) but found that the broadcast of Episode 6 would amount to a contempt of court (at [31]). Like the Victorian Court of Appeal in General Television Corporation v DPP,[12] Vickery J noted that, although only General Television was directly bound by the order, any publication by a person with knowledge of the order could amount to a contempt of court (at [46]-[47]). It may be some time before an unexpurgated version of Underbelly may be screened in Victoria in its entirety.

The suppression of Underbelly in Victoria raises a number of important issues relating to the protection of the administration of justice and the right of an accused person to a fair trial. The fact that Australia is a federation with eight different State and Territory criminal justice systems has long posed a problem for media outlets.

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This is particularly so given the existence of national newspapers and national radio and television networks. Media outlets have, for some time, needed to make arrangements to prevent publication or broadcast within a particular jurisdiction so as not to interfere with the administration of justice within that jurisdiction. Prominent criminal prosecutions, such as the Snowtown murders in South Australia and the prosecution of Bradley John Murdoch for the murder of Peter Falconio in the Northern Territory, required national media outlets to take steps to ensure the conduct of those trials were not jeopardised. The Australian newspaper had to modify editions circulating within each jurisdiction so as to comply with the suppression orders imposed and so as not to interfere with the administration of justice in each case.

The difficulties presented to the administration of the criminal justice system in relation to a complex, interconnected set of criminal prosecutions arising out of underworld crime by the proposed broadcast of a dramatisation of the events at issue in the trials are also not new. The restraint of the Australian Broadcasting Corporation's proposed screening of Blue Murder in New South Wales in 1995 provides a close analogue to Underbelly. Blue Murder was a dramatisation of the Sydney underworld in the 1970s and 1980s, particularly focusing on the interaction between police officer, Roger Rogerson, and criminal, Arthur 'Neddy' Smith. Blue Murder was only able to be shown in New South Wales in 2001 following the decision by the Director of Public Prosecutions not to prosecute Smith for the murder of drug dealer, Lewton Shu, at Waterfall in January 1983.[13] Like Underbelly, Blue Murder was also a docudrama which, by virtue of its blending of factual and fictional elements, had the potential to interfere with pending criminal trials.[14] However, people living in New South Wales who wanted to see Blue Murder were able to view

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it in the intervening six years. As journalist Stephen Gibbs observed, by the time Blue Murder was broadcast in New South Wales in 2001, the series had been 'already widely viewed on bootleg copies by police, lawyers, criminals and anyone else interested in such fare'.[15] The controversy surrounding Underbelly unsurprisingly raised the memory of Blue Murder. It prompted a late night re-screening of Blue Murder on the Nine Network and the promotion of Blue Murder's release on DVD. The Daily Telegraph even engaged Rogerson to review Underbelly.[16]

Whilst the challenges facing courts and the media are not new, their scale is novel. The crucial difference between the problems posed by Blue Murder in the late 1990s and those posed by Underbelly is the development of internet technologies. If people in New South Wales wanted to watch Blue Murder in 1995, they could have received a taped video copy from interstate family or friends or obtained one on the 'black market'.[17] This would have taken some time and effort. If people in Victoria wanted to watch Underbelly in 2008, they could use these conventional means (although DVD, not video cassette was the preferred medium for distribution) but they had the easier, more convenient option of downloading it from a file-sharing website.[18] Many of these file-sharing websites are not based in Australia. Two of the websites which experienced the most traffic, Mininova and Pirate Bay, are based in the Netherlands and Sweden respectively.[19] These websites also made it possible for Victorians to view Underbelly only minutes after it had finished screening in New South Wales.[20] By mid-March 2008, Mininova hosted all thirteen episodes of Underbelly.[21]

The judgments in the litigation associated with Underbelly disclose differing attitudes towards the challenges posed by internet technologies to the established principles relating to the making of suppression orders and contempt of court. King J purported to ban publication on the internet in Victoria. In its terms, the order is inefficacious. It is not possible wholly to prohibit publication on the internet within one Australian jurisdiction. Websites hosted by servers in other parts of Australia or overseas are still accessible within Victoria, as other courts have acknowledged.

The difficulties relating to the restraint of publication on the internet are not new. For instance, an order in terms nearly identical to the one made by King J was sought in a defamation case in the Supreme Court of New South Wales, Macquarie Bank Ltd v Berg.[22] In this case, Simpson J recognised that, in its terms, the order sought was ineffective because, once material was published on the internet, it was accessible by any person in any jurisdiction in the world, so long as he or she had 'the appropriate facilities' (at 44,792). Her Honour rejected a variation of the order limited to publication within New South Wales because, as her Honour noted, this limitation would be futile; there was no wholly effective means of excluding publication within a geographical area. The effect of making the order originally sought was characterised by Simpson J as purporting to 'restrain [the defendant] from publishing anywhere in the world via the medium of the internet' (at 44,792). Her Honour observed that the purpose of granting an injunction in New South Wales was to ensure compliance with the laws of New South Wales and to protect the plaintiff's rights under the laws of New South Wales (at 44,792). However, the making of the order sought would have the effect of superimposing the defamation laws of New South Wales on other jurisdictions which might take a markedly different view of the balance between the protection of reputation and freedom of expression (at 44,792). Consequently, in Simpson J's view, the making of such an order would exceed the proper limits of the use of the injunctive power of the Supreme Court of New South Wales (at 44,792). Crucial to Simpson J's decision was 'the nature of the internet itself' (at 44,792). Simpson J's reasoning in Macquarie Bank Ltd v Berg is directly applicable to the order made by King J and provides a compelling argument against the making of an order in such terms.

The Victorian Court of Appeal took a different view of the challenges posed by internet technologies to the effective operation of suppression orders and the principles of contempt of court but one which was equally problematic. Whilst King J purported to restrain the 'transmission, publication, broadcasting or exhibiting' of Underbelly by any person in Victoria, the Victorian Court of Appeal found that it was only necessary to prevent General Television from publishing Underbelly in Victoria. Their Honours expressed the view that other persons intentionally transmitting, publishing, broadcasting or exhibiting Underbelly in Victoria with knowledge of the order could nevertheless be held liable for contempt of court due to the deliberate frustration of the suppression order. Vickery J made a similar observation in X v General Television Corporation Pty Ltd.[23] However, the power of a State or Territory Supreme Court will not necessarily extend to conduct which occurs outside of that State or Territory. Just as the jurisdiction of a court in a given State or Territory to grant an injunction is for the purpose of ensuring compliance with the laws of that State or Territory and protecting a plaintiff's rights within that State or Territory, so too the jurisdiction of a court to issue a suppression order or to punish for contempt of court is intended to protect the administration of justice within that State and Territory; and just as it would exceed the proper limits of a court's power to grant an injunction to prohibit publication outside of that State or Territory, so too would it exceed the proper limits of a court's power to punish for contempt of court committed outside of that State or Territory.

This has been recently confirmed by the decision of Mandie J in

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R v Nationwide News Pty Ltd.[24] In this case, the Commonwealth Director of Public Prosecutions sought to have Nationwide News (the publisher of the Daily Telegraph newspaper) and Queensland Newspapers (the publisher of the Courier-Mail newspaper) punished for contempt of court in relation to breaches of non-publication orders made by the Magistrates' Court of Victoria, pursuant to the Magistrates' Court Act 1989 s 126, and the deliberate frustration of those orders (at [1]-[7]). The orders in question sought to protect the identity of a witness in a terrorism case. Significantly, the Commonwealth DPP did not rely upon the circulation of the newspapers within Victoria (at [8]). Mandie J noted the common law presumption that the criminal law proscribes conduct within the jurisdiction, with the consequence that the legislature is not taken to intend that criminal acts committed outside the jurisdiction are proscribed (at [63]). His Honour found that there was nothing in the relevant provision to displace the operation of this presumption (at [71]). The fact that the court was exercising federal jurisdiction did not alter his conclusion (at [74]). Consequently, the publications in New South Wales and Queensland did not constitute contempt of court in Victoria. The ability of a court in one jurisdiction to protect the administration of justice from being undermined by conduct in other jurisdictions is perhaps not as extensive as envisaged by the Victorian Court of Appeal in General Television v DPP and Vickery J in X v General Television.

One significant issue which remains unaddressed by R v Nationwide News is what constitutes publication for the purposes of contempt of court. In R v Nationwide News, the publication relied upon was publication within New South Wales and Queensland, presumably the circulation of the newspapers themselves. However, both the Daily Telegraph and the Courier-Mail have an internet portal. Is publication for the purposes of contempt of court to be treated the same as publication for the purposes of defamation, with the consequence

that publication occurs wherever a person receives contemptuous matter in comprehensible form?[25] If this is the case, the outcome of R v Nationwide News would likely have been different. Even though the websites of the Daily Telegraph and the Courier-Mail would have been directed towards their principal audiences in New South Wales and Queensland respectively, they would be accessible in Victoria and publication would occur in that jurisdiction. The conduct proscribed would therefore occur within Victoria and thus be subject to punishment. Adopting such a position would expand the scope of liability for contempt of court and challenge prevailing views about the territorial application of this body of law. Alternatively, is internet publication to be treated in the same way as 'hard copy' publication? If so, what is the principled basis for treating publication differently for the purposes of defamation and contempt of court?

The global nature of the internet presents real challenges to courts and the media in ensuring that effective suppression orders are made and enforced, that contempts of court are restrained and that the administration of justice is not undermined. With a history dating back to the twelfth century, the principles of contempt of court were clearly developed at a time when the scope for interference with the administration of justice from outside the jurisdiction was minimal.[26] Similarly, the common law principles relating to suppression orders and their statutory augmentation are territorially limited in their operation. Yet the global nature of internet technologies is

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not respectful of territorial boundaries. Media commentators have pointed to the difficulties presented to established legal principles surrounding the right to a fair trial by internet technologies but have not offered practical solutions, other than departing from the principles of contempt of court as currently understood and applied.[27] Courts, legislatures and law reform bodies have not yet adequately engaged with this issue; although they have acknowledged the problem, they too have not proffered detailed, principled solutions.[28] The challenges presented by internet technologies to the administration of criminal justice in a globalised world are significant and are only likely to become more acute.

Extradition, Human Rights and the Internationalisation of Law

If the facts and circumstances surrounding Underbelly highlight the way in which processes of globalisation affect the practical administration of criminal justice, they also demonstrate how these processes affect the legal framework within which criminal justice systems operate. In particular, the various legal proceedings associated with Tony Mokbel's extradition from Greece to Australia suggest that, by bringing different legal systems into contact with each other, globalisation can complicate the administration of justice within individual jurisdictions.

In general terms, the legal history of the Mokbel extradition raises two key questions concerning the relationship between different legal systems in a globalised world. Firstly, to what extent could the European Court of Human Rights interfere with Australian criminal proceedings, by preventing Mokbel's extradition from Greece? And secondly, could the Australian courts find that Mokbel's extradition from Greece was an abuse of process as it occurred before his application to the European Court of Human Rights was heard? In other words, can the legal position in Greece (namely, Mokbel's right to apply to the European Court, and Greece's obligations to comply with decisions of that Court) affect Mokbel's rights under Australian law?

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Could the European Court of Human Rights prevent Mokbel's extradition from Greece?

Following the Greek authorities' decision to extradite him to Australia, Mokbel applied to the European Court of Human Rights for orders preventing the Greek authorities from returning him to Australia. This was on the basis that returning him to Australia would violate his human rights, as guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Greece is a party. In particular, Mokbel argued that his right to life and his right to freedom from torture and inhuman treatment could not be adequately protected in Australia.[29] There was also speculation that Mokbel would argue that he could not receive a fair trial in Australia, in part due to the publicity associated with Underbelly.[30]

Mokbel was in fact extradited before his case was heard by the European Court. However, the case still raises interesting issues concerning the administration of criminal justice in the context of globalisation. In the first place, it highlights the way in which the Greek, European and Australian jurisdictions can simultaneously be engaged in relation to a particular criminal matter. More specifically, it demonstrates how these jurisdictions can potentially overlap, where human rights arising within a particular legal framework are claimed to have some form of extraterritorial effect. The particular issue here arises from the fact that Australia is not a party to the European Convention. Yet Mokbel's application asks the European Court to find that his extradition would be wrongful on the basis that his Convention rights would be violated in Australia. In this way, Mokbel is effectively asking the Court to give some form of extraterritorial effect to the rights enshrined in the Convention.

The question of whether the European Convention can be given extraterritorial effect in this way has been raised in a number of cases before the European Court. Perhaps the leading case on this point is Soering v UK,[31] which concerned the question of whether the UK would be violating the Convention by extraditing a German national to the US, where he faced the risk of inhuman and degrading treatment or punishment, contrary to Article 3 of the Convention. While the UK argued that it could not be found liable for breaches of the Convention which may occur outside its jurisdiction, the Court found that:

> the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country (at [91]).

The Court did accept that it could not be the case that 'a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention' (at [86]). Not every violation of every right will require a state to refuse to extradite. Nonetheless, the Court's finding that there are circumstances in which states should refuse extradition on the basis that the fugitive's Convention rights would be violated in the requesting state is significant, in that it extends the territorial scope of the Convention beyond those states who are parties to it.

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A similar tendency to extend the territorial scope of the Convention can be observed in other contexts also. Issues have arisen, for example, in relation to state parties' activities in foreign territories. Thus in its 2004 decision in Issa v Turkey[32], the Court indicated that if Turkey exercised 'effective control' over areas in northern Iraq, then it would be liable for violations occurring in those areas, even though Iraq is outside the jurisdiction of the European Convention (at [69]). Similarly, in R(Al-Skeini) v Secretary of State for Defence,[33] the House of Lords, following the European jurisprudence, found that the Convention would apply in British-run military prisons in Iraq.

Mokbel's case is not, therefore, the first to raise issues of the extraterritorial effect of the European Convention. However, it does serve as a useful vehicle for exploring the implications of these issues, which are likely to assume increased significance in the context of globalisation. Mokbel's case, as we have seen, was based on the claim that Greece should not extradite him because his rights to life and freedom from torture, under Articles 2 and 3 of the Convention, would be violated in Australia. In the absence of further information as to how Mokbel pleaded this case, it is difficult to assess its prospects of success. However, in light of the existing jurisprudence of the European Court, it would seem unlikely that Mokbel would be able to demonstrate, to the Court's satisfaction, a 'real risk' that he would be deprived of these rights in Australia. More interesting, perhaps, is Mokbel's potential argument that his right to a fair trial would be violated in Australia, in particular due to the publicity associated with Underbelly. In making this argument, Mokbel could rely on the proposition, initially set out in Soering v UK and confirmed in subsequent cases,[34] 'that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country' (at [113]). Ultimately, however, it remains unlikely that Mokbel would be able to meet this test. The European jurisprudence indicates that this requirement of 'a flagrant denial of a fair trial' will be met only in the most extreme of circumstances, for example, where proceedings are conducted in the absence of both the accused and his or her defence lawyers.[35] Further, the European jurisprudence on the impact of pre-trial publicity on the right to a fair trial is equivocal. While the European Court and related institutions have accepted that adverse pre-trial publicity can affect the fairness of a trial,[36] there has been no decided case in which a state has been found to have violated the Convention on this basis.[37]

However, while Mokbel's application may be unlikely to succeed, it usefully highlights a number of issues associated with the extraterritorial application of the human rights standards in the European Convention. In the first place, it raises the prospect of a blurring of jurisdictional boundaries, with more than one legal system involved in the same set of proceedings. Both the Australian courts and the European Court are involved in the Mokbel proceedings, and Mokbel will argue before both that his extradition and trial in Australia infringes his human rights. This raises fundamental questions and concerns for the administration of justice in individual jurisdictions. Human rights laws and standards not applicable within Australia could potentially have deprived Australian courts of the opportunity to try Mokbel: Australian legal proceedings could have been prevented or frustrated by a decision of the European Court preventing extradition. Of equal concern is the possibility of conflicting decisions as to whether Mokbel's treatment would meet basic human rights standards. If the European and Australian courts reach different conclusions on human rights issues, such as whether Mokbel would receive a fair trial in Australia, this could undermine confidence in the ability of legal systems to respond to the challenges of globalisation. At the very least, it would complicate the legal framework within which the proceedings would play out.

A further complication arises from the fact that any decision by the European Court on the lawfulness of Mokbel's extradition would depend, in part, on the European Court's assessment of Australian law. In order to determine whether Mokbel would be deprived of certain human rights in Australia, the European Court is required to engage, to some extent, with the legal position in Australia, in order to assess the procedural and other safeguards afforded to Mokbel

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under Australian law. Although the relevant test only requires the Court to consider facts and circumstances known to the extraditing state (Greece), this inherently involves some inquiry into the way in which human rights are protected in the requesting state (Australia). Australian law, then, is examined in European proceedings, which apply European standards to conditions in Australia. This not only raises the possibility of the fragmentation of criminal proceedings across different jurisdictions, but also the possibility of inconsistent interpretation and application of the same law. There is no guarantee that the European Court will interpret the legal and procedural requirements of Australian law in the same way as the Australian courts.

Finally, it is interesting to note that the European Court's willingness to give the European Convention a form of extraterritorial effect appears to be based on assumptions as to the importance and 'universality' of human rights. Thus in the Soering case, the Court justified its decision in part on the basis that:

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms … Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (at [87]).

Similarly, in Mamatkulov and Askarov v Turkey,[38] the Court confirmed the existence of an obligation not to extradite to a country where a fugitive would face a violation of Convention rights, noting that to do so 'would hardly be compatible with the "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble [to the Convention] refers' (at [68]). The implicit assumption here is that human rights are universal, part of the 'common heritage' of mankind, and therefore liable to be given a broad application, beyond the territorial boundaries of a particular jurisdiction. In this way, human rights standards increase the scope for multiple jurisdictions to be engaged in respect of a single set of legal proceedings. Significantly, this suggests that concerns regarding the extraterritorial exercise of jurisdiction, as identified above, are likely to increase as discourses of human rights become more dominant both globally and within individual jurisdictions.[39]

Could the Australian courts find that Mokbel's extradition was an abuse of process?

Of course, Mokbel was extradited from Greece before his case could be heard by the European Court, and so he was denied the opportunity to resist his extradition in that forum. Back in Australia, however, Mokbel's lawyers relied on this turn of events to argue that his extradition from Greece was an abuse of process, as it took place before his application to the European Court of Human Rights was heard. As a consequence, they argued, the relevant authorities should be restrained from prosecuting Mokbel.[40] This argument, like Mokbel's application to the European Court itself, suggests a blurring of jurisdictional boundaries in this case. Effectively Mokbel is asking the

Australian courts to find that his rights under the European Convention (namely, his right to apply to the European Court) give rise to obligations on the part of the Australian government. Even though Australia is not a party to the European Convention, and therefore cannot be found to be in breach of any obligation under that treaty by extraditing him, Mokbel is arguing that the treaty nonetheless creates rights which must be recognised and protected by Australian courts under Australian law. Once again, then, we see the globalisation of the legal framework within which issues of criminal justice must be decided: the Australian court is required to consider not only issues arising under Australian law, but also under European law.

Ultimately, the Victorian Supreme Court rejected Mokbel's application to restrain the relevant authorities from prosecuting him. The Court found that the continuation of criminal proceedings against Mokbel would not constitute an abuse of process, notwithstanding the fact that he was extradited from Greece prior to determination of his application to the European Court. In reaching this conclusion, the Court noted that 'Australia is not a party to, nor bound by, the European Convention' and that there was, consequently, 'nothing "shameful" or "unworthy" about the conduct of the Australian government' such as to constitute an abuse of process (at [60]). Although not mentioned in the judgment, this conclusion seems consistent with other decisions, which suggest that extradition while an appeal is pending does not, in and of itself, constitute an abuse of process.[41]

In spite of this conclusion, however, some of the Court's comments seem to leave open the possibility that, in another case, the blurring of jurisdictional boundaries for which Mokbel argued could take greater effect. It is clear that the issue of whether to stay or restrain

the European jurisprudence on the impact of pre-trial publicity on the right to a fair trial is equivocal

proceedings on the basis of an alleged abuse of process is a matter of discretion, to be determined by balancing 'the character of the conduct complained of by the accused on the one hand, and the public interest that accused persons, charged with serious criminal offences, be duly tried for those offences'.[42] In confirming this principle, the Court leaves open the possibility that, in an appropriate case, the legal position in the extraditing state may be relevant to that balancing exercise. Thus the Court notes that, when considering the lawfulness of actions by Australian authorities in relation to extradition, it is not only the laws of Australia, but also those of the extraditing state, which must be considered (at [52]). Further, there are suggestions in the judgment that Mokbel's argument failed, in part, because he did not provide any evidence that his application to the European Court had merit, or prospects of success. Certainly, this point seems to have been put to the Court by the defence (at [20]) and not disputed by the Court in its judgment. Thus the Court notes that Mokbel relied 'solely, on the bare fact' (at [57]) that at the time at which he was extradited to Australia, he had made an application to the European Court. While acknowledging that it 'may not be appropriate to agitate, in this Court, the merits or otherwise of the plaintiff's application to the European Court'(at [57]), the Court nonetheless seems to suggest that the nature of Mokbel's case before the European Court, and perhaps its prospects of success, could be relevant to the exercise of the Court's discretion.

This again raises concerns about the role played by multiple jurisdictions in criminal proceedings, and the way in which this can complicate the administration of justice in individual jurisdictions. Concerns about fragmentation of proceedings, overlap of jurisdiction and inconsistency in application of the law might all arise in this context. In particular, to the extent that the nature of Mokbel's case before the European Court might be relevant to the exercise of an Australian court's discretion, for example, the Australian court would be required to consider European law, in order to form an opinion as to that case. This scenario becomes further confused when

There was speculation that Mokbel would argue that he could not receive a fair trial in Australia, in part due to the publicity associated with Underbelly

we recall that, in reaching its decision, the European Court would take account of procedural safeguards available to Mokbel under Australian law. It is therefore possible, theoretically, that in deciding whether to exercise its discretion, an Australian court would need to consider how the European Court would interpret the legal situation in Australia.

Conclusion

The legal history of Underbelly – the banning of the docudrama in Victoria, and the real life legal adventures of Mokbel and others depicted in the series – provides a useful vehicle for examining the challenges which globalisation creates for the administration of criminal justice. Throughout this article, we have used the Underbelly story as a lens through which to examine the twin impacts of internet technologies and human rights on the conduct of criminal proceedings.

The legal ban on the broadcast of Underbelly in Victoria, and the difficulties associated with framing and potentially enforcing this suppression order, highlight the impact which the 'global' medium of the internet has on local court proceedings. Since the internet allows for the simultaneous publication of material in multiple jurisdictions, it poses an inherent challenge to the ability of courts, whose jurisdiction is limited territorially, to suppress the publication of prejudicial material. In this sense, it complicates and challenges the administration of justice in individual jurisdictions.

At the same time, the Mokbel extradition and the various legal proceedings associated with it demonstrate how the administration of justice can be complicated when multiple jurisdictions are engaged in respect of a particular matter. Of course, extradition scenarios inherently involve the interaction of different jurisdictions. However, the Mokbel story serves to highlight one particular factor which is likely to increase the incidence of cases involving the interaction of different legal frameworks, namely, the growing importance of human rights. The desire to protect human rights, whether through particular human rights instruments, or as part of the court's inherent jurisdiction to prevent abuses of process, is accompanied by a trend to give such rights as broad an application as possible. As a result, the human rights standards of multiple jurisdictions may become engaged in respect of the same matter.

While our discussion has focused on Underbelly, the impact of internet technologies and human rights on legal proceedings clearly extends beyond the scope of the facts discussed in this article. These globalising tendencies affect the conduct of criminal proceedings generally, and are only likely to become more significant over time. In this way, globalisation, and the challenges – and opportunities – which it creates, are likely to assume increased importance for the administration of criminal justice in the future.

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(Endnotes)

1 See generally R v A [2008] VSC 73 at [3].

2 Carter P 'Roberta Williams at $100-a-head Underworld Dinner' The Courier-Mail, 25 July 2008.

3 Petrie A 'Greece Gives Mokbel Marching Orders' The Age, 8 May 2008.

4 See for example Hughes G 'Judge Rejects Tony Mokbel's Claim That Extradition from Greece Was Illegal' The Australian, 29 October 2008.

5 R v A [2008] VSC 73 at [1].

6 Ibid at [13].

7 Sharp A, Ziffer D, Butcher S and Miller N 'Pirate Underbelly Screening Exposed' The Age, 14 February 2008.

8 General Television Corporation Pty Ltd v DPP [2008] VSCA 49 at [64].

9 Ibid. at [35] per curiam.

10 Silvester J 'Moran Murderer Revealed as Two-Time Killer' The Sydney Morning Herald, 30 May 2008.

11 X v General Television Corporation Pty Ltd [2008] VSC 344 at [48].

12 [2008] VSCA 49.

13 Gibbs S 'TV Drama That's Been Blue Murder' The Sydney Morning Herald, 29 January 2000 ; Gibbs S 'ABC Can Finally Get Away with Blue Murder' The Sydney Morning Herald, 13 July 2001; Ackland R 2001 'How the ABC Got Away with Blue Murder' The Sydney Morning Herald, 3 August 2001.

14 Goodsir D 'Almost All the Chilling Truth' The Sydney Morning Herald, 2 August 2001.

15 Gibbs S 'ABC To Get Away with Blue Murder Next Week' The Sydney Morning Herald, 26 July 2001; Ackland R 'Public Held in Contempt' The Sydney Morning Herald, 6 February 1998.

16 Rogerson R 'It's Bang on Target – Roger Rogerson Gives Underbelly Debut Four Stars' The Daily Telegraph, 14 February 2008.

17 Idato M 'Downloads Expose TV's Underbelly' The Sydney Morning Herald, 18 February 2008.

18 Dowsley A 'Black Market Hit Gives Nine a Bellyache' Herald-Sun, 22 February 2008; Idato above n 17; Moses A 'Web Pirates Sail around TV Ban' The Sydney Morning Herald, 13 February 2008; Singer J 'Hitting Jurors under the Belly' Herald-Sun, 31 March 2008.

19 Cummings L and Fenech S 'Mob of Bootleggers – Illegal Underbelly Downloads in Hot Demand' The Daily Telegraph, 16 February 2008; Rout M and Meade A 'Vics Trawl Web to Catch Banned Show' The Australian, 15 February 2008.

20 Cummings and Fenech above n 18; Miller N 'Internet May Render Censorship Futile' The Age, 13 February 2008; Moses above n 18; Rout and Meade above n 19.

21 Roberts B 'Nine Kicked in Belly Again' Herald-Sun, 17 March 2008.

22 (1999) A Def R 53-035.

23 [2008] VSC 344.

24 [2008] VSC 526.

25 See Dow Jones & Co. Inc. v Gutnick (2002) 210 CLR 575 at 600-01, 605-06 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

26 Witham v Holloway (1995) 183 CLR 525 at 538 per McHugh J.

27 Ackland R 'Blindfolding Jurors an Idea Whose Time has Gone' The Sydney Morning Herald, 15 February 2008; Idato above n 17; Singer above n 18.

28 See, for example Spigelman J 'The Internet and a Right to a Fair Trial' The Judicial Review vol 7 pp 403-422; Bell V 'How To Preserve the Integrity of Jury Trials in a Mass Media Age' The Judicial Review vol 7 pp 311-328; Whealy A 'Contempt: Some Contemporary Thoughts' The Judicial Review vol 8 pp 441-471.

29 Mokbel v DPP (Vic) and Others [2008] VSC 433.

30 Bachelard M and Fyfe M 'Human Rights or a get-out-of-jail-free Card?' The Age, 11 May 2008.

31 (1989) 11 EHRR 439. This decision has been confirmed and applied in numerous other cases, including, most recently, the interesting House of Lords decision of EM v Secretary of State for the Home Department (House of Lords, 22 October 2008).

32 (2004) 41 EHRR 567 cf Cbolpwj boe Puifst w Cfmhjvn boe Puifst 11 BHRC 435 (European Court of Human Rights, 2001).

33 [2007] 3 WLR 33.

34 Mamatkulov and Askarov v Turkey (Judgment of the European Court of Human Rights, 4 February 2005); Ismoilov and Others v Russia (Judgment of the European Court of Human Rights, 24 April 2008).

35 Bader and Others v Sweden (Judgment of the European Court of Human Rights, 8 November 2005) cf Mamatkulov and Askarov v Turkey (Judgment of the European Court of Human Rights, 4 February 2005).

36 Loucaides L 'Questions of Fair Trial under the European Convention on Human Rights' Human Rights Law Review vol 3 no 1 pp 27-51 at 39.

37 Perhaps the closest the Court came to such a conclusion was in T and V v United Kingdom (Judgment of the European Court of Human Rights, 16 December 1999), which concerned the two ten-year-old boys who were convicted for the abduction and murder of two-year-old Jamie Bulger in the UK. In those cases, the Court found that the boys, who were tried in an adult court, were denied the right to a fair hearing as the way in which the trial was conducted was intimidating and prevented the defendants from participating effectively in the conduct of their defence. One of the factors which the Court took into account was the overwhelming pre-trial publicity and media attention, noting that 'in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition' (at [87]), which had not occurred in this case. However, this decision stops short of finding that the pre-trial publicity in itself gave rise to a violation of the right to a fair trial.

38 (Judgment of the European Court of Human Rights, 4 February 2005).

39 In making these comments, we do not seek to suggest that this is an undesirable development. Indeed, the harmonisation of global human rights standards which may result, and which seems to be contemplated by s 32(2) of the Charter of Human Rights and Responsibilities Act 2006 (Vic), for example, would be extremely positive. In this article, we simply note the challenges which these developments create for the administration of justice in individual jurisdictions.

40 Mokbel v DPP (Vic) and Others [2008] VSC 433.

41 See, for example, Nudd v Australian Federal Police [2008] QCA 60.

42 Mokbel v DPP (Vic) and Others [2008] VSC 433 at [54].

From Chalk and Talk to an Online World of Digital Resources

The January 2009 edition of the *Communications Law Bulletin* included an article by Alex Farrar on amendments made to the Copyright Act affecting the use of multimedia in classrooms. Further to that piece, Simon Lake discusses the activities of Screenrights and available statutory licences for educational copying and communication of broadcast materials.

Screenrights (initially known as the Audio-Visual Copyright Society) was established almost two decades ago to deal with what was then a new copyright challenge – the use of the video recorder in education. For the first time, teachers and academics could record programs to keep in the library as a resource and to use in education. The problem was a practical one. The law at the time required educators to obtain prior permission from each of the copyright owners, a task that was so difficult, teachers either didn't copy off air, or did so illegally.

After lobbying from educators and the film industry, the Copyright Act 1968 (Cth) (**Copyright Act**) was amended in 1990 to include Part VA, a statutory licence that allowed educational institutions to copy from television and radio, provided they agreed to pay equitable remuneration. Screenrights was declared the society to administer these provisions.

The rationale behind this licence was two-fold: to ensure access to the resources provided by television and radio, and to provide payment to