

# INAUGURAL PROFESSORIAL LECTURES

## JUST (DON'T) DO IT: ETHICS AND INTERNATIONAL TRADE

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*[This speech was delivered by Professor Martin Davies as his Inaugural Professorial Public Lecture at the Law School, The University of Melbourne, on 21 May 1997. It is an attempt to find a basis for principles of ethical conduct in international trade. How is it possible to distinguish right from wrong in the context of international trade, when one must deal with people from different cultures and value systems? Can this be done without preferring one value system to another? If not, what should the basis for that preference be? In attempting to answer these questions, Professor Davies suggests that liberal theories are the most likely means of finding moral principles of international behaviour, whilst rejecting the rights-based theories of classical liberalism in this context.]*

### I HARRISON MOORE

It is customary for the holder of a named chair to spend some time at his or her inaugural lecture speaking about the person for whom the chair is named. In my case, that person is Sir William Harrison Moore, who was Dean of The University of Melbourne law school from 1893, the year of his appointment, until 1927. He is by far the longest serving Dean of the law school, and his record of almost 35 years in the office seems very unlikely ever to be broken, particularly in the light of the modern pressures of deanship. As well as being Dean, he served the law faculty and the University in many other capacities, including President of the Professorial Board (as the Academic Board was then called), long-term member of the University Council and even (rather surprisingly to modern eyes) President of the Law Students' Society from 1894 to 1901.<sup>1</sup>

Moore was a constitutional lawyer whose views profoundly influenced a generation of decision-makers at the highest level. His students included the former High Court chief justices John Latham and Owen Dixon, former High Court justices Wilfred Fullagar and Douglas Menzies, and the former Prime Minister Robert Menzies.<sup>2</sup> When Sir Owen Dixon was conferred with an honorary Doctor of Laws degree by this University in 1959, he spoke of his intellectual debt to

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<sup>1</sup> Loretta Re and Philip Alston, 'William Harrison Moore: Third Dean of the Faculty of Law, 1893 to 1927' in Ruth Campbell (ed), *A History of the Melbourne Law School 1857-1973* (1977) 71.

<sup>2</sup> George Winterton, 'Introduction' in Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910, reprinted 1997) liv.

two men, one of whom was William Harrison Moore.<sup>3</sup> Similarly, in 1967, Robert Menzies wrote of how he ‘revered’ the memory of Moore, ‘a great legal scholar’.<sup>4</sup> Moore’s greatest academic achievement was his book, *The Constitution of the Commonwealth of Australia*, first published in 1902. The second edition, published in 1910, was twice the size of the first, and it is still regularly cited in the High Court of Australia.<sup>5</sup> For example, the judges of the High Court turned to it for help in such great recent cases as *New South Wales v Commonwealth*<sup>6</sup> (‘the *Incorporation Case*’) and *Commonwealth v Tasmania*<sup>7</sup> (‘the *Tasmanian Dams Case*’), to name just two of many.

I am honoured to have been appointed to a chair bearing the name of such a distinguished scholar. I hope that I can occupy it with even a fraction of the success achieved by the previous incumbent, another former Dean, Professor Sandford Clark.

## II INTRODUCTION

To us, the Nike advertising slogan ‘Just Do It’ sends a tough-minded but positive message. It urges us to realise our potential by translating thought into action, words into deeds. No excuses, just get on with being what you can be, and you will be the better for it.

To the workers making Nike products in China, Indonesia and Vietnam, the slogan has a very different meaning. On a speaking tour in the United States of America, an Indonesian woman who had worked in a Nike shoe factory in Indonesia was shown another Nike advertisement, which said ‘Go ahead, demand a raise — you have everything to gain and nothing to lose’. She replied:

They would never say that on their ads in Indonesia. There, they just put the name, Nike, and the picture of the sports star. There is no text in the Indonesian ads. When we worked in the factory, we thought ‘Just do it!’ meant: ‘Work harder and don’t question authority’.<sup>8</sup>

On 17 October 1996, a CBS television documentary in the USA reported that workers in Nike factories in Vietnam earn an average of 20 US cents per hour,

<sup>3</sup> The speech is reproduced as ‘Two Portraits’ in Owen Dixon, *Jesting Pilate* (1965) 188. The other man honoured by Dixon was Thomas Tucker, Professor of Classical Philology at The University of Melbourne. I am grateful to Mr Peter Balmford for drawing Dixon’s address to my attention.

<sup>4</sup> Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 117.

<sup>5</sup> At the time of writing, the most recent direct reference to Moore’s book in the High Court was by Dawson J in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 361. In *Grollo v Palmer* (1995) 184 CLR 348, 393, Gummow J quoted from the judgment of Evatt J in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 117, which in turn referred to Moore’s book. For other references, see Winterton, above n 2, xl, fn 176.

<sup>6</sup> (1990) 169 CLR 482, 511–2 (Deane J).

<sup>7</sup> (1983) 158 CLR 1, 272 (Deane J), 315 (Dawson J).

<sup>8</sup> Cicih Sukaesih quoted in *Campaign for Labor Rights Newsletter*, at <http://www.saigon.com/~nike/clr1.htm> (on 1 October 1997). The Campaign for Labor Rights home page, which relates generally to the issues raised in this speech, is at <http://www.compugraph.com/clr/clrmain.html>.

working long hours each day.<sup>9</sup> The British organisation Christian Aid has calculated that the average labour cost of producing a pair of Nike shoes in China is about 46 pence per pair, approximately one Australian dollar.<sup>10</sup> Even when one adds the cost of materials and transportation, it is obvious that there is considerable profit to be made in selling a pair of Nike shoes made in China at prices of up to A\$200. The US parent company, Nike Inc, reported record revenues and earnings for the quarter to 28 February 1997 — income for the quarter was up 77% to US\$237.1 million, with worldwide futures orders up 34%.<sup>11</sup> Critics of Nike say that it is exploiting its Asian workers to achieve these results. Nike responds that it is bringing them opportunities and wealth that they would not otherwise have. How can we tell which claim is correct?

My aim in this lecture is not to deliver a diatribe against Nike or any other manufacturer, but to address the question of what amounts to ethical conduct in international trade. Is there anything wrong in engaging in practices in another country that would be regarded as unacceptable in Australia? How can we distinguish right from wrong in the context of international trade, which often crosses cultural boundaries as well as national ones? Our culture condemns the use of child labour, slavery and bribery, the payment of low wages and the degradation of the natural environment, but other cultures do not, or not to the same extent that we do. Are we right to condemn and avoid these practices when they occur in other countries, or are we engaged in cultural colonialism if we do so, judging the conduct of others by standards that they themselves would reject?

The answer is not quite as simple as it might seem. To insist that Australian manufacturers and traders must act in the same way abroad as they would at home is to deprive developing countries of their few comparative advantages in global terms. Developing countries need foreign capital and technology to improve the living conditions of their people, and their best chance of attracting them is usually by offering cheap labour and a willingness to exploit their environmental resources. If we insist on protecting child workers and rainforests in other countries, are we in fact depriving poor countries of the benefits of our wealth because of a sanctimonious belief that our vision of a just society is better than theirs? The developed countries have despoiled their own environment (and, in the case of former colonial powers, several other environments too) to form the basis of their own wealth. Do they have any moral right to instruct developing countries to refrain from doing the same, 'for the sake of the planet'?

<sup>9</sup> CBS News, '48 Hours', at <http://www.saigon.com/~nike/48hrfmt.htm> (on 1 October 1997). The official Antara news agency reported on 23 April 1997 that Indonesian Nike workers have won a pay rise after staging a mass strike and protest: Reuters, reported in NewsPage's 'Company Tracking: Nike' page at <http://www.newspage.com/NEWSPAGE/cgi-bin/walk.cgi/NEWSPAGE/info/d20/d15/d40> (on 24 April 1997; no longer available).

<sup>10</sup> Bethan Brookes and Peter Madden, 'The Globe-trotting Sports Shoe: Transfer Fees: The Cost of a Sports Shoe' at <http://www.saigon.com/~nike/christian-aid.htm#transfer> (on 8 September 1995).

<sup>11</sup> PR Newswire service, reported in NewsPage's 'Company Tracking: Nike' page at <http://www.newspage.com/NEWSPAGE/cgi-bin/walk.cgi/NEWSPAGE/info/d20/d15/d40> (on 21 March 1997; no longer available).

I shall try to address issues such as these under two main headings, which correspond roughly to the questions, 'What?' and 'How?'

The 'What?' question is the central one. If there is an obligation to trade ethically, what is its content? What can we permit and what must we refuse when dealing with other countries and other cultures? Are there any fundamental moral principles that are acceptable to everyone, everywhere, or is this just the liberal El Dorado, believed in, sought after, but never found?

The 'How?' question is more prosaic. If there are any ethical principles that can guide conduct across cultural and national boundaries, how are we to go about putting them into effect? How can or should we attempt to control what happens in other countries? If 90% of carpets exported from Pakistan are made by children between the ages of 4 and 14,<sup>12</sup> and if we are confident that this is wrong (not merely wrong by Australian standards), can we do no more than simply refuse to buy Pakistani carpets? Is Nike right to say that it cannot control the abuses inflicted on Asian workers by its sub-contractors?

In addressing these questions, I shall assume that corporations do have moral obligations, as well as their obligations to obey the law and to maximise profits for the benefit of their shareholders. In one sense, that assumption is central to my theme, because most of the entities engaged in international trade are corporations. In another sense, it is merely peripheral, because the debate about the moral status of corporations is principally concerned with the nature of corporations, rather than the ethics of international business. There is a large body of literature about corporate ethics,<sup>13</sup> to which I can add little. Although corporations are plainly not moral persons in the same way that individuals are, very few people would now take the view that they are not moral agents at all.<sup>14</sup> For present purposes, the assumption must suffice, because time does not permit me to examine it further.

<sup>12</sup> Jonathan Silvers, 'Child Labour in Pakistan' (1996) 277(2) *The Atlantic Monthly* 79, 80 (also available at <http://www.theatlantic.com/atlantic/issues/96feb/pakistan/pakistan.htm> (on 8 September 1997)), citing a UNICEF estimate.

<sup>13</sup> See, eg, Thomas Donaldson and Patricia Werhane (eds), *Ethical Issues in Business: A Philosophical Approach* (3<sup>rd</sup> ed, 1988) pt II 'Morality and Corporations'. A conveniently brief critique of the various positions can be found in Norman Barry, *The Morality of Business Enterprise* (1991) ch 2 'The Corporation'. A well known Australian text is C Coady and Charles Sampford (eds), *Business, Ethics and the Law* (1993).

<sup>14</sup> Perhaps the best known proponent of the negative view is Milton Friedman, who published a notorious article entitled 'The Social Responsibility of Business is to Increase its Profits' in the *New York Times Magazine* (13 September 1970). It is reproduced (among several other places) in Tom Beauchamp and Norman Bowie (eds), *Ethical Theory and Business* (5<sup>th</sup> ed, 1977) 56. Friedman had earlier expressed the same view in his book *Capitalism and Freedom* (1962) — even there he described the view that corporations had no social responsibility beyond profit-making as a 'fundamentally subversive doctrine': Milton Friedman, *Capitalism and Freedom* (1962) 133.

### III WHAT PRINCIPLES CAN GUIDE BEHAVIOUR IN INTERNATIONAL TRADE?

It is possible to begin with a few relatively straightforward propositions. If a trading relationship requires an Australian trader<sup>15</sup> to engage in conduct in Australia that would be regarded as unethical here, then the trader cannot excuse that conduct by saying that it is for the purpose of foreign trade. Equally, a trader should not engage in conduct in another country that would be regarded as unethical there, even if it would be tolerated here. More difficult questions arise in relation to conduct in another country that would be regarded as unethical here, but which is regarded as morally acceptable in the country where it is to take place. How should we act in such a case? Should we engage in activities abroad that would be condemned at home?

To put our central question another way: how should we behave towards people who think differently from us, who believe in different values, who have a different vision about what is good in life and just in a society? Let us consider an extreme example in the hope that we will find it to be a simple one. Imagine the prospect of establishing a manufacturing plant in a country that views slavery as neither an absolute evil nor even a necessary evil, but as a normal, acceptable practice. Labour in such a country would come exceedingly cheaply but we would (I hope) have qualms about using it. If we refuse to use slave labour because we believe our views about slavery to be right and theirs wrong, do we not thereby presume that our moral judgments are universally applicable in all societies and all cultures? We might feel comfortable in doing so in the case of slavery, but can we be so confident about other moral judgments that we make? Should we not uneasily remind ourselves that it is not so very long since our own culture regarded slavery as a normal, acceptable practice? In past centuries, our belief in the superiority of our moral judgments over those made in other countries led us to enslave and sell people who believed most profoundly (and from bitter personal experience) that slavery was wrong.

Stricken now by doubt, can we permit ourselves to use slave labour in a foreign country, on the ground that the moral judgments of that country's culture about its own people must be respected? Although we do (now) generally think it right to respect the ways of other cultures, there would be something hollow and self-serving about an easy acceptance of a practice that we find appallingly reprehensible but appealingly profitable. Worse, complete ethical relativism of this kind is dangerously corrosive. If we find ourselves unable to pass judgment on the social practices of other cultures, how confident can we be about the validity of our own?

Backbones stiffened, we turn against foreign slavery again, appealing to some transnational standard that declares slavery to be wrong not just for Australians and through Australian eyes, but for all people everywhere, for all time. This

<sup>15</sup> I will use the term 'trader' generically, to describe all those engaged in international trade, by whatever means, whether by direct import and export of goods or services, licensing of intellectual property, joint ventures, or in any other manner.

sounds much better: it avoids the twin evils of cultural colonialism and ethical relativism, allowing us to pass judgment on the social practices of the slave-owning country by reference to a norm that is not specific to our own culture or, indeed, to any one culture. Where are we to find such a norm, though? Is it sufficient that the norm is endorsed by a majority of the world's countries (say, in an international human rights convention), or must we go further and ask ourselves whether, even if generally accepted, the norm is in some sense right? Again, we should remind ourselves uneasily that not so long ago (and perhaps even still) a majority of the world's cultures found nothing morally reprehensible in the social subjection of women. How are we to distinguish transnational standards that are true and right from those that are merely widely held?

These questions mirror at a global level the moral and political issues faced by liberal societies at a domestic level. A theocratic society can choose between competing values by referring to some divinely given standard, believed to be absolutely true. A totalitarian society can choose between competing values by reference to fundamental principles of another kind — race, blood and soil, or historical inevitability, or the dictatorship of the proletariat, and so on. A liberal society, on the other hand, is committed to trying to accommodate competing values without choosing between them on the basis of their content. The fundamental principle on which liberal societies are based is that people must have the liberty to pursue their own concept of the good, and that that liberty should only be fettered to the extent that it is necessary to do so in order to guarantee the equivalent liberty of others. Belief in this principle of neutrality often forces liberals to face uncomfortable questions of the kind we have just encountered on an international plane. If values cannot be right or wrong, but are merely different from one another, why should the fundamental principle of liberty have special status, given that it, too, is a belief that not all people share? Is there no way of judging some societies or social practices to be absolutely unacceptable, or is liberal society forced into an uneasy relativism in which the equal liberty of the anti-liberal and the fascist must be grimly acknowledged and accommodated?

With some notable exceptions,<sup>16</sup> liberal theorists have long tried to box their way out of this corner by looking for a few uncontroversial principles that all people in a society either do or should accept — a moral bedrock like that of the theocrat and the totalitarian, but unlike it in being compatible with the pursuit of individually defined values. In previous centuries, the liberal version of that

<sup>16</sup> Isaiah Berlin, for example, squarely faced up to the fact that values are sometimes (or often) incommensurable and incompatible. This led him to his famous distinction between positive and negative liberty, with the latter providing the minimal conditions for the pursuit of the former. See, eg, the following passage from his chapter 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (1969) 169: '[I]t seems to me that the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized is demonstrably false. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each another, then the possibility of conflict — and of tragedy — can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition. This gives its value to freedom ... as an end in itself, and not as a temporary need, arising out of our confused notions and irrational and disordered lives, a predicament which a panacea could one day put right.'

moral bedrock has been founded on appeals to 'self-evident truth'<sup>17</sup> and abstract 'reason', but such ideas are no longer fashionable. More recent versions of the attempt are based on versions of the social contract model, such as John Rawls' book, *A Theory of Justice*,<sup>18</sup> or on the idea that there are 'shared social meanings', a 'common core' of values, both within and across cultures.<sup>19</sup>

However partial the success of these liberal enterprises, we can be fairly certain that they, or theories like them, are our best hope of finding a defensible basis for ethical conduct at an international level. Although liberalism is far from being universally accepted in all cultures of the world (it is not even universally accepted in liberal-democratic societies), liberal theory may nevertheless provide the best means of finding moral principles of international behaviour that are not compromised by their ethnocentric nature. Value pluralism is so profound on a global scale that there is no prospect whatever of international agreement on universal principles that would enable judgments to be made between the competing value systems of whole cultures in the way that non-liberal societies choose between competing values of individuals. For better or worse, liberal theorists are the most experienced at grappling with the problems posed by pluralism. Projecting their solutions onto an international plane should help us to find principles of ethical conduct in international trade.

So, how have liberal theorists fared in the search for the elusive transnational, transcultural principles of conduct? Not too well, unfortunately. Those principles that have been suggested are either so abstract and formal as to be devoid of real effect in the sometimes violent and squalid world of international trade, or they are so full of content that they are in effect moral imperialism in the guise of transcultural neutrality.

For example, in the Oxford Amnesty Lectures of 1993,<sup>20</sup> John Rawls used an adapted version of the method that he employed in *A Theory of Justice* to try to identify the principles of international justice that would be chosen by representatives of different 'peoples' (not necessarily the same thing as nation states, it seems) behind a veil of ignorance about the size of their territory, their population, their level of economic development or the extent of their natural resources. Unlike their counterparts in *A Theory of Justice*, who knew nothing of their own 'conception of the good, the particulars of [their] rational plan of life, or even the special features of [their] psychology such as [their] aversion to risk or liability to optimism or pessimism',<sup>21</sup> Rawls' international delegates *are* aware of the culture of the people they represent. Despite the obvious differences between those

<sup>17</sup> See, eg, the American Declaration of Independence 1776, which famously begins with the words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness'.

<sup>18</sup> John Rawls, *A Theory of Justice* (1971).

<sup>19</sup> See, eg, Michael Walzer, *Spheres of Justice* (1983); Sissela Bok, *Common Values* (1995). For a recent attempt to find a 'shared core' on an international plane, see Frances Harbour, 'Basic Moral Values: A Shared Core' (1995) 9 *Ethics and International Affairs* 155.

<sup>20</sup> Stephen Shute and Susan Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (1993).

<sup>21</sup> Rawls, above n 18, 137.

cultures, Rawls concluded that the representatives behind the veil of ignorance would agree on basic principles of international affairs that would serve as the transnational, transcultural bedrock of value that we are seeking.

There are obvious objections to Rawls' use of a method designed for the relatively homogeneous society of classical liberalism in an attempt to find solutions for the heterogeneous collection of 'peoples' of the world. Even behind a veil of ignorance about the conditions of his or her people, the delegate of a 'people' opposed to the political culture of liberalism would probably refuse to participate in the whole venture of selecting international principles by these classically liberal means. Besides, even if Rawls or another theorist were to be successful in finding an international morality of and for 'peoples',<sup>22</sup> that morality would not be concerned directly with the conduct of individuals dealing with one another across national and cultural boundaries. Moral injunctions against waging aggressive war offer no help to an international trader trying to decide what to do about bribery, slavery or other questionable practices. In short, the principles suggested by Rawls are too abstract and formal for our present purposes.

Other liberal theorists have attempted to find models of international behaviour that focus on the conduct of individuals. For example, in a work concerned with (among other things) the ethical obligations of multinational corporations when operating in developing countries,<sup>23</sup> Thomas Donaldson attempted to identify 'fundamental international rights' that should be respected by 'all international actors, including nation states, individuals and corporations'.<sup>24</sup> Having identified three conditions that must be satisfied before a right can qualify as a 'fundamental international right',<sup>25</sup> Donaldson produced what he called a 'minimal list' of ten such rights. Some of the rights on Donaldson's list, such as the right to freedom of speech and association and the right to political participation,<sup>26</sup> would plainly be unacceptable to societies that do not share liberal-democratic values. Others, such as the right to minimal education, would be regarded as a pious hope rather than a fundamental right in societies that do not share the comfortable affluence of developed countries. Donaldson's supposedly 'minimal' list of fundamental international rights looks rather more like the ground rules of life in a comfortable liberal democracy than a template for international conduct. In

<sup>22</sup> Other examples of the attempt to find an ethical basis for international relations between states include Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (1996); Terry Nardin and David Mapel (eds), *Traditions of International Ethics* (1992); Mary Maxwell, *Morality Among Nations: An Evolutionary View* (1990); J Hare and Carey Joynt, *Ethics and International Affairs* (1982); Gordon Graham, *Ethics and International Relations* (1997) chs 2, 7. Not all of these attempts use a Rawlsian social contract model.

<sup>23</sup> Thomas Donaldson, *The Ethics of International Business* (1989).

<sup>24</sup> *Ibid* 81.

<sup>25</sup> Donaldson's three conditions are: (1) the right must protect something of very great importance; (2) the right must be subject to substantial and recurrent threats; and (3) the obligations or burdens imposed by the right must be affordable in relation to resources, other obligations and fairness in the distribution of burdens: *ibid* 75.

<sup>26</sup> Donaldson's full list is: (1) the right to freedom of physical movement; (2) the right to ownership of property; (3) the right to freedom from torture; (4) the right to a fair trial; (5) the right to non-discriminatory treatment; (6) the right to physical security; (7) the right to freedom of speech and association; (8) the right to minimal education; (9) the right to political participation; (10) the right to subsistence: *ibid* 81.



short, the principles suggested by Donaldson are too detailed to be genuinely transcultural.

It is all too easy to engage in this kind of criticism of the models proposed by Rawls and Donaldson. That is, after all, what academics do (or rather one of the many things that they do) — to engage with the writings of other academics at their own chosen level. A blunter, more confronting response to academic attempts to find principles of international behaviour is to point out that the endeavour is usually conducted by people such as myself, in surroundings such as these, from which it is all too easy to make Panglossian assumptions that all is well with the world or airy generalisations about what business people should do 'out there'. The American writer Judith Shklar was uncompromisingly sharp in her condemnation of the abstraction and legalism of academic theories that allow themselves to become separated from actual political experience and conflict.<sup>27</sup> Shklar urged us to keep our feet on the ground by focusing on injustice rather than justice, on concrete examples of bad conduct rather than abstract models of good conduct. She said we must 'treat injustice with the intellectual respect it deserves',<sup>28</sup> 'putting cruelty first'<sup>29</sup> by looking at conduct from the point of view of those on the receiving end.<sup>30</sup> By doing this, she said, we avoid the possibility that our elegantly neutral models of justice and ethical behaviour will in fact mislead us about our ability to identify potential forms of injustice.

Taking this as her starting point, Judith Shklar was intensely critical of the usual liberal focus on rights, which dominates discussion of justice and ethics. To most liberal theorists, the task of finding ethical principles of conduct requires the identification and protection of the appropriate set of individual rights.<sup>31</sup> In global terms, a focus on rights is ethnocentric in itself, because not all cultures place as much emphasis on the rights of the individual as does ours. More fundamentally, however, Shklar argued that individual rights should be seen as a means to the end of diminishing cruelty and fear, rather than an end in themselves. She wrote:

[W]henever I talk about putting cruelty first, I am confronted by a rhetorical question and answer: 'Why?' 'Because we have rights.' That is, unhappily, a gross over-simplification, possible only, I suspect, among people who have relatively little experience of protracted and uninterrupted fear. To put cruelty first is not the same thing as just objecting to it intensely. When one puts it first one responds, as Montaigne did, to the acknowledgment that one fears nothing more than fear. The fear of fear does not require any further justification, be-

<sup>27</sup> See Bernard Yack, 'Liberalism without Illusions: An Introduction to Judith Shklar's Political Thought' in Bernard Yack (ed), *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N Shklar* (1996) 1, 5–9.

<sup>28</sup> Judith Shklar, *The Faces of Injustice* (1990) 17. Chapter 1 of *The Faces of Injustice*, from which this quotation is taken, is entitled 'Giving Injustice Its Due'. It was also published under that title in (1989) 98 *Yale Law Journal* 1135.

<sup>29</sup> Judith Shklar, *Ordinary Vices* (1984) ch 1 'Putting Cruelty First'.

<sup>30</sup> *Ibid* 15–23, a section entitled 'Thinking About the Victims: Then and Now'.

<sup>31</sup> This is true, for example, of both Rawls and Donaldson, considered above nn 16–26 and accompanying text.

cause it is irreducible. It can be both the beginning and the end of political institutions such as rights.<sup>32</sup>

For this reason, Shklar's liberalism was, in her most famous phrase, 'the liberalism of fear'.<sup>33</sup> For her, the goal of liberal theory was the 'development of defences against the ever changing threat of public cruelty rather than the discovery and application of the definitive understanding of human rights'.<sup>34</sup> A similar view has recently been taken by the Israeli philosopher Avishai Margalit in his book, *The Decent Society*.<sup>35</sup> Margalit agrees with Shklar that 'preventing cruelty is the supreme moral commandment',<sup>36</sup> but he would include humiliation as a variant of cruelty. In Margalit's definition, humiliation is 'the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans or inferior humans'.<sup>37</sup> Humiliation differs from insult in that it reaches within us, giving us a sound reason for considering our self-respect to have been diminished *in our own eyes*.<sup>38</sup> Insults may injure our self-esteem and social honour, but they depend on the attitude of others. Humiliation, on the other hand, involves what Margalit calls 'an existential threat',<sup>39</sup> a lessening of our respect for ourselves because of our treatment at the hands of others.

Margalit, like Shklar, sees human rights not as an end in themselves, but as a means of protecting human dignity by the avoidance of humiliation. It is possible to deny a person's rights without humiliating him or her: conversely, it is possible to humiliate people without denying their rights. For Margalit, as for Shklar, what is most important about a civil society is that its institutions avoid cruelty and humiliation. Guaranteeing rights is an important way of achieving that end, but it is not an end in itself. To put it more bluntly in our present international context: the child labourers in Pakistani carpet factories are more likely to be helped by individual traders determined to avoid the perpetration of cruelty and humiliation than they are by the assurance that they have rights that are being violated by such treatment.

It seems to me that this kind of 'liberalism of fear' is far more likely to produce a meaningful guide to ethical conduct in international trade than the rights-liberalism of theorists such as Rawls and Donaldson or the idea that there are

<sup>32</sup> Shklar, *Ordinary Vices*, above n 29, 237.

<sup>33</sup> *Ibid.*

<sup>34</sup> Yack, above n 27, 3.

<sup>35</sup> Avishai Margalit, *The Decent Society* (1996).

<sup>36</sup> *Ibid* 85.

<sup>37</sup> *Ibid* 121. Margalit carefully distinguishes the treatment of humans *as* non-human from the treatment of humans *as if* they were non-human: *ibid* ch 6 'Being Beastly to Humans', especially 91. Treating humans *as* animals or machines — actually believing them to be indistinguishable from a donkey or a lathe — is a highly unusual pathological condition. Far more common, and the focus of Margalit's concern, is treating humans *as if* they were animals or machines — recognising but ignoring their humanity.

<sup>38</sup> *Ibid* 119–20.

<sup>39</sup> *Ibid* 122. Margalit also considers and rejects the Stoic response that humiliation is in truth impossible because no external source can provide us with a good reason for feeling humiliated: *ibid* ch 2 'Humiliation'.

'core values' shared by widely differing cultures.<sup>40</sup> If there is any feature that is really common to all human cultures and value systems, it seems more likely to be the very concrete fear of cruelty and humiliation than any of the various fundamental human rights that have been suggested, many of which remain the subject of debate across cultures.

The avoidance of cruelty and humiliation may seem to be an extremely minimalist starting point for an ethics of international trade. However, even this essentially negative proposition provides us with a rich array of possibilities for moral judgment. Indeed, as a basic ethical principle, it may ask an uncomfortable amount of us, as we shall soon see.

Let us return to our initial example and ask again whether we should use slave labour when setting up a manufacturing plant in a foreign country. The answer is, of course, that we should not. To do so would be to condone and perpetuate the cruelty visited on the slaves of that country by their owners, and the humiliating loss of self-respect that they suffer as a result of their condition. We cannot let ourselves off the hook by arguing that the institution of slavery in the foreign country might be an attenuated one, free of cruelty and humiliation. With her customary sharpness, Judith Shklar reminds us that such rationalisations

are never checked against actual opinions, least of all those of the most disadvantaged and frightened people ... In the absence of a clear and free account of their feelings, we should assume that the least advantaged members of a society resent their situation, even though — like many a black slave — they smile and sing in a show of contentment.<sup>41</sup>

The value system that regards the enslavement of these people to be morally acceptable will be the value system of their oppressors. However much that value system may be shared by the enslaved themselves, we will know ourselves to be guilty of the rankest hypocrisy if we excuse our conduct on that account. To do nothing to alleviate the position of the enslaved is to be guilty of what Shklar called 'passive injustice', the refusal to prevent acts of wrongdoing when we have the ability to do so.<sup>42</sup>

To refuse to use slave labour in this situation is not to pass judgment on the relative superiority of our value system over the foreign one. It is simply to 'put cruelty first', doing everything in our power to avoid it. Those are compelling, uncomfortable words. As I have said, this ethical principle may require a great deal of us. If we withdraw altogether from our consideration of the foreign

<sup>40</sup> The 'shared social meanings' method seems particularly unlikely to yield any principles that might usefully be used as a guide to international action, where the various value systems are not only profoundly different but positively antagonistic. To take just one example, what common core or 'shared social meaning' can there possibly be between Western feminist and fundamentalist Islamic notions of the appropriate treatment of women? To be fair, Bok does concede that, 'in the 1990s, when ethnic and religious conflicts devastate so many regions, it may seem especially quixotic to speak of values recognizable across cultural, religious, ethnic and other boundaries — even downright offensive to many who stress fundamental value differences between North and South, Asia and the West, men and women, old and young, colonizers and indigenous peoples': Bok, above n 19, 1.

<sup>41</sup> Shklar, *The Faces of Injustice*, above n 28, 115.

<sup>42</sup> *Ibid* 5.

country in question, putting it into the 'too hard basket', we have, in effect, contributed to the injustices visited on the slaves there. We could have done something but we chose to do nothing. Our money might be the best (indeed, the only) means by which the slaves' condition could be ameliorated, given that the government, the laws and the morals of the country are happy to tolerate it. Moral courage requires us to go ahead with our plans to establish an operation in that country, but then to insist on using only free labour. By doing so, we will bring the benefits of our wealth to the country but will do what we can to make slavery unprofitable: the slave owners can sell us only their own labour, not that of their slaves. Even then, we must be vigilant to ensure that our policy is not being subverted or that it does not add to the cruelty inflicted on the slaves of that country in ways that we cannot presently foresee. We must be prepared to tolerate other kinds of behaviour that would be condemned by our system of values — such as greed, cowardice, corruption — if that behaviour will assist us in our goal of reducing the cruelty of slavery (provided, of course, that that behaviour does not itself involve cruelty to others).

This may sound hopelessly optimistic — that international traders should use their economic power and influence with self-restraint and the conscious aim of reducing cruelty and fear wherever they may encounter it, rather like globetrotting superheroes. Let us remember, however, what we have just done in our hypothetical example. We have chosen to invest in a foreign country where labour costs are cheaper than at home (albeit not as cheap as they would be if we chose to use slaves). We can take all the advantages of cheap foreign production, so long as we remain vigilant in our avoidance of cruelty and humiliation.

Let us remember also how much is permitted when we have the avoidance of cruelty and humiliation as our principal ethical guide. We may condone foreign practices that we would regard as immoral *if* they are both morally acceptable where they are done and if they are not cruel or do not have cruelty to others as one of their effects. To do otherwise is to engage in moral imperialism when our own moral purity is questionable.

Another objection that might be voiced is that the idea of cruelty is itself a cultural construct. What we in the soft and luxurious developed world now regard as cruel, others at different stages of development may regard as a necessity of life, tough but not cruel. How can we avoid exporting our own value system in the guise of judgments about what amounts to cruelty? Again, Judith Shklar provides us with the answer — by focusing on those at the receiving end, rather than ourselves. Shklar pointed out the subjective nature of the distinction between misfortune and injustice: what appears to be misfortune from the point of view of those not affected may look like injustice from the point of view of those who are affected.<sup>43</sup> The reverse may be true, too. It is worth reminding ourselves again that what we see as intolerable hardship may be the only com-

<sup>43</sup> See, eg, *ibid* 15: 'It will always be easier to see misfortune rather than injustice in the afflictions of other people. Only the victims occasionally do not share the inclination to do so. If, however, we remember that we are all potential victims, we might also decide to reconsider the matter and take a closer and more searching look at injustice — not only at justice — even though this is an unusual enterprise'.

parative advantage that a developing country has in the global free market. We do no good to the poor in other countries by insisting on treating them as well as we would ourselves. Unless we look on cruelty through the eyes of the victims, we may mistake under-development for oppression just as surely as we can mistake injustice for misfortune. As Shklar put it:

The voices of the victims must be heard first, not only to find out whether officially recognized social expectations have been denied, but also to attend to their interpretations of the situation.<sup>44</sup>

This does not mean, of course, that the victims are always right when they perceive injustice. Plainly, they are not. People complain with seemingly endless vigour of the injustices wrought upon them, even in (perhaps particularly in) the relatively well-ordered societies of the developed world.<sup>45</sup> Nevertheless, we should give priority to the voices of the victims, not because we think them more likely to be correct, but because they are more likely to be harmed if we wrongly adjudge the conduct that affects them as being fair and reasonable. This is a moral preference similar to that of the presumption of innocence in the criminal law. As Margalit points out,<sup>46</sup> when we presume that a person charged with a criminal offence is innocent until proven guilty, we do not do so because we believe that, statistically speaking, most people charged with crimes are in fact innocent. Most probably the reverse is true. The presumption of innocence is designed to ensure that any errors in the court's judgment favour the accused. This preference is usually summed up in the saying, 'It is better to let ten guilty people go free than wrongly to convict one innocent person'. An error leading to the wrongful punishment of an innocent person seems worse to us than an error allowing a guilty person to go free. A similar moral preference should lead us to give priority to victims' perceptions of injustice over any perception of their condition as being the unavoidable product of misfortune. An error that produces cruel and humiliating treatment of someone justifiably complaining of injustice should seem worse to us than an error that produces carefully benign treatment of someone wrongly complaining of injustice.

How would this approach work in cases less straightforward than our example of slave labour? What does it tell us, for example, about the practice of bribing foreign officials? What we in Australia would call bribery may, in other cultures, amount to no more than an entirely appropriate token of respect for a person's position of eminence. That justification is often used by Australians who pay money to foreign officials — that payments of this kind are simply part of local business practice. Such claims should be scrutinised with care. Most cultures regard bribery as unethical conduct, however commonplace it might be in practice. Payments to foreign officials may be regarded as morally unacceptable in that country, even if they are a routine part of business there. Respecting

<sup>44</sup> Ibid 81–2.

<sup>45</sup> For a polemic against the apparently increasing tendency of people in the USA to claim victim status for one reason or another, see Robert Hughes, *Culture of Complaint: The Fraying of America* (1993).

<sup>46</sup> Margalit, above n 35, 183.

differences in cultures does not mean that we must respect only the practices of the most corrupt level of society.<sup>47</sup> Nevertheless, if we are genuinely satisfied that such payments are not only standard business practice but morally acceptable in the country in question, we must still determine whether there are any who feel themselves victimised by the practice. We delude ourselves if we think bribery to be purely economic conduct incapable of leading to fear, cruelty and humiliation. It may be the price of official silence and inaction as foreigners flout laws designed to protect the safety and well-being of the local people. It may help to perpetuate a climate of terror and subjection in the foreign country, if the official also extorts money from local people under threat of violence. It may simply take bread from the mouths of the starving to buy a new Mercedes Benz for the corrupt. If it is any of these things, then we must be active in our opposition to it. Also, as I have tried to point out, we must do more than merely try to imagine the impact the practice might have in the foreign country. It is too easy to make conveniently self-serving assumptions about the line between the acceptable and the unacceptable in a culture with very different attitudes from our own. We must listen for and to the voices of people in the foreign country who view the practice as oppressive.

If, however, we are genuinely satisfied that the practice is both morally acceptable in the foreign country and that it does not have any victims, then we may make the payment. We may yet choose not to do so, of course. We may refuse in all circumstances to pay what we would call a bribe for fear of corrupting ourselves, undermining our belief in the integrity of the moral judgments of our own culture. If so, we should be clear that our refusal stems from a concern for our own moral welfare and not the well-being of anyone in the foreign country.

#### IV WHAT CAN BE DONE TO BEHAVE ETHICALLY?

Those who are accused of exploitation of foreign workers often respond that it is beyond their power to do anything about the problem, because the workers in question are not directly employed by them. For example, when the British organisation Christian Aid asked five sports shoe companies (Adidas, Hi-Tec, Nike, Puma and Reebok) to respond to the questions: 'Do you have a set of rules that producers in developing countries must follow? Do you check up on your factories overseas?', one response (from Adidas) ran as follows:

Today these products are manufactured by a large number of sub-contractors and licensees across the world, which most of the time do not have legal or financial ties with the Adidas Group. The absence of these ties limits the possibilities of intervention within these sub-contracting companies.<sup>48</sup>

<sup>47</sup> Hudson Rogers, Alphonso Ogbuehi and C Kochunny, 'Ethics and Transnational Corporations in Developing Countries: A Social Contract Perspective' in Nejdett Delener (ed), *Ethical Issues in International Marketing* (1995) 11, 20.

<sup>48</sup> Brookes and Madden, above n 10. The same report quotes a Nike manager telling an interviewer in the company paper: 'We don't pay anybody at the factories and we don't set policy within the factories: it is their business to run'.

The same sort of response might be made by, say, an importer of carpets made by child labour in Pakistan: 'I simply buy the product — I have no real knowledge of how it is made, and I couldn't control the process even if I wanted to'.

What are we to make of these responses? Can we reasonably expect traders to engage with what happens in other countries, or are they entitled to regard that as essentially none of their business? If we insist on a boycott of trading practices that do not meet the ethical standards we have just described, are we not merely making things worse? The lives of child labourers in Pakistan might well be made more desperate if no one were to buy the carpets made in the factories where they work.

Let us begin with the sports shoe manufacturers, taking them to be representative of all manufacturers who make their products in foreign countries not by establishing operations there themselves, but by licensing the intellectual property in the manufacturing process to a foreign sub-contractor in return for royalties or a share of the finished product. (I am not suggesting that the conduct of sports shoe manufacturers is typical of all manufacturers who license their intellectual property to foreign producers, but merely that the structure of the licensing arrangements by which their products are made is common for many different types of products.) It seems to me that the response, 'We cannot control what our licensees do', is a paradigm example of Judith Shklar's point about the subjective nature of the distinction between misfortune and injustice. Adidas may take the view that it is unfortunate but unavoidable if foreign workers suffer cruelty and abuse while making Adidas shoes, but one can be fairly sure that the foreign workers themselves will feel that Adidas is ultimately responsible for the conditions in which they work.

Besides, it is simply not true to say that the possibility of intervention is limited. Adidas and the other sports shoe manufacturers may have a licensing arrangement that minimises their ability to control conditions in the foreign countries where their products are made, but nothing forced them to make that choice. There are many different ways to structure contractual arrangements for foreign production, and the choice between them is driven by the ends that the manufacturer wants to achieve.

Ultimately, a manufacturer's decision about how to enter a foreign market involves a balancing of costs, control and risk.<sup>49</sup> At one end of the spectrum of trading arrangements, the manufacturer may simply make the product in its home country and sell it to a distributor in the target country. By doing this, the manufacturer faces very little commercial risk of failure, as it has already sold its product to the foreign distributor, but it may have little control over how the product is marketed by the distributor in the foreign country, and it will not share in the profits made by the foreign distributor in the retail market. In effect, this strategy is little more than an extension of the manufacturer's domestic process of production and distribution, with added transport costs. At the other end of the spectrum is a manufacturer that makes and sells its product in the foreign country

<sup>49</sup> Colin Gilligan and Martin Hird, *International Marketing: Strategy and Management* (1986) 99, ch 4 'Market Entry Strategies'.

itself. This strategy maximises the manufacturer's level of control over the manner in which the product is made and marketed in that country, and gives the manufacturer a share or all of the profit in the foreign retail market, depending on the domestic distribution structure that it sets up there. However, this strategy also maximises the commercial risk that the manufacturer faces if the product fails in the foreign market, because it has invested its own money and effort there.

Production under licence lies somewhere between these two extremes, offering some of the advantages and disadvantages of each. A manufacturer may license foreign production either for sale in the foreign country in question or for export to other countries, including the manufacturer's own. The manufacture of Guinness in Australia for consumption here is an example of the former; the manufacture of Nike shoes in Vietnam for sale in Australia and the USA is an example of the latter. If the product is intended for consumption in the country of production itself, the licensee usually pays a royalty for use of the intellectual property in the manufacturing process and keeps to itself the profits from sales in its domestic market. The price of the product in that market then reflects production costs in the country in question, rather than production costs in the licensor's country plus transportation costs. If, however, the product is intended for consumption in countries other than the country of production, the licensor usually receives the product itself, rather than (but sometimes as well as) a royalty.

If the original manufacturer licenses foreign production in this way, it bears none of the costs and risks of production, but it shares in the profits that arise from cheap foreign production. It may, however, forego control over the production process itself, other than quality control over the end product.

The factors that shape a manufacturer's choice of route into a foreign market include the following:

- The manufacturer's objectives and its expectations of the volume of business to be generated in the foreign market;
- The size of the manufacturer and its financial resources;
- The manufacturer's patterns of involvement in other foreign markets;
- The managerial culture and international marketing expertise of the manufacturer;
- The nature and degree of competition within the foreign market;
- The nature of the product and whether it has any distinct competitive advantages in the foreign market;
- The political infrastructure in the country of the foreign market.<sup>50</sup>

Other factors of importance include the taxation of profits in the foreign country and in the manufacturer's own country, and the ease with which profits are repatriated from the foreign country to the manufacturer's own country.

These factors interact with one another in a complex fashion to shape the contractual structure that the manufacturer uses to trade its product into a foreign

<sup>50</sup> Ibid 99–100. See also Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Materials* (1996) 303–5.



market. It is simply disingenuous for any manufacturer to say that it has no control over the conditions under which its product is made or sold in a foreign country. It may be true in fact that the manufacturer has no control, but that will only be so if the manufacturer has chosen to make it so in order to maximise some other benefit. The converse is true, too: control of the process may reduce some benefits (such as profitability) while increasing others. The CBS documentary about Nike to which I referred previously also considered the practice of Coca-Cola in Vietnam, which owns and operates its own factories rather than using sub-contracted licensees. When asked why Coca-Cola does not use sub-contractors in Vietnam, its representative replied:

I think you want to control your own destiny. Instead of cheap wages, we would rather look at productivity.<sup>51</sup>

The sports shoe manufacturers (and many other manufacturers of many other products) have chosen an operating structure that limits their ability to control the conditions of manufacture of their products in foreign countries. They have attempted to redress the balance by adopting worldwide codes of conduct for production standards, such as the Reebok Human Rights Production Standards of 1992. Nike also has a code of conduct, as does Puma. Although these efforts are laudable, their success is inevitably limited because enforcement is made difficult by the very structure chosen in the first place.

When producers have a financial interest in exercising control over the operations of a licensee, they certainly do not find themselves to be as powerless as the shoe companies claim to be in relation to the conditions of employment in the foreign factories making their products. The transfer of technology to developing countries provides an instructive example. Successful exploitation of a technological process requires more than just a licence to use the intellectual property in which that process is embodied.<sup>52</sup> It also requires the investment of capital for making, buying or leasing machinery, skilled labour to operate the process, raw materials and the transport infrastructure to convey them to the place where they are needed, and the ability to market the products of the technological process successfully. Because those resources are often not available in developing countries, a licence to exploit intellectual property rights there can be of little use in itself. For that reason, the transfer of technology from developed countries to developing countries usually takes the form of an integrated sequence of commercial transactions involving all the steps necessary to get a plant into industrial production.<sup>53</sup> Because the imbalance of bargaining power between the transferor of the technology and the transferee is often extreme in such circumstances, the transferor is often able to impose conditions highly favourable to itself,<sup>54</sup>

<sup>51</sup> CBS News, '48 Hours', above n 9.

<sup>52</sup> See Pyles, Waincymer and Davies, above n 50, 481.

<sup>53</sup> Michael Blakeney, *Legal Aspects of the Transfer of Technology to Developing Countries* (1989) 3.

<sup>54</sup> *Ibid* 35–42. See also ch 4 of the UNCTAD Draft International Code of Conduct on the Transfer of Technology, UNCTAD Document TD/CODE TOT/47 (1985). Although negotiations on the UNCTAD draft code have continued in a desultory fashion for at least 10 years (see generally

allowing it a high degree of control over the manner in which the product is made in the transferee country.<sup>55</sup>

If it chose to do so, a manufacturer could satisfy its ethical obligations by reserving and exercising similar contractual rights to supervise the manner of production under licence. Instead of using its financial muscle to take maximum advantage of conditions in the developing country (as the more predatory technology transfer contracts do), the manufacturer could use its bargaining power to ensure that those conditions do not fall below the minimum levels required of ethical international trade. Perhaps the oddest thing about the Adidas response to Christian Aid's questions was the assertion that the sub-contractors and licensees who make Adidas shoes have no 'legal or financial ties with the Adidas Group'. The licensing contract itself creates a legal and financial tie that can be shaped to create contractual obligations that are reinforced by financial incentives and disincentives. The only thing that is different about deliberately ethical trade is that it includes the avoidance of cruelty, fear and humiliation among the other factors that shape the trading contract, such as control, profit and risk.

What of the importer, who simply buys a finished product made in another country? If it is sufficiently large and powerful, the importer may still be in a position to negotiate about the manner of production of the products it buys. For example, large Australian department stores and catalogue sales organisations often exercise a high degree of control over the design of the products they import, stipulating such basic matters as size, pattern, colour and the materials to be used, rather than merely buying a finished product in the form chosen by the foreign manufacturer. This power could be used to regulate the manner in which the product is produced as well as the form that it takes, making it more profitable for the foreign exporter to avoid cruelty than to practise it.

For individual purchasers without that degree of buying power, the choices are rather simpler. If a product is made in conditions of cruelty, fear and humiliation, the ultimate sanction is to refuse to buy it at all. A boycott should be the *ultimate* sanction, however, when all else fails. A refusal to deal with a foreign manufac-

<http://www.unicc.org/unctad/en/pressref/tebtext4.htm#code>), there seems to be no real prospect of its implementation.

<sup>55</sup> Examples include grant-back provisions, which oblige a licensee of intellectual property to transfer to the licensor any improvements in the technology made by the licensee, without a reciprocal obligation on the part of the licensor to license the improvements back to the licensee; provisions which require the technology acquirer to continue to pay royalties for the use of intellectual property rights after they have expired; tying arrangements, which prohibit the technology acquirer from buying any of its requirements from anyone other than the technology provider, or from using technology developed by a competitor; non-competition provisions, which restrain the technology acquirer from selling its products in competition with those of the technology provider; provisions which prohibit the technology acquirer from conducting its own research and development; provisions which require the technology acquirer to employ skilled personnel nominated by the technology provider, rather than training nationals of its own country; price-fixing provisions, which stipulate the price at which the technology acquirer must sell its products; provisions restricting the countries to which the technology acquirer may export its products; very long or unlimited duration of licensing agreements, so that the licensee may continue to be tied to the licensed technology long after it has been superseded by competitive technology. See Pyles, Waincymer and Davies, above n 50, 482, drawing on the sources cited in above n 54.

turer who uses child labour may be ethically sound, but it is the bluntest of methods of influencing that manufacturer's conduct. Trade boycotts have occasionally proved successful in changing the way things are done in the target country, as the example of South Africa shows. Such success can come very slowly, however, and at the cost of a great deal of pain for the very people whom we desire to protect, the victims of cruelty and humiliation in the target country. In some cases, our best chance of protecting those people will be to engage in trade with their oppressors and to use whatever commercial pressures we can to influence their behaviour. Engagement usually gives a better chance of influence than disengagement. No trader is ever completely powerless, forced to accept what is given to it — that is simply not the nature of business. An importer (or even a coalition of importers) concerned about the conditions of production in the foreign country could appoint a purchasing agent there, rather than buying directly from an exporter or from an Australian sales agent of that exporter, who offer only the product and not information about the manner in which it was made. The purchasing agent could have instructions to investigate conditions and to buy only from approved manufacturers. By directing sales to those manufacturers, the Australian importer could do its small part to make it unprofitable to engage in cruelty and humiliation.

These two examples of international trade — manufacture under licence and importing finished products — are only a very small sample of the huge range of ways in which international trade is done. And that, in its way, is exactly my point: there is a huge range of ways of doing business internationally. Distribution, licensing, agency, franchising, joint ventures, direct import and export — traders can choose whichever suits their purposes best, or can construct the hybrid that suits them best. If the goals they wish to achieve include ethical conduct, they can structure their operations towards achieving that goal along with all of their other goals.

The people who know best how to do that are the traders themselves, advised (at least to some extent) by their lawyers. As I have tried to emphasise in this lecture, the best solutions are those that are devised to avoid concrete examples of injustice rather than those that attempt to state abstract principles of justice. Instead of (or perhaps as well as) legislating principles of ethical conduct from a distance, the commercial ingenuity of business people can provide practical solutions at first hand. While on the subject of commercial ingenuity, it is worth reminding ourselves in closing that moral rectitude can also be profitable, as the example of the international chain of Body Shop stores illustrates.<sup>56</sup> Many international traders have discovered that there are direct financial benefits in structuring their operations to avoid unethical conduct. Consumers in the late 20<sup>th</sup> century often prefer to buy a product that comes with the assurance that it was made, for example, without cruelty to humans or animals, the felling of old-

<sup>56</sup> The Body Shop's image of moral virtue has been called into question recently, largely as a result of a series of articles in *New Consumer* and *Business Ethics* magazines that suggested that the image did not fit the reality. A collection of the articles and the Body Shop's responses, 'The Body Shop Controversy', can be found at <http://www.arq.co.uk/ethicalbusiness/archive/bodyshop/index.htm> (on 8 September 1997).

growth trees and so on, and they are often prepared to pay more for the product if that assurance is credible.

## V SUMMARY

In summary, my arguments are as follows:

- The avoidance of fear, cruelty and humiliation provides a sounder basis for truly cross-cultural principles of ethical conduct in international trade than the abstractions of statements about rights, which should be seen as a means to an end rather than as an end in themselves;
- In determining what amounts to cruelty and humiliation (in drawing the line between injustice and misfortune), we must listen to the voices of the victims, not because we believe them always to be correct but because of a moral preference that errors should work in their favour;
- We must avoid the ‘passive injustice’ of doing nothing when we could do something, which includes entering into trading contracts in such a way that we are then powerless to control what is done in return for our money; and
- The wide range of possible trading arrangements and the commercial ingenuity of those engaged in international trade make ethical conduct according to these principles achievable by those who choose to engage in it, or at least a plausible goal for them to struggle towards.

## VI CONCLUSION

One of the reasons why the Nike slogan ‘Just Do It’ is so effective is that it gives the impression that life can be simple if one has the will to make it that way. Life is, of course, more complicated than advertising makes it seem. Writers such as Judith Shklar and Avishai Margalit make it painfully clear that if we are to ‘put cruelty first’, we must be prepared to accept compromises and to struggle with lesser vices in pursuit of our goal. In the end, though, how can we do otherwise? What profit, what degree of comfort for ourselves, can be worth the infliction of cruelty and humiliation on other people? If we knowingly participate, even by the ‘passive injustice’ of doing nothing when we could do something, then we have lost sight of something profoundly important.

Although the implementation of the message is a good deal more difficult than the uttering of it, the message itself is simple. If your trading relationship leads to cruelty and humiliation — just don’t do it.