Kirby Lecture in International Law 2010

International Law at the Coalface: Three Decades of Learning by Doing

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I. Introduction

Michael Kirby and I go back to a time whereof the memory of man runneth not to the contrary — to be more precise, the early 1960s. He was not exactly a '60s person, or student leader, anything like the rest of us: double-breasted-suited, monastic in his social habits and unbelievably industrious in his work ones, then as now a man of pietas, gravitas and dignitas — all those ancient Roman virtues. But a student leader he was, and one of great distinction, competence and influence, not only on his own Sydney campus but around the country — and, as all his student generation knew and the world now knows, a man of enormous human decency and relentlessly high principle.[1]

Of all Michael Kirby's innumerable contributions to law and policy — which took 35 chapters and 900 pages to summarise in the *festschrift* honouring his retirement from the High Court last year[2] — and of all his multiple incarnations, from Chairman of the Australian Law Reform Commission (where I worked with him in the mid-70s), to appellate judge, to Chairman of the International Commission of Jurists, to world-travelling lecturer and adviser to many intergovernmental organisations, the dimension of his legacy that has touched me most immediately, and which we certainly ought to celebrate on an occasion like this, is his absolutely ingrained internationalism — his total commitment, as he himself has put it, to seeing "the challenges of our time through the world's eye."[3]

That has taken the form not only of an indefatigable determination to import an understanding of international and comparative law into our own domestic lawmaking, but a huge range of contributions of his own to the international

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1 See A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011) 41–75.

2 Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby & His Legacy* (Lawbook Co, 2009).

3 Michael Kirby, *Through the World's Eye* (Federation Press, 2000) xxv.

development and application of good policy, and above all fundamental human rights principles, in areas ranging from health to drugs and crime to biotechnology to the environment to education. I was particularly moved personally — for reasons that I will come back in a moment — by the extraordinary contribution he made for several years in the 1990s as Special Representative of the UN Secretary General for Human Rights in Cambodia, often under threat, always under criticism, but unfailingly rigorous in his investigation and analysis, unfailingly polite, and always unfailingly human.[4] This article honours a truly great Antipodean, and a truly great man, and may his contributions to making the world a better place continue, as I am sure they will, for many years more.

In detailing my own contributions to international law and practice, such as they have been, I must at the outset make a confession. Despite the best efforts of Dr Hans Leyser more than 40 years ago at Melbourne Law School to initiate me into its mysteries, and all the meddling with various bits of international law and practice that I have engaged in over many of the decades since, I have to admit that my grasp of even the basics of the discipline is still lamentably shallow. I do stand in awe of the knowledge of almost everything under the sun that seems to be the stock in trade of the good international lawyer. And I stand even more in awe of the sheer, relentless productivity of the textbook writers among you, whose output seems better measured in kilograms, and in some cases tonnes, than mere pages. But I am afraid that whatever I have learned about international law has come far less from reading than from doing. If you are minded to ask me, say, what do I think about the current scope of *ius cogens,* and whether its reach is coterminous with obligations *erga omnes,* you will find me, I fear, rather quickly reduced to the vapours.

What I can claim is that my modest understanding of its doctrinal underpinnings and detailed case law has not stopped me having strong views about the role of international law in the scheme of things. I have been consumed, just about as long as I have been involved in public policy, with the notion of the centrality, and primacy, of a rule-based international order — above all in the area of peace and security.[5]

Part of my passion is straightforwardly based on national interest, given the relative modesty, in global terms, of our political, economic and military power. Even when we seek, as we regularly have done throughout our history, to leverage up our influence and self-protection by shamelessly harnessing, and occasionally subordinating, ourselves to the interests of some great and powerful notional protector, I cannot believe other than that our interests, like just about everybody

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4 See Hilary Charlesworth, 'Swimming to Cambodia: Justice and ritual in human rights after conflict' (2010) 29 *Australian Year Book of International Law* 1.

5 See, eg, Gareth Evans, 'When is it Right to Fight?' (2004) 46(3) *Survival: Global Politics and Strategy* 59; Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006-2007) 24 *Wisconsin International Law Journal* 703; Gareth Evans, 'A Rule-Based International Order: Illusory of Achievable?' (Speech delivered at the Graduate Center of City University of New York, New York, 19 September 2006) <http://www.crisisgroup.org/en/publication-type/speeches/2006/a-rule-based-international-order-illusory-or-achievable.aspx>.

else's, are best served by a rule-based rather than realpolitik-based international order.

The other main underpinning for that passion is a straightforward distaste — which remains unsuppressed despite years now of tramping diplomatic corridors and sitting around international conference tables — for the sheer moral indecency of conducting international life either without principled standards, or with double standards. For most international players, I am afraid, familiarity tends to breed indifference, rather than contempt, for these things. But even the rigorous insensitivity training I received in 21 years of Australian party and parliamentary politics does not seem to have overcome it in me.

All of which has made for considerable frustration as I have hacked away at the coalface, trying to make that vision of a rule-based international order actually mean something in practice. Apart from institutional reform of the UN itself, the most Quixotic enterprise of all, and an unequal struggle that I have, after more than twenty years of sustained effort just about abandoned, my own efforts have tended to focus on four inter-related but distinct areas — responding effectively to genocide and other crimes against humanity, reconciling the demands of peace and justice in conflict prevention and resolution, clarifying the rules and principles governing the use of military force, and achieving the elimination of weapons of mass destruction. Let me say a little about each of them.

II. Genocide and Other Crimes Against Humanity

My first real exposure at a practical working level to the horrors of genocide and crimes against humanity came with my involvement in Cambodia. I had developed a strong affection for the country and its people from my backpacking student days in the 1960s, had watched with horror the genocidal reign of Pol Pot — in which young people I knew, and scores of thousands more like them, were murdered — and suffered real distress from the ongoing civil war that followed it. I was determined in government to try to do something to bring that conflict to an end once and for all, a chance that came with the peace process we initiated in 1989 that came to fruition in the Paris Peace Accords in 1991.[6]

That experience taught me many things (including obvious ones, like never expecting any of the Permanent Five members of the Security Council to ever acknowledge that anyone but themselves could possibly have made a major contribution to achieving a UN-focused peace settlement). In particular it drove home to me the absolute necessity, on occasion, to negotiate directly across the table with those who bear or share responsibility for great crimes (in my case the Khmer Rouge leader Khieu Samphan) if that is what it takes to get a result: the whole point of diplomacy is to find accommodation not with those who are your friends but with those who manifestly are not. As regards the actual diplomatic strategy of this negotiation, I should perhaps add that what brought peace to Cambodia was an approach that did not yield concessions to the Khmer Rouge but rather isolated it: by proposing as we did that the UN play an unprecedentedly

6 *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict*, 31 ILM 183 (signed and entered into force 23 October 1991).

central role in the transitional administration of the country, we gave China a face-saving way of withdrawing its support for the Khmer Rouge, the continuation of which in the past had stymied all previous peace efforts.

There is a larger question thrown up by the Cambodian case, which came to a boil in public debate during the 1990s as a result of a series of catastrophes in the Balkans and Africa — especially the horror of Rwanda in 1994 — and which continues to haunt us to this day with events in the Congo, Darfur, Sri Lanka (and maybe will again right now in Kyrgyzstan). What on earth can we can do as an international community to ensure that we never again have to look back, after yet another mass atrocity crime has been perpetrated behind sovereign state walls, asking ourselves — with a mixture of anger, incomprehension and shame — how we could possibly have let it happen again? How do we overcome the lingering legacy of that reading of Articles 2(4) and 2(7) of the UN Charter which says that, despite all the international human rights instruments that have been developed since the Second World War, these crimes are internal matters, no-one else's business?[7]

The good news is that the international community is much closer to consensus now than it ever has been on the proper conceptual response to the questions in issue. The divisive discourse of the 1990s about "humanitarian intervention" has almost completely given way to a wholly new conceptualisation. Although most of the international law texts which address this issue at all still seem to be preoccupied with the earlier formulation, the issue — since the 2005 World Summit, in effect the UN General Assembly sitting at head of state and government level, unanimously adopted the new conceptualization — is no longer about anyone's "right to intervene" but rather everyone's "responsibility to protect".[8]

What that means is clear: while the primary responsibility for protecting its citizens from man-made catastrophe certainly remains with each sovereign state itself, and while there is a secondary responsibility for other states to assist them to so act, in the event of a state failing to discharge that responsibility, as a result of either incapacity or ill-will, then the responsibility shifts to the wider international community, which is obliged to act, as persuasively or as coercively as ultimately proves necessary, to halt or avert the harm in question.[9]

What we have seen over the last six years is the emergence, with astonishing speed, of a new international norm of really quite fundamental ethical importance, that may ultimately become accepted as a new rule of customary international law — though I certainly would not claim that state practice brings it near that point yet. I was present at the creation of the responsibility to protect concept in my capacity as Co-Chair of the Canadian-government sponsored International Commission on

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7 Charter of the United Nations, arts 2(4) and 2(7).

8 *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/1 (24 October 2005) 30 [138-139].

9 See generally *Implementing the responsibility to protect: Report of the Secretary-General*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009).

Intervention and State Sovereignty, which produced its report of that name in 2001.[10] I also had the good fortune to be a member of the Secretary-General's High Level Panel on Threats, Challenges and Change, which generated the key peace and security recommendations for the 2005 World Summit,[11] and was able in that role to ensure that the merits of they were fully understood and embraced. And I was actively involved in a good deal of the lobbying which led to that concept (though very little else) being adopted as one of the unanimous resolutions of that Summit — though ultimately the credit for squeezing it through rests with the Secretary General himself, one or two activist leaders (notably the Canadian Prime Minister), and the sub-Saharan Africans who made it clear to their developing country friends that, when it came to mass atrocity crimes, they saw indifference as a greater sin than intervention.

I can testify from participation in quite a few of these panels and commissions and lobbying exercises as to what actually works best in practice: tenacity and a thick skin are at least as important as good arguments, and when it comes to persuasive arguments it helps a great deal if one can rest their case not just on high principles but on some national interest ground. As the Depression-era NSW Premier Jack Lang once famously mentored a young Paul Keating, "In any horse-race, son, always back the one called Self-Interest. He'll be the only one trying." Or as Secretary of State Jim Baker once rather memorably put it to me in another context I do not think I now want to remember, using his Texan drawl to full effect: "Sometimes, Gareth, you just have to rise above principle." The self-interest argument that I found had most impact in the present context was that states that cannot or will not stop internal atrocity crimes are just the kind of states that cannot or will not stop terrorism, weapons proliferation, drug and people trafficking, the spread of health pandemics and other global risks that many, many countries fear will affect them.

I am proud of what has been achieved so far with the responsibility to protect norm — and remain cheerfully unbowed by a description of my efforts, in the current issue of the *New Left Review,* as a "facile re-branding of interventionist doctrine",[12] designed, along with my other efforts to change the world over the last decade, to seek "escape from the doldrums of opposition".[13] I hope and expect the norm will prove enduring. The best recent evidence that it will be is I think the outcome of the UN General Assembly debate on the subject last year, when despite the sustained effort of a number of spoilers over many months to create a climate for tearing apart the 2005 consensus, and a number of states expressing caution about applying the sharper end of the new doctrine, there ended up being only four

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10 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, 2001).

11 See *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges, and Change*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004).

12 Tom Hazeldine, 'The North Atlantic Counsel: Complicity of the International Crisis Group' (May-June 2010) 63 *New Left Review* 17, 26.

13 Ibid.

states opposing outright the whole responsibility to protect principle: Nicaragua, Venezuala, Cuba and Sudan.[14] An instructive combination.

The task ahead is to further consolidate the momentum which has been achieved, and ensure that words really will now become deeds — that the new norm will be effectively implemented when and where it needs to be. A number of very specific challenges remain to be met, both conceptual and practical. There is a need to untangle any remaining problems of definition so as to ensure to the extent possible that there is agreement about what are specifically 'responsibility to protect' situations, and what may be better thought of as more familiar conflict or human rights violation cases: a regularly published watchlist, perhaps prepared by the Global Centre on the Responsibility to Protect in New York, whose Advisory Board I co-chair, would be very helpful in this respect. There is a need to ensure that there are early warning and response focal points established within all the key governments and intergovernmental organizations. There is a need to have in place civilian capability able to be utilized, as occasion arises, for diplomatic mediation, civilian policing and other critical administrative support. There is a need to have, at least in a standby capacity, rapid response military capability, to ensure available support in the most extreme cases which cannot be otherwise addressed. And there is a need to consolidate informal mechanisms for quickly mobilizing and sustaining political support when ugly situations arise, particularly a global NGO coordinating mechanism and a governmental group of "friends of the responsibility to protect", frameworks for both of which now exist, but need further development. These are the kinds of issues on which I am now working, and I hope that serious, constructive work on them will be done, as it has been by a number of you in recent years, in the academic community.[15]

III. Justice, Reconciliation and Peace

One issue that not even Michael Kirby could fully resolve in Cambodia, and which continues to preoccupy us in many situations around the world (including now in the UK, with the release last week of the Saville Inquiry report on Bloody Sunday in Northern Ireland),[16] is that of transitional justice: finding ways in post-conflict societies of satisfying the hunger for punishing the guilty, while at the same time not undermining the prospects for community reconciliation. The short answer for those who would seek a single model — based on South Africa's Truth and Reconciliation Commission or anything else — is that there isn't one: every situation is different, and the only safe guide for policy makers is to listen very carefully indeed to what people on the ground are telling them about how they want

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14 See *Report on the General Assembly Plenary Debate on the Responsibility to Protect* (15 September 2009) International Coalition for the Responsibility to Protect <http://responsibilitytoprotect.org/ICRtoPGAdebate.pdf>.

15 See, eg, Montreal Institute for Genocide and Human Rights Studies, *Mobilizing the Will to Intervene: Leadership & Action to Prevent Mass Atrocities* (2009); Andrés Serbin and Gilberto M A Rodrigues, 'The Relevance of the Responsibility to Protect for Latin America and the Caribbean Region: Prevention and the Role of Civil Society' (2011) 3 *Global Responsibility to Protect* 266.

16 Bloody Sunday Tribunal of Inquiry, *Report of the Bloody Sunday Inquiry* (2010).

the balance struck; what kind of institutions, local or international or some hybrid of the two, they want engaged; and the extent to which they do genuinely want to put the past behind them and just move on.

I have been a very strong supporter of the creation of the International Criminal Court,[17] as a crucial new ingredient in overriding the culture of impunity that has sustained so many deadly conflicts and the perpetration of so many terrible atrocities in the past, and when I was at the International Crisis Group spent hours discussing with the Chief Prosecutor and his team the multiple issues and dilemmas as to whether and when to prosecute. The dilemmas are not quite so acute after a conflict is concluded, when punishing at least the ringleaders can both satisfy the demands of justice and hopefully serve as an important deterrent to others elsewhere, with the only downside being the possibly negative impact on local reconciliation. But when a conflict is still ongoing, the dilemma of whether to opt for peace or justice — and the two sometimes *are* irreconcilable, however much my colleagues in the global human rights community like to assert otherwise — can be a very tricky one indeed.[18] This troubled me immensely trying to formulate policy as head of the International Crisis Group, especially in the cases of Uganda, with the Lord's Resistance Army Leaders, and Sudan, with President Bashir's role in Darfur.

My own view is that some form of amnesty can be justified in exceptional circumstances, with a controversial but I think good example being Nigeria's conditional protection of Charles Taylor from the jurisdiction of the Sierra Leone special court to get him out of Liberia in 2003 and avert a final battle for Monrovia which would certainly have cost many lives. But it is always a question of case by case judgment, and the question boils down to whose judgment it should be. In the case of the International Criminal Court, I have long thought that it is unfair and inappropriate to put the burden on the shoulders of the Prosecutor and the Court itself to exercise any necessary discretion here: far better for the prosecutor to focus single-mindedly on the prosecution process, letting the UN Security Council make any amnesty-type decision that the overall situation might justify, as it could under a broad reading of its deferral power under Article 16 of the Rome Treaty.[19]

IV. The Use of Force

The question of when it is right to fight — to use coercive military force against a misbehaving sovereign state — is one that has constantly preoccupied international policymakers. It has certainly troubled me over the last two decades, as Foreign

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17 See generally, 'Australian Practice in International Law 1994: Establishment of an International Criminal Court – Australian Support' (1995) 16 *Australian Year Book of International Law* 518.

18 See, eg, Linda M Keller, 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3(1) *Hague Justice Journal* 12; *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN SCOR, 59th sess, 5052nd mtg, UN Doc S/2004/616 (23 August 2004) 8 [21].

19 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 16.

Minister responding to Iraq's invasion of Kuwait in 1991, as President of the International Crisis Group wrestling with a multitude of much harder conflict cases, as Co-Chair of the International Commission on Nuclear Non-Proliferation and Disarmament trying to think through the best way of dealing with would-be proliferators, and as one of the architects of the responsibility to protect grappling with the need to keep open the option of military action for extreme cases like Rwanda but to know when it would be defensible and productive to use it, and certainly not to see military force as the only available response. While I yield to no- one in my abiding aversion of the horror and misery and destructiveness of war, I have long argued that it is critical to recognise — hard as this may be for some to instinctively accept — that if there is one thing as bad as using military force when we should not, it is *not* using military force when we *should.* The trick is to know where and when to draw that line.

One of the main pieces of unfinished business both in relation to mass atrocity crime issues, and peace and security issues more generally, has been the unwillingness of the World Summit in 2005 or the Security Council since to accept the parallel recommendations of the Canadian ICISS commission, the High Level Panel and the Secretary-General that a set of guidelines be adopted by the Security Council as to when it is, and is not, appropriate for military force to be used.[20] One of my remaining missions in international life is to try to achieve some further progress on this front.

The context here is, to repeat, not just the narrow one of coercive intervention in the exercise of the responsibility to protect in extreme cases, but any exercise of military power under Ch VII of the UN Charter — and indeed the evaluation of the legitimacy of any purported exercise of the self-defence power under Article 51 of the Charter.

The proposed principles, five "criteria of legitimacy", are straightforward, and have a long pedigree in Christian "just war" theory, while at the same time not offending any other established mainstream religious or cultural precepts governing the use of force. In short, they are the seriousness of the harm being threatened; the primary intent or purpose of the proposed military action (whether it is to halt or avert that harm or for something else); the issue of last resort (whether there are reasonably available peaceful alternatives); the proportionality of the response; and the balance of consequences — whether more good than harm would be done.[21]

I have never thought it a realistic aspiration to imagine these principles being codified any time soon into formal international law. There may be now a highly developed body of international humanitarian law governing how force is to be

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20 See International Commission on Intervention and State Sovereignty, above n 10, 32-8; *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges, and Change*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 53-8; *In Larger Freedom: Towards Development, Security and Human Rights For All: Report of the Secretary-General*, UN GAOR, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) 33 [126].

21 See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution, 2008) 43–5.

used, particularly as it affects civilians, in the context of a conflict once started (ius *in bello*), even if this law is, as often as not, honoured more in the breach than the observance. But so far as *ius ad bellum* is concerned, once one gets beyond the bare bones of Article 51 and Chapter VII, there is a lamentable shortfall of agreed principles about the conditions under which resort to war is justified in the first place, and no evidence of any real willingness by any of the major players to fill the vacuum.[22]

As I have found for my pains in endless debates on this issue in the corridors of the UN and in capitals, in the case of the U.S. (and some of the other P5 members peering from behind its skirts on this issue) it is a matter of not wanting to inhibit maximum freedom of action to act ad hoc, case by case; in the case of many Non-Aligned Movement countries (or at least the group's more cynical leading members) it is a matter of not wanting to embrace anything that implies that the use of force is ever permissible.

The argument for having a set of agreed guidelines, with moral but not legal force, is not that they would be self-executing, producing agreed outcomes with push-button consistency, or even that they would be observed at all. As I had occasion to say, in another context, to a retreat for UN Security Council members a few years ago, in the immortal words of Australian Prime Minister Ben Chifley, "the trouble with gentleman's agreements is that there are not enough bloody gentlemen." The argument is simply that with such guidelines in place, with much press and commentariat attention being then focused on how well the arguments for and against each of them are standing up, the chances of having no debate at all on their substance would be much diminished, and the prospects of finding real consensus on what are, and are not, suitable cases for military treatment would be much enhanced.

V. Weapons of Mass Destruction

The remaining dimension of my continuing international law education on which I wanted to touch — and the one that has taught me whatever I know about the practical business of treaty-making — is the effort to eliminate weapons of mass destruction, a policy issue about which I have been passionate ever since having the harrowing experience of visiting Hiroshima and Nagasaki on my first ever overseas visit, as a young student, in the mid-1960s.

One of the real highlights of my ministerial career was the role that Australia played in bringing to conclusion in 1992, after some twenty years of very

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22 See, eg, Thomas M. Franck, 'Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States' (1970) 64(5) *American Journal of International Law* 809; Thomas M. Franck, 'What Happens Now? The United Nations After Iraq' (2003) 97(3) *The American Journal of International Law* 607; Rosalyn Higgins, 'The Legal Limits of the Use of Force by States: United Nations Practice' (1961) 37 *British Year Book of International Law* 269. See generally Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2011); Christine D Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008).

inconclusive negotiations, the Chemical Weapons Convention,[23] which remains the most comprehensive of all the various WMD treaty regimes — an achievement that so exhausted the Geneva Conference on Disarmament that it has not been able to agree on even starting to negotiate anything else even since! Along with doing a mass of very professional text-drafting, one of the most useful of all the catalytic roles we played was convening in 1989 a global conference in Canberra of all relevant government and chemical industry players, which did more than anything else to get the diplomatic endgame going.[24] The idea for that initiative in fact came from the then U.S. Secretary of State James Baker (whom I quoted earlier to slightly less exalted effect) who in a phone call from mid-Atlantic said to me in almost these words: "We have too much baggage to do this ourselves; you guys believe in this, are knowledgeable, and have a reputation for real independence of mind, so you wont be seen as just carrying our water". We did not mind doing just that, and I think the exercise remains a model of mature cooperation between our two countries.

An expression of independence of mind which was marginally less to the U.S. Government's taste, but very much to mine, was the Labor Government's very serious commitment to doing whatever we could to achieve the abolition of nuclear weapons, the most indiscriminately inhumane of all the weapons of destruction ever invented, and a real threat, I strongly believe, to the continuation of life on this planet as we know it, matched in gravity only by the threat constituted by carbon emissions. Our major endeavours first took the form of Australia joining the case before the International Court of Justice initiated by the UN General Assembly, arguing for the illegality of nuclear weapons.[25] The Court's advisory opinion in 1996 went some of the way down that path but not as far as we would have liked, and — not unusually for such opinions — did not do as much to change the world's behaviour as we would have liked. That remains the only occasion on which I ever appeared before the ICJ, and I have to say I remember it best for the total inconsequentiality of the oral proceedings, with uninterrupted set-piece presentations and absolutely no questioning or other substantive exchanges between bench and bar. I enjoyed the majestic formality of it all, but my part could perfectly well have been played by a well-trained Major Mitchell cockatoo.

The other major nuclear initiative of the Hawke/Keating Governments was our sponsorship of the Canberra Commission on the Elimination of Nuclear Weapons, which gathered together an extraordinary cross-section of the world's best minds on these issues, including former heads of the UK defence forces and US Strategic Air Command, to produce a strongly argued unanimous report, making for the first time

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23 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).

24 See Gareth Evans, 'International Law and Australia's Interests' quoted in 'Australian Practice in International Law 1988 and 1989: International Law in General' (1988-1989) 12 *Australian Year Book of International Law* 326, 331.

25 See 'Public sitting held on Monday 30 October 1995, at 10 a.m., at the Peace Palace, President Bedjaoui presiding', *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1995] ICJ Pleadings 22.

at this level a compelling case for a nuclear weapons free world, in terms that have have been widely quoted ever since: "So long as any state has ... nuclear arms others will want them. So long as any such weapons remain in any state's arsenal, there is a high risk that they will one day be used, by design or accident. And any such use would be catastrophic."[26]

Unfortunately the Canberra Commission reported only after we left office in 1996.[27] Its recommendations were not taken up with any enthusiasm by the incoming Howard Government, and for all their force, the world moved into a period of sleep-walking on nuclear non-proliferation and disarmament from which it has only just emerged over the last two years, driven above all by the advent of the Obama administration in the U.S. Riding this wave, and making up for lost time, the Rudd government established in 2008 a successor to the Canberra Commission which I have had the pleasure of chairing with my former Japanese Foreign Minister colleague, Yoriko Kawaguchi, the International Commission on Nuclear Non-Proliferation and Disarmament. The value-added of the 300-page report we produced in December last year,[28] in time to feed in specifically to the recently concluded — and mercifully reasonably successful — 2010 NPT Review Conference, has been generally acknowledged around the world to be four-fold: its timeliness; the stature and global representativeness of its commissioners; its comprehensiveness, addressing the full range of disarmament, non-proliferation and peaceful uses issues and all the interconnections between them; and, above all, its hard-headed realism — never losing sight of the ultimate goal of absolute abolition, not just reduction, of nuclear weapons, and mapping a clear and detailed path, with a number of specified timelines, for getting there, but at the same time fully recognising all the constraints and obstacles that will have to be overcome on the path to global zero.

The Commission will have its final meeting in Vienna early next month, to review where the world now stands on these issues after the NPT Review Conference, and the challenges that lie immediately ahead. I hope that as a particular legacy for the future we can put further flesh on the bones of a recommendation we have already foreshadowed for like-minded governments to join in sponsoring the creation of an independent non-government Global Centre for Nuclear Non-Proliferation and Disarmament — possibly based here at the Australian National University (ANU) in association with the newly announced Public Policy Institute but with a genuinely international character and outreach, and possibly with elements located in Geneva and Vienna. The primary role of the Centre would be to produce, under the guidance of a distinguished international board, a comprehensive and punchily-written annual report card on the world's progress, or lack of it, on all relevant issues. A secondary role may be for it to initiate and coordinate worldwide research and development of an all-embracing

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26 Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms* (2006) 17.

27 Canberra Commission on the Elimination of Nuclear Weapons, *Report of the Canberra Commission on the Elimination of Nuclear Weapons* (1996).

28 International Commission on Nuclear Non-Proliferation and Disarmament, *Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers* (2009).

Nuclear Weapons Convention, as an intellectual foundation for eventual multilateral disarmament negotiations, and for which there is strong support from civil society and a number of governments.

The trick in getting good results from expert panels and commissions like these is for their chairs to remain determined to achieve consensus outcomes — on the principle that if this lot cannot agree, who else is going to — but at the same time be fiercely resistant, for as long as decently possible, to lowest common denominator verbal sludge. The other trick, of course, is to get the right commissioners in the first place — expert, experienced, prominent, respected, and sufficiently diverse in starting outlook for their agreement on a final text to actually mean something: in this context at least, a choir known to be singing from the start from the same songbook will not produce as impressive a performance as one having to write its own.