

## KIRBY LECTURE 2014

### The meaning of international law: government monopoly, expert precinct or the people's law?

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3 July 2014

#### INTRODUCTORY COMMENTS: MICHAEL KIRBY AND INTERNATIONAL LAW

It is a great privilege to have been invited to present the Annual Kirby Lecture on International Law and I am extremely grateful for the honour. One advantage of the fact that there have been previous Kirby lectures means that much has been already said in this context and consequently in the pages of the *Australian Yearbook of International Law* about the achievements of Michael Kirby as judge, jurist, writer, international diplomat, and human rights advocate.

My first experience of the Kirby energy and vision was when I was a law student at this university and Michael Kirby came to talk to us about one or other of the then current inquiries of the Australian Law Reform Commission of which he was inaugural Chairman. One of his props, which he produced with a theatrical flourish at the appropriate time, was a silicon computer chip, with which he exemplified the rapid march of new technology and the law's need to keep up with it. That impression of a man riding the wave of technological modernity was, I must confess,

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qualified somewhat a couple of decades later when if I recall correctly, he had to be advised on the use of a computer mouse at the grand opening of some legal database or similar initiative.

But the impression which has not been dissipated – because it has been constantly reinforced – is Michael Kirby’s extraordinary generosity with his time and his preparedness to speak to all, but especially to young people, including law students, whenever he is invited to do so. I recall one occasion when on a wet and miserable night he came by car from Sydney to the Southern Highlands to give a rousing address to an ANU Faculty retreat, and then drove back to Sydney. On another occasion I invited him to address a dinner of our higher degree research students. He turned up, introduced himself, spoke to us about the importance of high quality legal research for the health of the legal system, moved a generous and well-earned vote of thanks to himself and left, leaving behind a gratified though slightly disconcerted audience.

His appearances and words enthuse and inspire his audiences, who see in him a man who has a steadfast commitment to justice and the rule of law, to civility and to speaking the truth plainly. He has been orthodox yet heterodox, a staunch advocate of the common law tradition but a true internationalist, at least since his Damascene conversion on the road to (or at least in) Bangalore in the late 1980s.<sup>1</sup>

His most recent, and continuing, international service has been as chair of the UN Human Rights Council Commission of Inquiry to investigate human rights violations in the Democratic People’s Republic of Korea. This has been a challenging task, but it is one to which he has brought

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<sup>1</sup> Michael Kirby, ‘The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes’ (1993) 16(2) *University of New South Wales Law Journal* 363.

dispassionate forensic skills but also a passion for the vindication of the human rights of those who have been so cruelly and inhumanely mistreated.

It is the internationalism so exemplified by Michael Kirby's life, especially in relation to international human rights and the domestic legal order, that underlies the themes I wish to explore tonight. I will do this through an examination of some aspects of a modest and somewhat technical topic, the international law relating to the interpretation of treaties, with a specific focus on Australia. My particular concern is executive government interpretive dominance in relation especially to human rights treaties and challenges to that from within and from outside formal institutional frameworks. I will first set the scene, then describe two types of internal challenge and then one example of external challenge, before offering some final reflections. To appropriate a phrase, it will be an examination of the law of treaties in, beyond and perhaps above the Vienna Convention on the Law of Treaties.<sup>2</sup>

## **SETTING THE SCENE**

Last Wednesday, 25 June 2014, the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, introduced into the Commonwealth Parliament the Migration Amendment (Protection and Other Measures) Bill 2014.<sup>3</sup> It was the eve of the International Day in Support of Victims of Torture, celebrated each year on the anniversary of the adoption of the Convention against Torture by the UN General Assembly, just over 27 years ago, on 26 June 1987.

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<sup>2</sup> See Enzo Cannizzaro, *The Law of Treaties Beyond The Vienna Convention* (Oxford University Press, 2011).

<sup>3</sup> See Jane McAdam and Kerry Murphy, 'Punishment not protection behind Morrison's refugee law changes', *The Conversation*, 27 June 2014.

That bill proposes the inclusion in the Migration Act of a provision that would explicitly provide that a person seeking to avoid return to a jurisdiction where ‘there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture’,<sup>4</sup> must show that it is *more likely than not* that he or she would suffer significant harm if returned. ‘More likely than not’, explained the Minister in his second reading speech, means that there is ‘a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to.’<sup>5</sup>

The Minister further stated that ‘[t]his is an acceptable position which is open to Australia under international law and reflects the government’s interpretation of Australia’s obligations.’<sup>6</sup>

The amendment would reverse the effect of court decisions which require that the claimant show just a ‘real chance of significant harm’. This, the Minister noted, was ‘the same low threshold that applies to the

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<sup>4</sup> Convention against Torture, art 3.

<sup>5</sup> Proposed new section 6A. The new section 6A(3) will provide:

(3) A non-citizen will suffer significant harm if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment;
- or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

<sup>6</sup> Second reading speech. This reflects the wording of the statement of human rights compatibility accompanying the bill: ‘It is the Government’s position that the risk threshold applicable to the non refoulement obligations under the CAT and ICCPR is higher than the real chance’ test. While there is some difference of opinion in international fora and amongst the various national implementations of these obligations, applying the risk threshold of —more likely than not— is considered to be an acceptable position which is open to Australia under international law. The ‘more likely than not’ threshold reflects the Government’s interpretation of Australia’s obligations. As courts have applied a lower risk threshold that is inconsistent with this interpretation of Australia’s obligations, it is necessary to give express legislative effect to this interpretation.’ Statement of compatibility, pp 8-9 (Attachment A to the Explanatory memorandum).

assessment of claims under the Refugee Convention' and which 'can be as low as a 10 per cent chance of harm occurring.'

The same change will apply in relation to similar claims made under the ICCPR, which provides a guarantee against refoulement where a person runs a real risk of death or being subjected to cruel, inhuman or degrading treatment.

Together these protections form part of Australia's complementary protection framework regime, introduced by legislation in 2012. This regime seeks to provide protection to those fleeing a real risk of fundamental rights violations but who did not fall within the categories of persons protected by the Refugee Convention. I note in passing that a bill introduced earlier in the current Parliament proposes to abolish this legislative regime, replacing it with a purely administrative process without independent merits review and in which the ultimate safeguard is the personal, non-compellable discretion of the Minister and subject to very limited judicial review).

There have been other legislative changes enacted or proposed in the last year, nearly all of which will make it harder in substantive and procedural terms for a person seeking refuge in this country to make out a claim for protection.

On each occasion the government through the Minister and the documents put before the Parliament has stated that the proposed changes are consistent with Australia's international obligations.

My purpose tonight is not to subject these recent changes and other aspects of the operation of our migration law to substantive critique on the basis of international law, or on policy or ethical grounds, though they plainly need it. From these examples I wish to explore the ways in

which the asserted virtual monopoly of executive government over the control of the meaning of international obligations has been contested by an increasing array of actors, and how this has affected government's responses to and accountability over such issues.

### *Acceptability as a standard of interpretation of treaty obligations*

The Minister's description of the government's interpretation of Australia's obligations under CAT and the ICCPR<sup>7</sup> as 'acceptable' is an interesting turn of phrase. Those who wrote these words and the Minister who spoke them did not describe the interpretation as one that involved a generous reading of treaty-based human rights in accordance with the object and purpose of the treaties, nor as the 'most persuasive' or 'a compelling' interpretation of the treaty provisions, nor as one which was in conformity with the views taken by the international supervisory bodies of the scope of the obligations in question.

Of course, an interpretation of a convention which satisfied any of these descriptions might accurately be described as an 'acceptable' interpretation of the treaty, but it would be a modest endorsement indeed. Whether intended or not, the choice of words – 'acceptable and open to Australia under international law' – seems tentative and a little

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<sup>7</sup> And now, indeed, its similar obligations under the CEDAW Convention. The CEDAW Committee has stated that article 2(d) of the CEDAW Convention obliges States parties 'to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention... . For example, a State party would itself be in violation of the Convention if it sent back a person to another State in circumstances in which it was foreseeable that serious gender-based violence would occur.' *MNN v Denmark*, Communication No. 30/2011, UN Doc, decision on admissibility, 15 July 2013, para 8.8. See also *MEN v Denmark*, Communication No. 35/2011, decision on admissibility, 26 July 2013, para 8.8.

defensive. It intimates that there might be other, more acceptable and preferable interpretations.

Nonetheless, it is a prerogative and indeed a necessary function of executive government to articulate its views on the meaning of the treaties it has made and their consequences for the conduct of the State, whether that be to enable or to restrain the State in the exercise of its powers. Our still predominantly State-based system of international law gives the nation-State (and thus pre-eminently the executive government) a privileged position in deciding what a treaty means and the limits it imposes on actions. At the international level, the orthodox position is that, unless States have agreed, collectively or on an ad hoc basis, to submit a contested issue of treaty interpretation to binding adjudication, it is for the States parties collectively to interpret what their commitments mean. Equally, under the international law of treaties,<sup>8</sup> it is *their* subsequent practice as a group that has the potential to contribute formally to the development of the meaning of the treaty's terms. The limited reciprocity inherent in human rights obligations leaves individual States with a considerable degree of discretion in interpreting their commitments. It is a discretion that is frequently exercised to reduce rather than to expand the scope of human rights protection.

This dominant position of the executive is also to be seen at the national level, particularly so in dualist systems such as Australia where treaties do not become part of domestic law merely by virtue of their entry into force for Australia internationally. However, in this context, when adjudicating on treaty provisions incorporated into domestic law the courts may provide an alternative reading that challenges executive interpretations. They may thus make binding decisions involving a

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<sup>8</sup> Vienna Convention on the Law of Treaties, art 31(3)(a).

rejection of the government's interpretation of its international obligations. However, unless the courts have invoked a constitutional basis to frustrate a government measure, a government can generally reinstate its preferred interpretation and policy through legislative amendment. So we have seen last week, and on many occasions previously.

Four decades ago statements such as the one made by the Minister about government's understanding of its treaty obligation might have met with limited contestation. Quiet engagement by international bodies such as the UNHCR, some political lobbying by refugee advocates, and perhaps some incisive analysis from one or other of the small band of academics who had access to Grahl-Madsen's authoritative tome on refugee law, might have been the order of the day; an inquiry by a parliamentary committee might have been the only forum offering a higher profile examination of the international legal issues that were in play. There was then no UN Human Rights Committee or Committee against Torture, no Parliamentary Joint Committee on Human Rights, few human rights NGOs with the expertise and resources to take up these issues, limited access to the international sources of expert knowledge and State practice on these issues, and a relatively small international legal community outside government.

Today, of course, it is a different story: there is a burgeoning, vibrant and well-informed international law community inside and outside government, an NGO community literate in the international law of human rights, the information is readily available, and there are new ways of organising and publicising critiques through electronic means. All of these make possible a significantly higher level of critical engagement with executive views. I will discuss two of them –

international expert bodies and an example of a Parliamentary institution.

### ***Challenges to executive government parsing of human rights treaties***

The government's position in relation to what has to be shown to make out a claim of complementary protection under the ICCPR and CAT, is not the only interpretation available. The decisions of the Australian courts have made this clear. The government notes that 'there is some difference of opinion in international fora and amongst the various national implementations of these obligations' and that its approach represents an 'acceptable' interpretation that was in fact the original intention of the complementary protection legislation. The differing national approaches are a reference to the Canadian and US approaches, which have adopted the 'more likely than not' test in this context.

One competing interpretation is to be found in the pronouncements of the UN Committee against Torture, the body of independent experts established by States parties under the Torture Convention to carry out functions which include the review of State reports and the examination of individual complaints of violation of the Convention. In fact, most of the Committee's work dealing with individual complaints has involved assessments of claims that persons were being returned to a country where they would face torture.

The Committee against Torture has declared itself unimpressed with the domestic legal standard adopted by Canada and the United States in relation to return to torture, noting that the 'more likely than not' standard 'involves a much stricter standard than reflected in the Committee's

jurisprudence'.<sup>9</sup> The United States has explained that the US had adopted this approach in order to align the standard to be applied under the CAT with that already applied by the US courts under the Refugee Convention.<sup>10</sup>

While the case law of the Committee against Torture has not articulated its position as clearly as it might have, it seems this committee considers the 'more likely than not' standard is a different one from that required by a proper interpretation of the Convention. Comments by the UN Human Rights Committee also indicate that the proposed standard falls short of what the ICCPR requires.<sup>11</sup>

### ***The status of the UN human rights treaty bodies more generally***

These are, of course, not the only instances in which actions by the Australian government have been argued to be inconsistent with the relevant treaties. The UN human rights treaty bodies have concluded that Australia has violated the treaties in a number of individual cases over the last few decades.<sup>12</sup> In their review of Australia's periodic reports under the treaties, the committees have also expressed the view that Australia's law and practice is inconsistent with international standards in a number of respects, and offered recommendations as to how these shortfalls might be remedied.

The orthodox view expressed by States, including Australia, has been that the general and specific statements of the committees are, in

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<sup>9</sup> Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture A Commentary* (Oxford University Press, 2008) 154 (quoting CAT/C/SR.242, para 17).

<sup>10</sup> CAT/C/SR.427, para 9 (2000).

<sup>11</sup> See, eg, UN Human Rights Committee, *Pillai v Canada*, Communication No 1763/08, 25 March 2011, pp 21-22 (Individual opinion by committee members Keller, Motoc, Neuman, O'Flaherty and Rodley).

<sup>12</sup> For an overview, see Remedy Australia, *Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014)*, [http://remedy.org.au/reports/2014\\_Follow-Up\\_Report\\_to\\_treaty\\_bodies.pdf](http://remedy.org.au/reports/2014_Follow-Up_Report_to_treaty_bodies.pdf).

normative terms, no more than informed (and sometimes ill-informed) recommendations to States parties for their consideration. Thus, it is said, no obligation to *comply* with such views exists, though there may be an international legal obligation to give due consideration to these recommendations in good faith and also, arguably, to give reasoned responses when they are rejected. Much of the academic commentary puts it slightly higher<sup>13</sup> (including that authored by some members and former members of such bodies<sup>14</sup>).

The responses by States to what they perceive as claims by UN human rights treaty bodies to a higher legal status for their views and recommendations, have been unfavourable and in some instances robustly so. Most international lawyers will be aware of the emphatic and critical responses made in 2005 by a number of States when the UN Human Rights Committee issued its general comment on reservations to the International Covenant on Civil and Political Rights.<sup>15</sup> Another equally interesting episode, less noticed in the literature took place in late 2008. This involved a series of statements made by the United States, during the drafting by the UN Human Rights Committee of its general comment on the obligations of States parties to the First Optional Protocol to the ICCPR.<sup>16</sup> That Optional Protocol allows the Committee to consider allegations by individuals of violations of the

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<sup>13</sup> See, eg, Nowak and Macarthur, above n 9, pp 777-778.

<sup>14</sup> See, eg, Ivan Shearer, '[The Australian Bill of Rights Debate: The International Law Dimension](#)', *Proceedings of the Twenty-first Conference of The Samuel Griffith Society*, Adelaide, 2009, ix-x (noting at p x: 'The Committee thus adopts a nuanced conclusion as to the status of its views, falling just short of stating them to be binding, but by stating them to be "authoritative" it gives to those views a status far higher than that of mere recommendations for consideration by the respondent State party.') And, it should be said, the duty to consider recommendations and to provide a substantive response is one with which Australia has in general sought to comply, though one may not always agree with the substantive arguments made in response to adverse findings.

<sup>15</sup> General comment 24 (52) (2004).

<sup>16</sup> Human Rights Committee, General comment No 33 (2008).

ICCPR against States which are parties to both the Covenant and the Optional Protocol.

Though not a party to the Optional Protocol, the United States as a party to the Covenant considered it appropriate to give the Human Rights Committee and the international community the benefit of its views on the role of the Committee and the status of its various outputs.

The particular concerns of the US were what it saw to be the pretensions by the Committee to claim that it was a quasi-judicial body, that its conclusions had some 'determinative' or 'authoritative' legal status, and that States parties to the Optional Protocol were obliged to give effect to the views of the Committee as part of an obligation to provide a remedy for violations.

The gist of the two sets of comments<sup>17</sup> provided by the US can be gleaned from its second démarche in which the US expressed its appreciation for the Committee's efforts to improve the draft general comment. While this had led to the elimination of 'some of the flawed reasoning and problematic conclusions' in the initial draft, the main conclusions of the final version 'remain[ed] unsupported by the plain text of the Covenant, its Optional Protocol, the negotiating history of the two treaties and international law on treaty interpretation.'<sup>18</sup> The comments also refer to the Committee's attempt to 'arrogate to itself a legal

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<sup>17</sup> Comments of the United States of America on the Human Rights Committee's 'Draft General Comment 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant Civil and Political Rights' *October 17, 2008*, <http://www.state.gov/documents/organization/138851.pdf>; Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, *December 22, 2008*, <http://www.state.gov/documents/organization/138852.pdf>. Extracts from both appear in *Digest of United States Practice in International Law 2008*, <http://www.state.gov/documents/organization/138513.pdf>, pp 252-261 and 261-266.

<sup>18</sup> *Digest of United States Practice in International Law 2008*, pp 261-262.

authority’<sup>19</sup> that has no basis in international law and criticise it for basing ‘its extraordinary assertion’ on three arguments, none of which are sound in law or logic.’<sup>20</sup>

This is what, in academic terms, we would call a ‘clear fail’.

During this same period the United States also offered its views in relation to a General comment adopted by the Committee against Torture on the implementation of the general obligations in the Torture Convention.<sup>21</sup> In that General comment the CAT made a number of statements about the role of the Committee and the authority and legal consequences of its general comments and decisions in individual cases. The United States rejected what it saw as the assertion of ‘an exceptionally broad, new power for the Committee that States Parties had not given’ to it, namely requiring compliance with the Committee’s concluding observations and views in individual cases.<sup>22</sup> It concluded by offering the Committee some advice as to how it might more usefully deploy its efforts:

37. Finally, and as a general matter, the United States observes that General Comment 2 is presented in the style of an advisory opinion issued by a juridical body. ... the General Comment is replete with legal pronouncements, many of which have little or no textual or historical foundation. The United States considers this approach unbecoming of the Committee’s role and reputation as a body charged with assisting and advising States Parties with respect to their implementation of the Convention. Neither does the United States consider the legalistic approach embodied in General Comment 2 to be the most effective

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<sup>19</sup> *Id* at p 262.

<sup>20</sup> *Id* at p 264.

<sup>21</sup> Committee against Torture, *General comment No 2* (2008).

<sup>22</sup> Observations on UN Committee Against Torture General Comment No. 2, *Digest of United States Practice in International Law 2008*, <http://www.state.gov/documents/organization/138513.pdf>, p 269, p 271, para 35. The comment concluded: ‘Thus, with respect to both concluding observations and individual communications, the Convention grants no authority to the Committee to issue legally binding views on States Parties’ obligations.’ *Id* at p 272, para 36.

means of advancing the objectives of the Convention, namely the prevention of torture and ill-treatment. Having reviewed several hundred reports of States Parties and having considered numerous individual cases, the Committee is in the unique position of being able to identify the most important themes, patterns, best practices, and lessons learned regarding the prevention of torture and ill-treatment. The United States considers that the Committee, rather than issue conclusory and ill-founded legal pronouncements would be doing a great service by distilling and disseminating such valuable information to the international community.

While the public record does not show whether other States contributed in such a robust way, there is little doubt that many States would share the underlying legal analysis put forward, even if they do not articulate this in such a systematic or energetic way.<sup>23</sup>

Australia's responses to the concluding observations and individual complaints decisions of the UN human rights treaty bodies manifest the same view: that these bodies do not generate legally binding outcomes, that their recommendations will be considered seriously, but that there is no obligation to accept the committee's interpretations as binding or to give effect to their recommendations.<sup>24</sup> Generally a reasoned explanation for declining to accept an interpretation or follow recommendations, particularly in individual cases, is provided.

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<sup>23</sup> Though it may be noted that Australia 'commend[ed] the [Human Rights] Committee for its initiative in drafting General Comment 33.' CCPR/C/AUS/Q/5/Add.1, p 3 (Issue 3) (2009).

<sup>24</sup> For example, in its Response to the List of Issues raised by the Human Rights Committee in relation to Australia's fifth periodic report under the ICCPR, Australia commented: 'The Australian Government reiterates its position that the views of the Committee adopted under the First Optional Protocol are to be considered in good faith by States parties and that considerable weight should be given to them, although they are not formally binding in law.' CCPR/C/AUS/Q/5/Add.1, p 3 (Issue 3) (2009).

### ***Game, set and match?***

At one time such a clear government rejection of a committee view set out in an individual case or in a more general interpretation, may have been enough to quell contestation. But today it is certainly not. To adopt a 'reject adverse interpretation/decision, publish rejection on website, and file' approach would fail fully to reflect the role that non-binding legal pronouncements play and how law has an authority and meaning irrespective of government's view of it.

Opinions can be legitimate and have persuasive power for various reasons: the status or a formal authority of the speaker, the persuasiveness of their reasoning, and recognition by others, are some of the factors that may mean a person's views are listened to. And the output of UN human rights treaty bodies is found everywhere – it has spread into the academic commentaries, the submissions of advocates in courts and of those seeking to change policy or laws, the analysis of human rights commissions and other public bodies and of civil society organisations, and the judgments of international and national courts – it even occasionally achieves some prominence in the press and thereby contributes to public debate.

Equally importantly, States invoke such output in their submissions to international bodies, in their submissions in domestic contexts. Even when the State is not the first party to resort to these sources, its engagement is not purely on the formal level of the status of such materials but is substantive, often arguing the merits of its case within the framework elaborated by these non-authoritative interpreters. Thus, these interpretations become part of the legal discourse and of the cognitive and rhetorical framework within which arguments about the

human rights are conducted. Such pronouncements matter, deliberately, politically and legally, even if they are not formally binding. Perhaps it is the fear of such outcomes that partially motivated the public slap-down of the Human Rights Committee and Committee against Torture to which I have referred.

### ***Parliamentary scrutiny and challenges – the Parliamentary Joint Committee on Human Rights***

Yet the recent challenges to the executive domination of treaty interpretation are not confined to the international level or civil society engagement. The next dimension of the challenge to the executive domination that I want to explore is the role of Parliaments in scrutinising on a systematic basis the executive's interpretation of Australia's international obligations, above all its human rights obligations. While I do not want to underrate the considerable human rights work that has been done systematically and on an ad hoc basis in Australian Parliaments over decades, the last decade has seen important developments in that regard.

This has been the result of the introduction in the ACT and Victoria of statutory bills of rights based on international treaties (in particular the ICCPR) and at the federal level the Australian Human Rights Framework, which I understand has been recently 'disappeared' from the Attorney-General's Department website.<sup>25</sup> In the case of the

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<sup>25</sup> Compare the archived webpage, 'Australia's Human Rights Framework' at <http://web.archive.org/web/20130519095952/http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx> (as of May 2013), reachable from the 'Human rights and anti-discrimination' webpage at <http://web.archive.org/web/20130504090306/http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/default.aspx> (As of May 2013). The current (4 July 2014) version of the page contains no mention of or link to the Australian Human Rights Framework : <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/default.aspx> (4 July 2014).

Commonwealth Parliament, the significant change has been the establishment of the Parliamentary Joint Committee on Human Rights (PJCHR) with its mandate of scrutinising bills and legislation for compatibility with seven UN human rights treaties. That committee has been operative now for about two years, during which time it has reviewed more than four hundred bills and thousands of legislative instruments, and published almost thirty reports.<sup>26</sup>

I should note that I serve as external legal adviser to the PJCHR. My remarks do not purport to represent the views of the committee; and I refer only to matters on the public record.

As is well-known to many of you, a central feature of the *Human Rights (Parliamentary Scrutiny) Act 2011* which established the committee is the requirement that any bill introduced into Parliament be accompanied by a statement of human rights compatibility. The committee takes these statements as the starting-point for its examination of the bills. Sometimes these statements contain a clear articulation of the executive's understanding of its international obligations and how the bill in question is compatible with them. On other occasions the committee seeks clarification from the responsible Minister of whether and how a bill is consistent with treaty obligations. Sometimes the committee accepts the Minister's explanation or interpretation, on other occasions the committee may take a different view of scope and meaning of the relevant obligation. Sometimes the dialogue continues, sometime it rests there.

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<sup>26</sup> See Parliamentary Joint Committee on Human Rights, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights).

The international legal issues on which the committee has expressed views that are or may be at odds with the positions of the executive government include:

- the extraterritorial extent of Australia's obligations under relevant human rights treaties and its responsibility in relation to acts occurring outside its territory (in particular on Manus Island and Nauru)<sup>27</sup>
- the understanding of the concept of discrimination and the meaning of 'special measures' under international law and Australian law<sup>28</sup>
- the applicability of international fair trial criminal guarantees to civil penalty provisions which are a common feature of many Commonwealth regulatory statutes<sup>29</sup>
- the non-implementation in Australian law of a *Pinochet* exception arguably required by the Convention against Torture, which would permit the prosecution for the offence of torture to be brought against a person who would otherwise enjoy immunity under international and domestic law<sup>30</sup>
- the consistency with the rights to social security, an adequate standard of living and non-discrimination of changes to social security benefits paid to single parents.<sup>31</sup>

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<sup>27</sup> Parliamentary Joint Committee on Human Rights, *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation, Ninth Report of 2013*, June 2013.

<sup>28</sup> Parliamentary Joint Committee on Human Rights, *Stronger Futures in the Northern Territory Act 2012 and related legislation*, Eleventh Report of 2013, June 2013.

<sup>29</sup> See generally Parliamentary Joint Committee on Human Rights, Practice Note 2 (interim), *Human rights and civil penalties*,

<sup>30</sup> See Parliamentary Joint Committee on Human Rights, *Fourth Report of 2013*, March 2013, pp 42-47; *Sixth Report of 2013*, May 2013, pp 228-232, and *First Report of the 44<sup>th</sup> Parliament*, December 2013, pp 97-99, especially at paras 2.23-2.36.

<sup>31</sup> Parliamentary Joint Committee on Human Rights, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012, Final Report, Fifth Report of 2013*, p 38, para 1.120.

The committee has also engaged with the complementary protection issues which I have already mentioned. In a March 2014 report it questioned whether interpreting the ‘real risk’ standard to require a showing that harm was more likely than not to occur was consistent with the ICCPR and CAT.<sup>32</sup> It also expressed the view that the ICCPR and CAT require that an effective remedy be available under domestic law in relation to threatened violations of the right not to be refouled, and that this remedy must, as a matter of international obligation, include the possibility of an independent review of the merits of any such claim.<sup>33</sup> It remains to be seen what government’s final response to these views will be, and what will become of the complementary protection legislation.

I think it is fair to say that government has thus far rarely been prepared to directly concede that its view on any significant issue of human rights interpretation is not the better view or that it needs to be reviewed in light of the committee’s comments. Nonetheless, government has engaged with the committee, setting out its views on the substantive content of legal obligations and their applications to the legislative measures in question.

If government does not appear to modify its views or even accept that there may be other legitimate interpretations – whether ‘acceptable’ or even preferable ones--- what value does this process have, other than as another subject for academics to research? There are various answers to this – but my interest is in its relevance to an improved discussion around international law and above all human rights law.

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<sup>32</sup> Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, March 2014, paras 3.44-3.47.

<sup>33</sup> Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, March 2014, paras 3.57-3.63.

The positive contribution that such a process makes to the implementation of international human rights law domestically is that it opens up a forum independent of the executive that can systematically undertake an assessment of compatibility with international standards across legislation in many areas. The statement of compatibility requirement and the dialogue between the committee and Ministers made public in the committee's reports, provide government with the opportunity to clearly articulate the reasons for the interpretation it has adopted, and for a reasoned response to committee concerns or views. It thus provides a clearer and often more detailed explanation of the views of government and the justification for them.

But fundamentally the procedure limits the capacity for uncontested interpretation by executive fiat. Government cannot simply just state a position and say, that's it. A Parliamentary body can ask why it is that human rights protections appear to have become a ceiling rather than a floor, why it is that narrow interpretations of rights rather than generous ones are consistently adopted, and why government instinctively gravitates to the more intrusive limitations on rights when other options are available. Seeking such explanations and relevant information has led to a revealing dialogue in a number of cases about the interpretation of particular provisions, government's understanding (and sometimes lack of understanding) of international legal principles and a transparent debate about a range of contested issues.

And it has also provided a forum for civil society organisations to articulate law and policy based challenges to government limitation of rights.

## ***Beyond the institutions of the State***

Thus far, my concern has been with different forms of challenge to the interpretive statements of executive governments within what are in essence State-sponsored institutions – treaty regimes at the international level established by States – or the different organs of the nation-State itself (I have focused on one aspect of the role of the legislature). But this is to operate within a confined world, one in which ownership of international law and of human rights is professionally claimed and administered by an epistemic community or communities whose practice of their discipline also means patrolling its boundaries and the credentials of those who might be heard as legitimate participants in any debate over its significance or meaning. Koskenniemi<sup>34</sup> and others have pointed this out, and most if not all of us who ‘practise’ international law in the broad sense of the word ‘practise’ are implicated in this process, even as we believe or hope that our engagement is in support of a progressive undertaking.

However, this does not mean that international lawyers or the formal State and international institutions have a monopoly of ownership of international law or its use, even inside those State-controlled intellectual and institutional bastions.

Early in the drafting of the UN Convention on the Rights of Persons with Disabilities disability advocates proposed the inclusion in the new convention of the ‘right to self-determination’. This was a concept frequently invoked in the disability community, in order to address the systematic denial of autonomy faced by persons with disabilities everywhere. International lawyers, and I was among them, patiently (and

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<sup>34</sup> Martti Koskenniemi, ‘The Politics of International Law – 20 Years Later’ (2009) 20(1) *European Journal of International Law* 7.

perhaps a little arrogantly) explained that the ‘right to self-determination’ was already ‘taken’: it had a special meaning in international law and was enjoyed only by ‘peoples’. I wonder whether that was the right approach, or whether a right described in those same words but understood differently should have been included in the convention, rather than consigning the articulation by those affected of how they viewed their rights to the world outside international law. We international lawyers knew the meaning of the ‘right to self-determination’, but so did persons with disability – and we were probably both right as to its meanings, actual and potential, in international law.

### *Peoples’ tribunals*

Among the more theoretically and politically interesting engagement with international law free of executive government constraints has been its use by peoples’ tribunals. By these I mean public opinion or civil society tribunals rather than the political show trials that have been a popular expedient under some repressive or revolutionary regimes. Such tribunals, frequently growing out of a social movement around a particular cause have proliferated in recent decades.<sup>35</sup>

Citizen-based and organised rather than State-sponsored, such tribunals claim legitimacy and relevance on a number of bases independent of any State authorisation. They serve various functions, ranging from the collection and preservation of evidence of atrocity with attendant publicity, with the hope of a future State-sponsored criminal prosecution or other reparatory procedure, as an archive acknowledging and ensuring the memory of suffering, to attempts to bring about reform to

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<sup>35</sup> Michael Kirby served in 1992 as a member of a peoples’ tribunal on Tibet. See Permanent Peoples’ Tribunal, *Session on Tibet, Verdict*, 20 November 1992 (revised version 14 December 1992) and Michael Kirby, ‘Decision of the Permanent Tribunal of Peoples in its session on Tibet, Strasbourg, France, November 1992’ (1994) 68 *Australian Law Journal* 135.

international structure involving disparities of economic, political and social power.

A striking feature of many of the civil society tribunals that have been held in recent years is their commitment to and invocation of the norms and values of international law. They are not uncritical in their assessment of the power structures underpinning contemporary international law and of particular bodies of law. Yet they assign great importance to positive law, in particular the law of human rights and humanitarian law<sup>36</sup> and civil society's power to claim for itself and to interpret the rights conferred by international law.

Among the examples that are well-known are the original Russell Tribunal from the 1960s dealing with the Vietnam war, the Tokyo International Women's Tribunal on Military Sexual Slavery (held in 2000),<sup>37</sup> the World Tribunal on Iraq held after the 2003 Iraq War, and the more recent and controversial Russell Tribunal on Palestine.<sup>38</sup> But these are just a few of dozens of such tribunals held in recent decades, with the issues addressed ranging from water disputes in Latin America to the adequacy of modern international humanitarian law, the treatment of asylum-seekers and migrants in Europe, the regulation of the

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<sup>36</sup> Gabrielle Simm and Andrew Byrnes, "International Peoples' Tribunals in Asia: political theatre, juridical farce or meaningful intervention?" (2014) 4 *Asian Journal of International Law* 103, and Andrew Byrnes and Gabrielle Simm, "Peoples' tribunals, international law and the use of force" (2013) 36 (2) *University of New South Wales Law Journal* 711.

<sup>37</sup> The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Judgment, online: <<http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf>>; Christine Chinkin, 'Women's international tribunal of Japanese military sexual slavery' (2001) 95 *American Journal of International Law* 335.

<sup>38</sup> Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability' (2008) 30 *New Political Science* 161; Arthur Blaser, 'How to Advance Human Rights without Really Trying: An Analysis of Nongovernmental Tribunals' (1992) 14 *Human Rights Quarterly* 339.

transnational agrochemical industry,<sup>39</sup> atrocities gone unacknowledged or unpunished in countries such as Iran, and recent tribunals on a fair minimum wage in the garment industry in Asia to atrocities during the final stages of the civil war in Sri Lanka. In July 2013 Australia itself was the venue for a civil society tribunal, the Biak Massacre Citizens Tribunal, which addressed an alleged massacre of independence activists and others by Indonesian troops in West Papua in 1998.<sup>40</sup>

These tribunals, among other things, provide a form of accountability for cases where the international State-sponsored system provides no or no accessible forum, or where access is blocked or delayed by political or other barriers. In doing so they articulate and apply, and sometimes develop, existing international norms, seeking to hold States, international organisations and other powerful actors accountable for infractions against accepted international law norms.

As Gabrielle Simm and I have written elsewhere:

Rather than simply being ignored or dismissed, international peoples' tribunals may be understood not as a form of political activism and advocacy that lacks legitimacy from a legal perspective, but as institutions that engage seriously with international legal norms. The world of international law has expanded far beyond the society of nation-states and international organizations to include a range of other actors who contribute to and draw on international law. The study of these institutions provides a window into the significance of international law for civil society, raises questions about the source of legitimacy of international law norms and "ownership" of them, and highlights some of the gaps in and failings of the present international legal system.<sup>41</sup>

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<sup>39</sup> Permanent Peoples' Tribunal, Session on Agrochemical Transnational Corporations, Bangalore, 3-6 December 2011, online: <[http://www.internazionaleleliobasso.it/wp-content/uploads/2012/03/37.-English-version\\_TPP\\_Bangalore3Dec2011.pdf](http://www.internazionaleleliobasso.it/wp-content/uploads/2012/03/37.-English-version_TPP_Bangalore3Dec2011.pdf)>.

<sup>40</sup> <http://www.biak-tribunal.org/>. See 'Atrocities in West Papua revealed', *Solomon Star*, 2 June 2014, [www.solomonstarnews.com/news/regional/2243-atrocities-in-west-papua-revealed](http://www.solomonstarnews.com/news/regional/2243-atrocities-in-west-papua-revealed)

<sup>41</sup> Gabrielle Simm and Andrew Byrnes, "International Peoples' Tribunals in Asia: political theatre, juridical farce or meaningful intervention?" (2014) 4 *Asian Journal of International Law* 103, 104.

I wonder how long it will be before a major public opinion tribunal will be convened in relation to some of the actions of recent Australian governments in some of the areas I have touched on tonight – whether as a freestanding event or as an information-gathering exercise for other, more formal international proceedings.

## **CONCLUSION**

And so, where does this discussion leave us? Certainly not with a general theory of or a new approach to treaty interpretation, nor with an endorsement of a human rights law controlled and deployed only by international law initiatives. But on what basis can one ground the legitimacy of challenges to the executive's claimed and practised monopoly in relation to the interpretation of treaties, but in particular human rights treaties?

A possible riposte by our nation-State that this prerogative is justified because it is a democratically elected government is not persuasive at a general level, for neither in theory nor in practice is democratic legitimacy a critical element of the qualification to claim Statehood or the State's interpretive privileges.

Perhaps expertise to be found in the executive provides a firmer basis for grounding the prerogative. But that argument may have more purchase in relation to the determination of more technical matters than it does when the issue is whether the treatment of others is humane, discriminatory or arbitrary. As history has made clear, these are not issues on which governments can credibly claim to have consistently demonstrated a superior understanding and expertise.

Conversely, how do we locate and justify the various types of challenges to exercises of executive interpretive power? Perhaps they

can best be justified by staying formally within the discipline of international law and invoking more rigorously the established rules of treaty interpretation. Insistence on giving proper attention to the humanitarian object and purpose of human rights treaties and requiring adherence to the accepted principles of construing rights generously and limitations narrowly, may perhaps help us avoid what might otherwise be 'a human rights debt and deficit disaster'. The notion of what is an 'acceptable' interpretation and whether acceptability is enough needs to be interrogated and challenged both from a technical perspective and but also from the perspective of what we should reasonably expect of those who exercise public power on our behalf.

However, it is not clear that the justification for such challenges can ever be entirely technical or that the concrete meaning of a generous interpretation or the specific content of the underlying values of dignity, autonomy and respect are to be found solely within the text of a treaty. We are all aware of the indeterminacy of law and language. It may well be that treaty provisions will always need to be enlivened from an external ethics or drawn from a political morality. Guidance may therefore have to come both from the treaty itself, as well as from outside it.

But these are not discussions we tend to have in the interpretation of human rights treaties, in the second reading speeches and explanatory memoranda that accompany bills corrosive of rights. Our government has in recent times begun to pronounce itself 'comfortable' that the serious restrictions it has imposed on the enjoyment of rights are compatible with international law. It appears that such a state of comfort may be achieved once an 'acceptable' interpretation of treaty obligations has been identified.

At the same time peoples' tribunals teach us that the international law of human rights, even sourced in positive law, can have a social and political meaning independent of official views of what it means. There is a force and legitimacy in civil society's deciding for itself what international law can mean and does mean, linguistically and politically. In that sense so many of our fellow citizens can and have become international lawyers – the civil society engagement with international law around the Iraq War of 2013 is perhaps the most memorable recent example of this. But peoples' tribunals also underline the importance of political action beyond the politics of doing international law like an international lawyer.

Of course, those who are committed to human rights and to international law in the service of humanity must continue to engage with the executive State, challenge its views and seek real justification from it when it seeks to restrict human rights, particularly of those least able to resist. When government is too 'comfortable' about the restrictions it has imposed on rights, there is always a danger of complacency. And that certainly is not something that is or should be acceptable to us. At the same time even progressively interpreted international law, falls short in providing protection against actions that we should not be prepared to countenance. That way lies a broader politics, not just the politics of the progressive deployment of international law.

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