INTERNATIONAL LAW AND AUSTRALIA'S INTERESTS

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Thank you for inviting me to deliver this first lecture in the series planned by the Australian Branch of the International Law Association to stimulate the interest of Australian lawyers in international law and in the work of the ILA. I am honoured to be cast in the role of inaugural intellectual stimulator, not least by a profession that in the past sometimes seems to have felt that I rather over-stimulated it!

In international law, no less and probably rather more than elsewhere, there certainly is plenty of room for thinking actively and open-mindedly about the nature and utility of the legal rules and the processes we apply -- although I would not go quite as far as that cynical author who wrote:

> There is no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth.[2]

What I would like to do is to look at the place of international law in Australian foreign policy, and in doing so to discuss international law both "in the books" and "in action", to borrow Julius Stone's familiar and always relevant distinction.[3] I want to explore how well the law of nations, as it is currently perceived and practised in Australia, serves us and our interests; to ask what modifications, if any, may be required in our approach to international legal questions, and to examine the challenges and opportunities available to Australian international lawyers in responding to the needs of our own Asia-Pacific region which is so diverse in its politics, economic structures and cultural traditions. I take it as given, first, that foreign policy and international law are interdependent; secondly, that while international law remains essentially a product of Western thought and tradition, it serves the long-term interests of all nations and ought to be seen by the community of nations as an irreplaceable means of managing its growing interdependence; but thirdly, because international law lacks the sanctions apparatus that forces adherence in domestic legal systems, there are real questions of choice involved in the extent to which countries are bound by its rules, and to which they participate in its development and application.

This all means that if international law cannot meet the test of serving, and being seen to serve, the long-term interests of all nations, its force and relevance will decline, and this at a time when the international environment is rapidly changing. At such a time of change, the development and elaboration of accepted ground-rules of relations between states -- which is what international law is all about -- becomes more important than ever.

Of course international law -- no matter how widely observed or clearly elaborated -- can never relieve individual nations of the burdens of advancing and protecting their particular national interests vis-a-vis other nations. But it should stabilise and civilise that process through establishing a basis of shared knowledge and assumptions, and a measure of predictability, as well as providing an essential means for dealing with new and inescapably international problems, such as environmental degradation, drugs and terrorism.

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1 Inaugural lecture given at the Law School, University of Sydney, 30 March 1988.
2 Jean Giraudoux, *Tiger at the Gates* (London, Methuen, 1955) 45.
3 Julius Stone, *Social Dimensions of Law and Justice* (Sydney, Maitland Puyblications, 1966) 62-71.

I want to look in particular at our own perceptions of international law as they affect the area of primary foreign policy importance to us -- the Asia/Pacific region. But before doing so, let me make some general comments about the origins of international law, and the contributions of various cultures and regional groupings to its contemporary development.

The first point -- to which I have already alluded and which will be obvious -- is that many rules of international law find their origin in European civilisation, and that many of the underlying principles of international law are drawn largely from the Western philosophical tradition, in particular Roman law, and Greek and Judao-Christian values. In earlier times, international law was promoted and imposed by the major Western powers, not only amongst themselves but in other parts of the world, to protect their strategic and commercial interests, and to safeguard the life and liberty of their citizens abroad. Even the United Nations was originally conceived by Western nations in their own image, within the Western ideological framework of individual rights, equality and liberty.

However -- and this is my second point -- the principles of international law are not necessarily at odds with those which might be derived from non-Western systems of thought and law. Even in cases where they may be, for instance the idea of individual rights and freedoms, they have generally commanded acceptance, or least have rarely been the subject of frontal challenge. This reflects, I believe, the historical role of Western powers in the development of the modern system of nation states, and particularly the extent to which they have bequeathed through education and persuasion their own systems of law to the elites of the new nations which have emerged over the past century. There is, in addition, a pragmatic realisation on the part of most nations that any system of law must be based on some agreed norms, and that there is little to be gained from challenging the existing framework unless there are issues of fundamental importance at stake and a credible alternative to offer.

It is the resulting continued vitality and credibility of the Western tradition which in part enables Western nations, although outnumbered in multilateral negotiations, particularly in the UN context, to continue to play a major role in the codification and progressive development of international law. For a country like Australia, the ability to deal with such issues in a conceptual framework with which we feel at ease, and in which we have good intellectual and scholarly resources, is a valuable means of maximising our influence.

Thirdly, and more specifically, many traditional Western principles of international law (for example, diplomatic and consular protection, the law of international transport, a good deal of the law of the sea) are generally acceptable to, and observed by, countries in other regions of the world. Japan, in particular, has adopted to its advantage a very Western approach on many international law issues. In recent years, China has also moved a long way in accepting Western concepts on international law, particularly in the commercial area. But other rules have been rejected, and I will return to that later.

The fourth point I would make, and with particular emphasis given the preceding ones, is that notwithstanding all the influence that Western principles and concepts have had, non-Western countries have made very important contributions indeed to the development of international law -- particularly in the areas of self-determination, sovereignty over natural resources, conventions against racial discrimination and apartheid, and in the emerging areas of shared resources, transfer of technology and development aid. At the same time, precedent continues to play an important role in international law, with the result that, particularly in these newer areas of the law where the precedents are either non-existent or unhelpful in character, reform and development is slow and ponderous.

In the context of the contribution made by non-Western countries to the development of international law, it is worth noting in particular that several countries in our region are playing an increasingly significant role in multilateral negotiations on major issues. This was particularly striking in the Law of the Sea negotiations. Singapore chaired the Conference at which the 1982 Convention was concluded. Indonesia, Japan and Australia were very active players and -- for the first time ever -- Pacific Island states were active participants in an international negotiation of global scope.

These observations provide some of the backdrop to the situation which both Australian Governments and Australian practitioners in international law now confront. It is against this backdrop that I want to discuss the Australian approach to international law, how it differs from that of other countries in our region, and where I think we should be seeking to modify our approach, or that of other countries.

As far as Australia is concerned, the particular international legal tradition we have inherited and which we practise is Western and a great of it is British. We attach great importance to fundamental norms such as *pacta sunt servanda* (the principle that agreements between States are to be respected); international customary rules governing international responsibility for breaches of international law and liability to pay compensation for injury and damage; traditional territorial sea and high seas rights and obligations; concepts of adverse possession in the acquisition of territory; the criteria of statehood; and notions of territorial sovereignty, aggression, self-defence, neutrality and humanitarian intervention. We have subscribed to a variety of human rights treaties, particularly in the anti-discrimination area, and are one of the few countries to have accepted the compulsory jurisdiction of the International Court of Justice without reservations. We have been very active in the negotiation of treaties, declarations and resolutions on disarmament, conservation and the protection of the environment.

Above all, we take our international obligations very seriously. I do not wish to be understood by this to say that other countries in the region do not. But we take pains to observe to the full rules of international customary law and, once we subscribe to a treaty, we abide by its requirements in every detail.

This purist view is part of our legal heritage. In some other parts of the world, and our region, international legal instruments are seen more as a statement of intent than a legally binding obligation. This is not to say that these states consider themselves free to ignore treaties or agreements. Rather, their view of problem-solving is not to appeal to the fine print of treaties so much as to work out a solution with which all parties can live. In short they place much less authority than we might on what a treaty says, and tend to the view that there are no legal answers to problems, only political answers in the broad sense of that term.

To Australian governments, the international legal order is an essential element in relations between states. It provides a framework for promoting peace, order and predictability in international relations, and for promoting co-operation between nations and the adoption of new international and national standards to meet common challenges. We have criticised foreign states, including close allies, when that order has been violated, even when such violations have not involved Australia as a party principal (e.g. Australia voted in favour of the United Nations General Assembly Resolution which criticized the United States' refusal in November 1988 to give Yasser Arafat access to the United Nations as required under the Headquarters Agreement).[4] We protest vigorously against abuses of human rights, whether they occur in our region or elsewhere. In other words, we treat violations of international law as matters of international concern.

4 See UN General Assembly Resolution 43/48, 30 November 1988.

We have a clearly defined interest in being, and being seen to be, a good international citizen. As I have argued elsewhere,[5] part of the Government's role involves the projection into foreign policy of basic values of the Australian community, values which are at the core of our sense of self and which the population at large expects its government to pursue. It is proper, if for no other reason than to maintain our own sense of worth in pursuing ends that are inherently valuable, to seek to improve standards world-wide in human rights and equal opportunity; to work for an end to apartheid in South Africa and racial intolerance everywhere else; to try to remove the inhumanity of the death penalty; to eliminate weapons of mass destruction; to develop new international legal regimes to protect our common environment; and to assist through substantial aid programs the economic and social development of countries struggling with debt, poverty, or national calamity.

The evolution of just and tolerant societies brings its own international returns -- in higher standards of international behaviour, and in the contribution that internal stability makes to international stability and peace. Moreover countries that contribute actively to that process do reap on balance reputational rewards that can be helpful in pursuing less obviously selfless interests.

While it is thus unquestionably in our interest to press for the promotion of an effective international legal order, one that reflects our values and priorities, the question is still whether there are areas where we can be more responsive to the legal preoccupations of countries in our region. Conversely, we might also ask what opportunities exist for us to influence the thinking and approach of our regional neighbours to international legal issues.

As I have already mentioned, self-determination has been a major issue for many developing countries including, of course, those in our region. Successive Australian governments have been strong supporters of the principle of self-determination not only in word but also in deed. I need only mention Australia's role in securing self-determination and independence for Indonesia and for Papua New Guinea, Zimbabwe and Vanuatu, our past work on the Committee of Twenty Four in New York, and our policies in regard to self-determination in New Caledonia. There is a shared philosophy here between ourselves and our regional neighbours. But at the same time, while we have been amongst the foremost Western nations in pursuing the full and universal application of self-determination as it arises in the context of colonisation, as the age of decolonisation draws to a close we have also sought on appropriate occasions to remind all governments that the principle is not exhausted by a single act, but remains a central pillar of the international regime of human rights, whereby individuals and peoples have the right to choose governments which truly represent them.

Similarly, we have taken a strong stand on racial discrimination and apartheid. Although our committed advocacy of racial equality has at time led to friction with significant neighbours, such as Fiji, we believe, as I have said, that equality is not only an essential means to the promotion of peaceful relations, both regionally and internationally, but also a valuable end that must be pursued for itself.

We subscribe to Western criteria of what constitutes "statehood" but have tempered our legal views on the subject in regard to the freely associated states. We have treated the Federated States of Micronesia and the Marshall Islands as full members of the regional community by moving quickly to establish diplomatic relations with them, and strongly supporting their candidature for membership of certain intergovernmental

5 "Australia's Place in the World: The Dynamics of Foreign Policy Decision-Making", ANU Strategic and Defence Studies Centre Conference, Canberra, 6 December 1988.

organisations, such as ICAQ and the ADB, despite the fact that they are freely associated states and not sovereign independent states in the traditional sense of that term.[6]

There are important differences of emphasis, however, between some of our regional neighbours and ourselves concerning the observance of some other basic rights and freedoms. I refer to abolition of capital punishment and cruel and inhumane treatment, freedom of speech and of the press and various procedural rights. I do not deny that much of the misunderstanding and friction in these areas arise from differences between a liberal democracy, on the one hand, and countries where individual rights have no strong foundation in the national culture, on the other.

It is important to appreciate the cultural context from which our regional neighbours assess questions of individuals rights, although there is a big difference between understanding and endorsing. If we judge that certain rights are fundamental and universal than there is an obligation on us to defend those rights. After all, we are not dealing here with rights that exist only within a particular cultural context but with rights which are enshrined in the Universal Declaration of Human Rights and in widely ratified, legally-binding Covenants and Conventions.

Nor should we forget that a right not defended is a right easily lost, and that responsible representations -- which often means quiet representations -- can have some effect. And we should also encourage others to see the upholding of human rights as in their own interests -- a point which I think has now been appreciated by Mr Gorbachev and others. In international law (as in international relations generally) we should not be shy of appealing to self interest, because no rule of customary international law or international treaty will long survive if a significant number of those who subscribe to it do not see some benefit in it for them.

Another area where there are important differences of approach between ourselves and a significant number of our neighbours is the question of sovereign immunity from the jurisdiction of national courts and from execution of judgments. Many developing countries' governments have taken the view that they are immune from legal processes in the courts of other countries. We believe, on the other hand, that in a world where governments are increasingly involved in commercial transactions, immunity must be relative and not absolute.[7] The list of countries that have abandoned absolute immunity is growing, though rather slowly, and I am hopeful that one day there will be more common ground between Western countries and other regional groups on this issue. Certainly, Australian lawyers can, in their contacts with their professional colleagues in the region, highlight the advantages of treating states, companies, and individuals on a more equal footing in commercial transactions and investment arrangements.

It would be a mistake, of course, to assume that our approach to international law is always appropriate in dealings with our neighbours. There are issues and occasions when it may well behove us to adopt a more flexible approach in some areas of international law.

There may, for instance, be room for greater flexibility in our approach to compulsory third party settlement of disputes, given the strong reservations which South Pacific countries and some major civilisations to our north -- including China and Japan -- have to the strict application of the law and litigation. As I have said, such countries do regard law more as a framework for discussion to achieve mutually satisfactory objectives than something that has to be applied strictly. There would be advantage from our point of view in looking to alternative mechanisms for settling disputes, such as

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6 See (1987) 58 *Australian Foreign Affairs Record* 394 for the Australian announcement of the opening of official relations with the Federated States of Micronesia and the Marshall Islands.

7 See Foreign States Immunities Act 1985 (Cth).

mediation and conciliation. I should add that this is entirely consistent with the general non-confrontationist approach to problem solving which this Government from the outset has taken, in international relations just as in the domestic sphere. We may need to examine more imaginative means of resolving perceived legal conflicts so as to ensure, without prejudice to our own real interests, that all the parties to a dispute can save face, rather than have a system that produces "winners" and "losers". This, of course, is a recipe for effective diplomacy more generally.

There is also the question of negotiating styles: we have inherited a Western tradition of negotiation which is perceived, rightly or wrongly, by some as being adversarial and sometimes offensive. Anyone who has dealt with Japanese or South Pacific negotiators will know how different their styles are to that of our own. Patience, repetition and a search for harmony and unity are important characteristics of these styles. We need to understand these differences and respond to them appropriately.

On the other hand, the fact that we are a country with a Western tradition situated in the South Pacific has enabled us on occasion to play the role of "honest broker" between major Western powers with interests in the South Pacific and our regional neighbours. This happened, for example, in the protracted negotiations that led to the adoption in 1986 of the South Pacific Regional Environment Convention,[8] where Australia played a major role in convincing the United States and France of the importance to South Pacific countries in adopting in the Convention strong anti-pollution standards and accepting a provision banning the sea dumping of all radioactive wastes. We have taken a similar approach on the South Pacific Nuclear Free Zone Treaty[9] -- so far without success, although I was pleased to have confirmed by Secretary of State Baker during my visit to Washington in March 1989 that the new US Administration will undertake a review of its position on the Treaty.

One aspect of the Western international law tradition which has not proved especially helpful, in dispute resolution or anywhere else, is the jargon which lawyers are so fond of. Some of this, particularly when it is in Latin, must be incomprehensible to other lawyers, let alone the public. Better use of language must assist in better communication. In this respect I think that the drafters of the South Pacific Nuclear Zone Treaty deserve some credit for crafting a document that is simple to read despite the complexity of the issues that it addresses. The treaty is a testament not only to the consensus politics of the "Pacific way" but also to the capacity to express such consensus by uncluttered eloquence.

The evolution of international law presents the legal practitioner with both a challenge and an opportunity. The challenge is to respond to the new needs, the new priorities, the new technological advances. The opportunity is to participate creatively in the evolution of new norms of international law. The developing international environmental law is an important case in point. The protection of the environment, and more particularly of the atmosphere, is becoming a major global issue. Industrialised countries are widely perceived by developing countries as being the major polluters. Some deft diplomacy will be required to convince developing countries that it is just as much in their interest to put in place effective mechanisms to preserve the environment as it is for the richer countries. The task will be to persuade countries in our region that environmental concerns transcend national sovereignties and that every country has a responsibility to protect the environment for future generations.

I represented the Prime Minister in March 1989 at a summit meeting, in the Hague, of twenty four Heads of State and Government or their representatives, which adopted a Declaration designed to give political impetus to urgent international efforts to tackle the problems of climate change and to chart a program of innovative measures to deal with the unprecedented global threat posed by the greenhouse effect, the depletion of the ozone

8 (1987) 26 International Legal Materials 38.
9 (1985) 24 International Legal Materials 1440.

layer and related phenomena.[10] The signatories to the Declaration have acknowledged and agreed to promote a number of principles, including:

* the development, within the UN framework, of new institutional authority (if necessary through a new organisation) to combat further global warming of the atmosphere;

* the development by this authority of new instruments and standards;

* the adoption of appropriate measures to promote the effective implementation of and compliance with the decisions of this authority, decisions which will be subject to "control" by the International Court of Justice; and

* fair and equitable assistance to compensate countries bearing an abnormal or special burden as a result of decisions taken to protect the atmosphere, especially where their responsibility for atmospheric degradation has been marginal.

Clearly, the negotiation of the necessary new international legal regimes foreshadowed by the Hague Declaration will require a careful balancing between national interests and international responsibilities. Australia will have the opportunity of playing a crucial role in these negotiations and will need to work closely with its Asian and Pacific neighbours on matters of common concern.

There will be large costs involved for all countries in meeting their new environmental responsibilities if the world as know it is to prosper. Developing countries cannot be expected to share this burden alone and unaided. The adjustment burden will have to be equitably shared by all of us, and in a way that recognises the interconnection of this problem with a number of other major problems -- of international trade, debt, development and equity -- that press upon so many members of our international community.

On environmental issues -- as on other issues of global concern -- regional action can complement international efforts. The Hawke Government, more so than any of its predecessors, has placed a high value on regional co-operation, including in the treaty-making field. We have complemented our global support for nuclear non-proliferation with our initiative in proposing the South Pacific Nuclear Free Zone Treaty. We have built on our involvement in the negotiations on a global Chemical Weapons Convention by taking the lead to raise the level of awareness of chemical weapons issues in the region. In these ways and others, we are making a contribution to the elaboration of regional agreements and to the region's capacity to have its perspective reflected in international discussions and treaty making negotiations.

Let me conclude by returning to the central question I posed at the beginning of this paper: does international law serve us and our regional interests? The answer in my view is clearly yes, provided we are sufficiently sensitive and skilful in preserving and strengthening the broader acceptance and authority of the law while using it in the pursuit of those interests. Obviously, some countries in the region are more receptive to our views of international law than others. This is to be expected in a region as vast and diverse as our own. As we move to a position of greater interdependence with our Asian and South Pacific neighbours, we will be presented with further opportunities to develop effective legal frameworks to regulate4 trade, investment, environmental and other concerns. The continuing negotiation with Indonesia of an innovative legal regime to govern a "Zone of Co-operation" for the exploitation of petroleum resources in the disputed boundary area known as the Timor Gap is both a test of our skill and sensitivity in that respect, and an encouraging symbol of the way in which legal problems can be

10 The text is reproduced in the *Weekend Australian*, 1 April 1989.

approached in a practical and co-operative manner, with all the benefits that can afford for bilateral relationships more widely.

We must be fully aware of the different traditions and values in our region. While each case must be considered on its merits, it is in general unlikely to be in our interest to take a rigid and aggressive approach on international legal issues if we are to consolidate and build on regional support for the creation of effective international legal regimes.

I believe the academic community can do much to identify differences in legal perspectives of major philosophies which have influenced the region and to examine to what extent they have impeded regional consensus on legal issues. It would also be useful to examine what mechanisms could be put in place to enhance understanding between Australian international lawyers and their Asian and South Pacific counterparts. Scholars in this country are well placed to do this.

Contact with international lawyers from third world countries by participation in meetings of the Attorney-General's Department's annual trade law seminar and of the Asian-African Legal Consultative Meeting have provided useful occasions for frank and robust discussion on matters of mutual interest. The International Law Association's 64th Biennial Conference, which Australia will host in Brisbane in 1990, will provide a good opportunity for greater understanding between lawyers from countries with different traditions to our own. It is to be hoped that the conference will provide valuable new contacts and induce more meetings of international lawyers in this part of the world.

To conclude, it may be that human nature and the force of nationalism will thwart the development of a common law of mankind as espoused by some scholars. But in international law -- as in diplomacy generally -- the best ought not to be the enemy of the good. I have already asserted that to remain effective international law must evolve. Evolution is always a slow process, so we should not be too discouraged if it takes governments time to agree on new international rules or if the international rules or if the international rule of law is not as developed or widely observed as we would like. Just because international law experiences setbacks from time to time, particularly in regard to the use of force, does not mean that we should abandon our efforts for greater international co-operation, for the strict observance of existing international law, and for the elaboration of new international legal rules to meet our separate and our shared interests.