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INDIGENOUS EQUALITY: THE LONG ROAD

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This essay identifies some of incremental progress towards substantive racial equality in Australia for First Nations Peoples observed in the course of a legal practice extending over the past 44 years, affected by cases brought before the courts, particularly the case of Mabo v Queensland. It discusses the impact on that progress of legislation, particularly the Native Title Act. It concludes that recognition of the fiduciary duty of the Government towards its First Nations Peoples may be a necessary prerequisite to according them self determination and equality within the Australian nation.

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CONTENTS

I INTRODUCTION

The road to Indigenous equality in Australia is proving to be a long one for Indigenous people over the past 232 years, since the assertion of British sovereignty. This essay traces my experiences, observations and participation as a legal practitioner in some of the legal changes over the past 44 years which have been affected by cases brought before the courts, particularly in the area of native title. It references legislation, which, in some instances, has been reactive to those cases. The essay identifies some of the incremental progress towards substantive racial equality in Australia. The essay, while identifying

deficiencies and limitations in the legal process, also suggests the direction in which Australia should be heading, if it is to achieve legal and social equality for First Nations Peoples.

II MY INTRODUCTION TO INDIGENOUS INEQUALITY

As a law student at the University of Western Australia in 1972, I participated with a group of fellow law students in an awareness raising survey of the conditions in which Aboriginal people were living in the south-west of Western Australia. We visited towns in the south-west and observed things such as Aboriginal Reserves having one tap to four houses. Following a workshop comparing our experiences, the student Blackstone Law Society resolved to participate in a voluntary legal aid service which had just been established by the Justice Committee of the New Era Aboriginal Fellowship. In 1974, I joined that Committee, as its student representative. It evolved into the Aboriginal Legal Service of Western Australia in that period.

The first job I took upon obtaining my legal practice certificate in 1976 was with the Aboriginal Legal Service of Western Australia in its new Kalgoorlie office. In 1977, I attended the second meeting of Central Desert communities of Western Australia, South Australia and the Northern Territory which, during the course of that year, became incorporated as the Pitjantjatjara Council to fight to obtain land rights, which mirrored what had been enacted by the *Aboriginal Land Rights (Northern Territory)* Act 1976.[1]

In 1978, a delegation of leaders from the Pitjantjatjara Council travelled to Perth with their employed solicitor, Phillip Toyne.[2] We met with the Premier of Western Australia, Sir Charles Court, to argue the case for Western Australia enacting land rights legislation. I do not recall that we gained much traction with the Premier, but the delegation did draw some public attention to the cause.

I was convinced at that time that if Governments would just recognise the rights to land, which it appeared to me that Aboriginal people self-evidently held as an integral part of

[1] Which brought together communities for the whole of the Western Desert Cultural Bloc – Ngaanyatjarra, Ngatatjarra, Pitjantjatjarra, and Yankutatjarra peoples.
[2] See a summary of Phillip Toyne's career at Andrew Campbell, 'Phillip Toyne cared for land-carers, black and white', *The Conversation* (Web Page, 15 June 2015) <https://theconversation.com/phillip-toyne-cared-for-land-carers-black-and-white-43235> and 'Phillip Toyne', *Wikipedia* (Web Page, 20 August 2020) <https://en.wikipedia.org/wiki/Phillip_Toyne>.

their existence, it would deliver to them all that was required for them to be self-determining and socially and economically secure. I could see from my time travelling around the Central Desert communities how intimately their lives were connected with the land to which they belonged.

In 1978, I attended the second meeting of the Kimberley Land Council and then, with its Chairman, Frank Chulung,[3] traversed the Kimberley, identifying areas of land that were of significance to Aboriginal people which could be purchased on their behalf by the Aboriginal Land Fund Commission,[4] or preserved by being added to the Conservation estate, by what we anticipated may have been a State Government willing to establish a network of Conservation Reserves throughout the Kimberley.

I secured a grant from the Australian Institute of Aboriginal Studies in the latter half of 1978,[5] to conduct a study on the topic of 'Aboriginal Land Rights at Common Law'.[6] The thesis I started with was that, if local legal customs could be recognised as part of the law of England, then that was a basis for recognition of Aboriginal title in Australia.

In 1981, I was invited to a conference on the topic of 'Land Rights and the Future of Race Relations in Australia' organised by the James Cook University Student Union in North Queensland and the Townsville Treaty Committee on the topic 'A High Court Test Case?'[7] Eddie Koiki Mabo, alongside historian Noel Loos, was a co-chair of the Townsville Treaty Committee and, following some side discussions during the conference, I received instructions to commence a test case for land rights on Murray Island.

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[3] 'Our History', *Walalakoo* Aboriginal Corporation (Web Page) <https://www.walalakoo.org.au/history>; 'Tom Stephens', *Wikipedia* (Web Page, 24 October 2020) <https://en.wikipedia.org/wiki/Tom_Stephens>; Rod Dixon.

[4] Established under the *Aboriginal Land Fund Act 1974* (Cth) and the precursor to the Indigenous Land and Sea Corporation.

[5] Now known as the Australian Institute of Aboriginal and Torres Strait Islander Studies, after reading academic critiques of the 1971 decision of Justice Blackburn in the Supreme Court of the Northern Territory in *Millirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 by Geoffrey Lester and Graham Parker, 'Land Rights: The Australian Aborigines have lost a battle, but…' (1973) 11(2) *Alberta Law Review* 189; John Hookey, 'The Gove Land Rights case: a judicial dispensation for the taking of Aboriginal lands in Australia' (1972) 5(1) *Federal Law Review* 85; John Hookey, 'How much of a roadblock is the Gove case?' in Garth Netteim (ed), *Aborigines, human rights and the law* (ANZ Book Co, 1974) 99-103; and, with the encouragement of the Principal Legal Officer at the ALS, Graham McDonald and Ken Colbung, its Chair, who was also Chair of the Australian Institute of Aboriginal Studies.

[6] A more detailed account of how that study unfolded is set out in 'Genesis of a Test Case', in Toni Bauman and Lydia Glick (ed), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2012) 7–20.

[7] The papers from the Conference were published in Erik Olbrei (ed), *Black Australians: the prospects for change* (James Cook University of North Queensland Student Union, 1982).

Starting with five plaintiffs and a committed legal team, proceedings commenced on 20 May 1982 in the High Court and resulted in the decision handed down on 3 June 1992 in *Mabo v Queensland [No 2]* recognising native title at common law.[8]

III LITIGATION OR LEGISLATION

In 1983, I travelled with Mick Miller,[9] the Chairman of the North Queensland Land Council, to Canberra to meet with the Secretary of the Department of Aboriginal Affairs, Charles Perkins,[10] and the Minister for Aboriginal Affairs, Clyde Holding. The Minister was confident that the Hawke Government would enact national land rights legislation. However, as Paul Keating later described it:

> In 1983, the Hawke Government promised a national land rights bill which included an inalienable freehold title and compensation for past acts and alienations. But this promise of uniform national land rights was broken in March 1986 when Bob Hawke buckled under pressure applied by the then Labor Premier of Western Australia, Brian Burke…[11]

In that context, the pursuit of the claim on behalf of the Meriam People was to maintain its significance. A political and legislative recognition of Indigenous rights to land had dropped off the agenda by 1983. The path of recognition through litigation was all that was left.

IV LEGISLATING NATIVE TITLE

Following the High Court's decision in *Mabo [No 2]* in June 1992, Paul Keating has said that there was an 'opportunity' in the willingness of the Labor Government he led to 'legislatively validate and develop the decision of the High Court of Australia' in *Mabo [No 2]*.[12] He has expressed the view that the High Court in *Mabo [No 2]* had opened the door to a possibility of consultation and negotiation between the colonial government and the

[8] (1992) 175 CLR 1. The details of that 10 year journey are chronicled in Bryan Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013).
[9] 'Mick Miller (Aboriginal statesman)', *Wikipedia* (Web Page, 3 September 2020) <https://en.wikipedia.org/wiki/Mick_Miller_(Aboriginal_statesman)>.
[10] 'Charles Perkins (Aboriginal activist)', *Wikipedia* (Web Page, 15 November 2020) <https://en.wikipedia.org/wiki/Charles_Perkins_(Aboriginal_activist)>.
[11] Paul Keating, 'Time to Revisit Native Title Laws' in Toni Bauman and Lydia Glick (eds), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2012) ch 32, 409.
[12] Ibid 406.

country's Indigenous representatives on the country's common law but without a 'comprehensive, firm and quick legislative response that door would have just as quickly closed'.[13]

The negotiations which ensued involved Indigenous representatives in what they had hoped was a 'settlement process' but as Darryl Cronin described it, 'in reality, given the enormous power of industry and territory governments, they became engaged in a political battle to protect the basic core of native title'.[14] The *Native Title Act 1993* (Cth) which emerged from the negotiations was 127 pages long. It declared at section 3 that it had four objects: (a) 'recognition and protection of native title'; (b) a procedure for future dealings with native title; (c) a mechanism for determining native title; and (d) validating past acts invalidated by native title. However, as Les Malezer has commented, 'a large impact of the 1993 *Native Title Act* was that any land titles issued between 1973 and 1994 (and later extended to 1996 [after the High Court's *Wik* decision]) were validated retrospectively'.[15]

V PUSHING BACK THE STATES

The State of Western Australia was the most active of all the States in reacting against recognition of native title. It enacted the *Land (Titles and Traditional Usage) Act 1993* (WA). That Act purported, by Section 7, to extinguish any native title that existed in the State and, in its place, entitled any Aboriginal group who had held native title 'to exercise rights of traditional usage'. The legislation was challenged in High Court proceedings by native title claim groups from the Kimberley and the Western Desert of Western Australia on the basis that it was inconsistent with Section 10 of the *Racial Discrimination Act 1975* (Cth).[16] The State of Western Australia, in proceedings which were heard at the same time, challenged the constitutional power of the Commonwealth to enact the *Native Title Act*

[13] Ibid 407.
[14] Darryl Cronin, 'The Lead up to the Passage of the *Native Title Act*' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 years On* (AIATSIS Research Publications 2012) Ch 7, 69.
[15] Les Malezer and Toni Bauman, 'Interview with Le Malezer' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 years On* (AIATSIS Research Publications 2012) Ch 15, 160.
[16] *The Wororra Peoples & Anor v The State of Western Australia* No 147 of 1993 and *Teddy Biljabu & Ors v The State of Western Australia* No P45 of 1993, reported as *Western Australia v Commonwealth* [1995] HCA 47; (1995) EOC 92-687 (extracts); (1995) 69 ALJR 309; (1995) 183 CLR 373. I appeared for the Kimberly Land Council in those cases with A R ('Ron') Castan QC and B A ('Bryan') Keon-Cohen in those cases.

1994 (Cth).[17] The High Court ruled that the state legislation was invalid and the Commonwealth *Native Title Act* was a valid exercise of the power to make special laws for the people of a race.[18]

VI PASTORAL LEASES V NATIVE TITLE

Early purported decisions by the President of the National Native Title Tribunal in relation to the extinguishing effect of pastoral leases on native title were the subject of challenge.[19] The High Court concluded in March 1996 in *North Ganalanja Aboriginal Corporation and Anor for and on behalf of the Waanyi People v the State of Queensland and Ors* that the question of whether a pastoral lease extinguished native title was fairly arguable.[20] Therefore, the President should not have formed the opinion that it was not arguable that the native title had survived the grant of a pastoral lease and thus, declined to accept an application for native title on that basis. The issue of the co-existence of native title with pastoral leases was resolved on 23 December 1996, when the High Court handed down its decision in *Wik Peoples v Queensland*.[21]

VII HOWARD'S TEN POINT PLAN

In the wake of the *Wik* decision, then Prime Minister John Howard on 1 May 1997 announced a 'Ten Point Plan' to amend the *Native Title Act*. On 8 May 1997, the Prime Minister released a statement, introducing a marginally amended Ten Point Plan, in which he said:

> My aim has always been to strike a fair balance between respect for native title and security for pastoralists, farmers, and miners. That is one reason why I staunchly oppose blanket extinguishment of native title on pastoral leaseholds.

[17] *Western Australia v Commonwealth* [1995] HCA 47; (1995) EOC 92-687 (extracts); (1995) 69 ALJR 309; (1995) 183 CLR 373.
[18] *Constitution* (Cth) s 51(xxvi).
[19] *Waanyi Peoples (No 2)* 14 February 1995 and *Ngaluma/Injibarndi* December 1995.
[20] [1996] HCA 2; (1996) 185 CLR 595. I appeared for the Kimberley Land Council, as intervener in the High Court in that case.
[21] [1996] HCA 40; 187 CLR 1; 71 ALJR 173; 141 ALR 129. I appeared for Napranum Aboriginal Council (7th Respondent) and for Kimberley Land Council, Nanga-Ngoona Moora-Joonga Association, Western Desert Puntukurnuparna Aboriginal Corporation, Ngaanyatjarra Land Council, Intervening in that case.

> The fact is that the *Wik* decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre.[22]

Explaining the government's position on ABC TV, Deputy Prime Minister Tim Fischer produced what has been described as 'a memorable oxymoron'. The legislation would, he said, provide 'bucket loads of extinguishment and bucket loads of native title'.[23]

The Western Australian Aboriginal Native Title Working Group had serious concerns about the likely impact on native title parties of the proposed amendments to the legislation. In particular, the fact that it would impose an additional 33 forms of procedural rights in place of the right to negotiate associated with future acts affecting native title and the proposal for states to be able to administer an alternative right to negotiate to that applying under the Commonwealth *Native Title Act*.

The Working Group appointed a Negotiating Team to lobby to avoid the most onerous elements of the proposed amendments,[24] and in particular, oppose the shifting of the negotiating regime to one managed by the State of Western Australia, bearing in mind the oppositional stance which the Western Australian Government had been taking in relation to native title.

An alternative state regime for Western Australia was approved by a determination by legislative instrument by the then Commonwealth Attorney-General Darryl Williams.[25] However, the legislative instrument failed to be approved by the Parliament, as is required for a legislative instrument to have the force of law. Due to the casting vote of Senator Brian Harradine, it never came into force in Western Australia.

Of the many amendments to the *Native Title Act* introduced in 1998, the most onerous was the introduction of a complex registration test,[26] which had to be passed before an

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[22] 'John Howard's Amended Wik 10-Point Plan', *Australian Politics* (Web Page, 8 May 1997) <https://australianpolitics.com/1997/05/08/howard-amended-wik-10-point-plan.html>.
[23] 'Blackfellas, whitefellas and the hidden injuries of race', *The Age* (Web Page, 17 April 2004) <https://www.theage.com.au/entertainment/books/blackfellas-whitefella-and-the-hidden-injuries-of-race-20040417-gdxov8.html> quoted by J Brough, 'Wik Draft Threat to Native Title', *The Sydney Morning Herald* (Sydney, 28 June 1997) 3. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report – July 1996 – June 1997* (Human Rights and Equal Opportunity Commission, Sydney, 1997), 59-100.
[24] Which operated between 1998 and 1999 and included Pat Dodson, then chair of the Reconciliation Council, Peter Yu, Executive Officer of the Kimberley Land Council, and Michael O'Donnell as its Principal Legal Adviser and I was an Executive Officer and legal Adviser to the Team.
[25] As was required by the *Native Title Act 1993* (Cth) s 207A.
[26] Set out in the *Native Title Act 1993* (Cth), ss 190A(6), (6A), 190B-190C.

application for a determination of native title could be accepted for registration and attract negotiating rights. The registration test was multi-faceted and required a native title application to address every element of the test with precision and a sophisticated understanding of both the common law relating to native title and the *Native Title Act 1993* (Cth) as amended in 1998, which had quadrupled in size from its 1993 origins to become a statute of 441 pages.

Between 1998 and 2000, I led a Western Australian Native Title Support Team to develop a pro forma application for a determination of native title that satisfied the technical requirements of what needed to be expressed in an application in order for it to meet the registration test. It assisted the Native Title Representative Bodies and some individual claimants throughout the state to prepare applications in a form which had some prospect of passing the registration test. It was a test upon which the applicant needed to score a 100% correct result, and, thus, it required careful attention to detail.

VIII EXTINGUISHMENT AND COMPENSATION

Professor Kent McNeil, an international authority on native title accepted by the High Court in *Mabo [No 2]*,[27] has comprehensively demonstrated that the position the Court arrived at in that case, which condoned extinguishment of native title by executive act without statutory authority and without compensation, is contrary to fundamental common law principles. He has written:

> The Executive acting on behalf of the Crown can extinguish native title by executive act if unambiguously authorised by valid legislation to do so and the intention to extinguish is clear and plain.[28]
>
> …
>
> Statutes authorising the Crown compulsorily to acquire lands for public purposes, for example, might apply to lands held by native title, permitting that title to be extinguished in accordance with the legislation. However, if that is the case, compensation would have to be paid to the native titleholders unless

[27] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39 (Brennan J) nn 97, (Toohey J) 178 nn 71-2, 180 nn 76 ('*Mabo No 2*').
[28] Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1(2) *Australian Indigenous Law Review* 181.

> the legislation clearly provided otherwise. As for statutes authorising the Crown to grant interests in lands, in the absence of unambiguous legislative intention to the contrary that authority, like the common law power to grant, extends only to interests which are the Crown's to give. The Crown cannot grant interests which it does not have, nor can it extinguish the property rights and interests of its subjects by granting their lands to someone else….
>
> The law just summarised is not the law as applied by the High Court in Mabo *[No 2]* … [T]he judges were in general agreement that, subject to the constitutional limitations discussed above, native title can be extinguished by executive acts. In particular, apart from Toohey J they decided that it can be extinguished either by a grant of a freehold or lesser estate or by appropriation by the Crown, to the extent that the grant or appropriation is inconsistent with the continuing enjoyment of native title.[29] Moreover, this aspect of the decision was affirmed by the Western Australia case.[30]

My hope is that a time will arrive in the future when it is appropriate to revisit this aspect of the decision in *Mabo [No 2].* If Australia is to comply with its obligations at common law and under the Universal Declaration of Human Rights and United Nations Convention on the Elimination of All Forms of Racial Discrimination, as adopted into Australian domestic law by the *Racial Discrimination Act 1975* (Cth), and as the High Court in *Mabo (No 1)* concluded, it has an obligation to compensate Indigenous Peoples for the arbitrary taking of their property which has occurred over the last 232 years.

It would not be impossible for the High Court , in an appropriate case brought before it, to review that aspect of its analysis of the common law in *Mabo [No 2]*, bearing in mind that the conclusion on that issue was reached by a majority of 4 to 3 judges of the High Court, by combining the judgment of Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, and the dissenting judgement of Justice Dawson, who concluded that native title was not capable of recognition by the common law. Justices Deane and Gaudron, in a joint judgment, and Justice Toohey were all of the view that native title could not be the subject of an inconsistent Crown grant without compensation, 'in the absence

[29] *Mabo v Queensland (No. 2)* (n 27), per Brennan J at 68-70, Mason CJ and McHugh J concurring at 15; Deane and Gaudron JJ at 89-90, 94, 110.
[30] Western Australia v Commonwealth (n 17) 47.

of clear and unambiguous statutory provisions to the contrary'.[31]

If the court were to address this issue, it could have a significant impact upon the assumption upon which the *Native Title Act* is presently being applied. This Act and the various complementary pieces of state and territory legislation enacted pursuant to it,[32] explicitly extinguish native title by validating past 'previous exclusive possession acts'.[33] The High Court in *Western Australia v Ward* in its discussion on extinguishment,[34] proceeded on the basis that it is only the Crown's grant of title subsequent to the enactment of the *Racial Discrimination Act 1975* (Cth) which may not have been effective in extinguishing native title, because of the operation of that Act which needed to be validated by the *Native Title Act*.

The alternative is that executive governments or legislatures of the future will recognise the injustice which was wrought by the colonising acts which have progressively and arbitrarily dispossessed First Nations Peoples of their property. Effecting a process of just reparation is required, which acknowledges the long history of past arbitrary taking and reaching an agreed position that compensates for the loss which it has occasioned, engrossed in a treaty or treaties with First Nations Peoples.

IX BUNDLE OF RIGHTS

In *Western Australia v Ward*,[35] the High Court said that native title rights and interests are properly to be seen as a bundle of rights, the separate components of which may be extinguished separately.

Concerns have been expressed about this analysis because it was thought to confirm that the *Native Title Act* allows the piecemeal erosion of native title,[36] and was a rejection of the proposition that native title is solely to be understood as a possessory title based on

[31] *Mabo (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).
[32] Native Title Act 1993 (Cth) s 23A(4).
[33] Ibid pt 2, div 2B.
[34] [2002] HCA 28 [104]-[134]; (2002) 76 ALJR 1098, 1128–1134.
[35] (2002) 213 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); a case in which I appeared with Walter Sofronoff QC for Kimberley Land Council and appeared leading D Ritter for Yamatji Barna Baba Maaja Aboriginal Corporation (Intervening).
[36] Lisa Strelein, *Compromised Jurisprudence, Native Title cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 58.

proof of occupation.[37] That concern was somewhat allayed by the majority of the Court in *Ward* referring to the 'bundle of rights' description of native title as a metaphor to describe all property interests, noting it may be used to illustrate that there may be more than one right or interest in a particular piece of land and is to be distinguished for a 'list of activities'.[38]

X EXTINGUISHMENT AND REVIVAL OF NATIVE TITLE

In *Fejo*,[39] the High Court considered whether native title could still exist over land which was once granted in fee simple but later reverted to vacant Crown land. The High Court held that native title was extinguished by freehold grants and that the extinguishment was permanent and that native title under the common law could not be re-recognised or 'revived' when the land returned to the Crown. It applied an inconsistency of incidents test.

The test for extinguishment of native title has been revisited by Australian Courts in the last decade in a group of interesting cases.

In *Akiba v Commonwealth,*[40] French CJ and Crennan J emphasised the presumption in favour of regulation of native title. A statute could be interpreted as affecting the exercise of native title, rather than extinguishing the 'underlying' title.[41] Hayne, Kiefel and Bell JJ agreed with that approach.[42]

In *Karpany v Dietman,*[43] the High Court, applying a 'necessary implication' test, held that a prohibition on fishing without a licence amounted to regulation, not extinguishment of native title.

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[37] A proposition which I advocated for in that case. See Noel Pearson, 'Land is Susceptible of Ownership' in M Langton et al (eds) *Honour Among Nations?* (Melbourne University Press, 2004) 83.
[38] *Western Australia v Ward* (2002) 213 CLR 1, 95 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[39] *Fejo and Mills (on behalf of the Larrakia People) v The Northern Territory & Ors* [1998] HCA 58. I appeared for the Noongar Land Council, Edna Bropho, William Warrell, the Kimberley Land Council, Kenny Oobagooma and the Goldfields Land Council, Intervening in the case.
[40] (2013) 250 CLR 209.
[41] Ibid [29].
[42] Ibid [68]. See also Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim Case', in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29–43.
[43] (2013) 303 ALR 216.

In *Brown v Western Australia,*[44] a case which involved the State of Western Australia making an agreement with joint venturers about the development and exploitation of an iron ore deposit at Mount Goldsworthy,[45] the joint venturers were granted mineral leases. At first instance, Justice Bennett applied the doctrine of 'operational inconsistency' developed by the Full Federal Court in *De Rose*,[46] and found that native title had been extinguished in those part of the mining lease where the town site and mine had been constructed.

The High Court in *Brown* took a different view,[47] holding that the grant of the mineral leases did not extinguish those native title rights and interests in relation to the land subject to the mineral leases, concluding that the rights granted under the mineral leases are not inconsistent with the claimed native title rights and interests.

The High Court pointed out that:

> The identification of the relevant rights is an objective inquiry.[48] This means that the legal nature and content of the rights must be ascertained.[49] The nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised. That is why the plurality in *Ward* said that consideration of the way in which a right has been exercised is relevant only in so far as it assists the correct identification of the nature and content of the right.[50]

Brown may be a sign of a doctrinal shift by the High Court back towards the concept of native title as right to land rather than a bundle of rights. The concept of partial extinguishment has only ever been said to occur by way of extinguishment of 'exclusivity', prompting a need to revisit what had previously been understood to be the outcome of the High Court in *Ward*.

[44] (2010) 268 ALR 149.
[45] The agreement was approved by Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA) s 4(1).
[46] *De Rose v State of South Australia* (2005) 145 FCR 290 (special leave refused).
[47] Ibid [3].
[48] Ibid [34].
[49] Cf *Wik Peoples v Queensland* (1996) 187 CLR 1, 71–72 (Brennan CJ), 185 (Gummow J); [1996] HCA 40.
[50] [2002] HCA 28, 89; (2002) 213 CLR 1, [78].

The tension between the inconsistency of incidents test of extinguishment and the requirement for a clear and plain legislative intention to extinguish native title is brought into sharp relief in the recent High Court decision in *Queensland v Congoo*.[51]

In 2001, the Bar-Barrum People lodged an application in the Federal Court for a determination of native title over an area in Queensland. Part of the determination area was used by the Commonwealth during World War II as an artillery range and live fire manoeuvre range for training the military pursuant to a series of orders made under the National Security (General) Regulations under the *National Security Act 1939* (NSA), which allowed the Commonwealth to take possession of any land. The Commonwealth relinquished control of the land in August 1945.

In a split 3:3 decision, French CJ and Keane and Gageler JJ found that native title did exist; however, Hayne, Kiefel and Bell JJ found that it had been extinguished. Section 23(2) of the *Judiciary Act* 1903 (Cth) states that when the Justices sitting as a Full Court are equally divided in opinion in a question where the decision of the Federal Court of Australia or a judge of that Court is called into question by appeal or otherwise, the decision appealed from shall be affirmed. As a result, the appeal was dismissed with costs.

French CJ and Keane J jointly, and Gageler J (with a different reasoning), found that for the Military Orders to have extinguished native title rights and interests, they would have to confer a right of exclusive possession to be able to exclude anyone and everyone for any or no reason at all, and they did not. The orders were concerned with actual physical possession and not exclusive possession.

Gageler J reached the same conclusion by finding that there is no reason to read 'possession' in the regulation to mean 'exclusive possession', and the rights were limited to their objective.

Hayne, Kiefel and Bell JJ found, in three separate judgments, that the Military Orders did allow the Commonwealth to take exclusive possession of the land, and the fact that they took that possession for a limited time did not deny the rights taken were inconsistent with the native title rights and interests.

[51] [2015] HCA 17.

According to French CJ and Keane J:

> The clear and plain intention standard for extinguishment formulated in *Mabo [No 2]* is an important normative principle informing the selection of the criterion for determining whether a legislative or executive act should be taken by the common law to have extinguished native title.[52]

Hayne J rejected the notion that a clear and plain intention standard had continued its application to the extinguishment of native title. He suggested that the majority of the Full Federal Court had reverted to the concept of adverse dominion, adopted by the trial judge in *Ward*, but rejected by the High Court in *Ward*.[53]

It remains to be seen whether or not this doctrinal divide between the judges will have implications for future cases on extinguishment. On one view, an approach to the construction of legislation that has regard to the objective legislative purpose, ascertained by reference to statutory context and framework in which the provision in question appears, is unremarkable and in accordance with settled authority.[54] The proposition that such an approach should be eschewed when one comes to a consideration of legislation affecting native title rights and interests, as opposed to other proprietary interests, seems at odds with the common law of native title as developed in other common law countries and imported into Australia, which premises concepts of equality before the law.[55] As Brendan Edgeworth argued, 'this post-*Ward* reformulation of native title does no violence to the basic idea of native title as a unitary title established in *Mabo [No 2]*… and most importantly, it advances a fairer balance between native title claimants and others'.[56]

XI THE LIMITATIONS OF NATIVE TITLE

My naïve hope, in pursuing the quest for land rights through the mechanism of the Meriam People's claim in the High Court, was that it would secure for them and other Indigenous

[52] Ibid [34]. Gageler J made a similar point at [159].
[53] Ibid [78]–[82].
[54] Ibid (French CJ, Keane J) [36] citing amongst other cases *Project Blue Sky Inc v Australian Broadcasting Authority*. See also Brendan Edgeworth, 'Extinguishment of Native Title: Recent High Court Decisions' (2016) 8(22) *Indigenous Law Bulletin* 28, 32.
[55] *Mabo (No 2)* (1992) 175 CLR 1, [29] (Brennan J).
[56] Queensland v Congoo (n 54) 33.

Peoples a basis for recognition and self-determination within the Australian community. What the *Mabo [No 2]* decision delivered was not quite that.

XII CONTROL: PROPERTY

A real issue about the extent to which native title in Australia has delivered benefits to Aboriginal and Torres Strait Islander Peoples is best explored by considering whether, or to what extent, it has actually delivered or is capable of delivering property to them.

The decision of the High Court in *Mabo v Queensland [No 1]* proceeded on the basis that the 'traditional rights and interests'[57] asserted by the Meriam people were property which they were entitled to own and entitled not to be arbitrarily deprived of. The Court based its decision on the *Racial Discrimination Act 1975* (Cth) which invoked the human right to own property and not be deprived of it, accorded by Article 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination and Article 17 of the Universal Declaration of Human Rights (1945).

As the High Court said in *Yanner v Eaton,*[58] 'property does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing'. Native title, if it is to truly be a form of property, must contain elements of the capacity to control access to land, waters and the resources within them.[59] 'Exclusivity' is a metaphor for the right to exercise the powers or ownership or the right to exercise the power of ownership or control what makes up the property or title being asserted. It is not an absolute, but a relative concept.[60] Whether one has the right to exclude is determined by who has the better title. It does not follow, for example, from the fact that native title holder's rights co-exist with those of a pastoral lease holder that a native title holder is unable to enforce a right of exclusion against a stranger or third party. Chief Justice Lamer in *Delgamuukw v British Columbia* suggested that 'exclusive use and occupation of land' is a defining

[57] (1988) 166 CLR 186.
[58] (1999) 201 CLR 351, [17].
[59] See further, Greg McIntyre, 'Native Title is Property' in ed Lisa Strelein, *Dialogue About Land Justice: papers from the National Native Title Conference* (Aboriginal Studies Press 2010) 52-3.
[60] *Mabo v Queensland* (n 27), 208-9 (Toohey J).

element of aboriginal title[61] and allowed that 'joint title can arise from shared exclusivity' a concept 'well known in the common law'.[62]

The Federal Court in *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* and *Banjima People v State of Western Australia*,[63] confirmed that a traditional law creating an obligation of neighbouring Indigenous Peoples to obtain permission from the native title holders to enter their land has a normative character which comprises the 'essence' of a right to exclusive possession. The argument that the practical inability of native title holders to enforce that right against non-indigenous people did not negate the existence of the right was rejected.

The concept of native title as a 'unitary' title discussed above in relation the evolving jurisprudence on extinguishment of native title also supports its existence as something which has that crucial element of power connected to it.

XIII POSITIVES AND NEGATIVES

The Yorta Yorta People's native title claim is illustrative of the fact that even a native title claim which was unsuccessful in the courts can have some positive results.[64]

Justice Brennan in *Mabo [No 2]* said:

> [W]hen the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.[65]

The 'tide of history' metaphor was adopted by Justice Olney to dismiss the native title claim of the Yorta Yorta people, saying 'the tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.[66]

[61] (1993) 104 DLR (4th) 470, [117], [155]–[157], [183], [196] La Forest J.
[62] At [158], referring to United States v Santa Fe Pacific Railroad Co (1941) 314 US 339.
[63] [2019] FCAFC 177, [281]; [2015] FCAFC 84; (2015) 231 FCR 456, [38]–[42].
[64] Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58.
[65] *Mabo (No 2)* (1992) 175 CLR 1, 60.
[66] *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [129] (Olney J).

Monica Morgan, a Yorta Yorta woman, and spokesperson for the Yorta Yorta/Bangerang native title claimants, whose claim was dismissed by Olney J, said in 2012:

> Looking back 14 years after the 'tide of history' decision and 20 years after the *Mabo* decision, there are a couple of positives that have come out of the land claim process. The Yorta Yorta native title claim was able to give our story, show our connection to our lands and waters and to each other. Another outcome was to bring the Victorian Government to the table and deliver a negotiated outcome between the Yorta Yorta and the Victorian Government for a joint management over Crown lands within Yorta Yorta traditional country. A negative of the native title process was that the determination cancelled out the possibility of Yorta Yorta/Bangerang peoples receiving compensation for extinguishment.[67]

Brennan et al have identified that:

> Achieving positive change and empowerment out of the native title paradigm requires extremely hard and sustained effort, both internally by Indigenous groups, and externally in the interactions between those groups and government, legislatures and third parties.[68]

As they say, success, internally, depends on determining goals: self-determination, empowerment, recognition, and defining goals in a way which secures legitimacy within the group. It also involves deciding on the sharing of decision-making and benefits by balancing accountability, representativeness, and 'adaptive change' with retaining identity. Governments, because of their control over legislative regulation and public policy, have a substantial input into whether Indigenous communities are empowered to press claims for recognition of their rights and to leverage a better future from their position as property right holders.

Ciaran O'Farcheallaigh said that '[d]espite the challenges they face, Aboriginal people in some of Australia's resource-rich regions are grasping economic opportunities created by recognition of their native title rights'.[69]

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[67] Monica Morgan, 'What has native title done for me lately?' in Toni Bauman and Lydia Glick (ed.), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) 240-1.
[68] Brennan et al, Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment (The Federation Press, 2015) 3.
[69] Ibid 169.

Marcia Langton notes that empowerment to enjoy the benefits which native title may afford requires financial and human resources and organisational structures capable of administering a complex set of legal and practical problems.[70] She cites the example of philanthropic social enterprise bodies in facilitating expertise being transferred from partner corporations to Aboriginal organisations, in particular Jawun – formerly known as Indigenous Enterprise Partnerships, which supports 60 Indigenous corporations and has over 20 corporate partners who second staff to provide professional skills and advice.

Native title claims have precipitated some significant alternative settlements in recent times. The Noongar Native Title Settlement involved the registration of six Indigenous Land Use Agreements (ILUAs) under the *Native Title Act*. It covered 30,000 Noongar people and around 200,000 km^2 of land in south-west Western Australia. Its total value is approximately $1.3 billion, and it includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage. In exchange for this package, the Noongar people agreed to surrender all current and future claims relating to historical and contemporary dispossession. The Western Australian Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016, which* recognised the Noongar people as the traditional owners and occupiers of south-west Western Australia, and their continuing relationship with country. Around 320,000 hectares of Crown land is to be transferred into the Noongar Boodja Trust (NBT) over five years. The NBT will function as a perpetual trust, upon which the Western Australia Government will make funding instalments of $50 million (indexed) yearly for 12 years.[71]

A matter of continuing controversy among the Noongar people was the State of Western Australia setting as a pre-condition of the settlement that all native title be surrendered. Some members of the Noongar people strongly opposed the Settlement, largely because of that pre-condition. The decisions at meetings authorising the ILUAs were made by slim majorities in most cases. Not all persons authorised to enter into the ILUAs on behalf of

[70] Ibid 182-3.
[71] Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law* (Web Page, 24 October 2018) <https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>; Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1; 'Settlement Agreement', *South West Aboriginal Land and Sea Council* (Web Page) <http://www.noongar.org.au/settlement-agreement>.

the 6 claim groups could register and sign the ILUAs. Proceedings were commenced by some of those dissentients resulted in a decision of the Full Federal Court in *McGlade v Native Title Registrar*.[72] It found that the ILUAs were not valid without all registered claimants signing them. That precipitated remedial legislation, retrospectively validating the Noongar ILUAs and hundreds of others around the nation.[73] The ILUAs were the subject of applications for registration under the Native Title Act. Objections were made to them under the Act. They were registered, despite the objections, and the registrations were challenged in the Federal Court, unsuccessfully in *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation [No 2].*[74]

The Yamatji Nation ILUA was registered by the National Native Title on 30 July 2020.[75] The negotiators of that agreement had the benefit of observing the litigious process in relation to the Noongar Settlement and the state accepted the position that agreement was unlikely to be reached if the pre-condition of surrender of all native title was insisted on. The Yamatji Nations ILUA both recognises native title and provides a package of benefits to ensure the social and economic independence of future generations of the Yamatji Nation.[76] The ILUA covers more than 48,000 square kilometres of land in the mid-west of Western Australia. It was signed on 24 February 2020, following a Federal Court hearing on 7 February recognising the native title rights and interests of the Yamatji Nation over a small selection of significant parcels of land. The Yamatji People negotiating the ILUA, assisted by a legal team, of which I was a part, insisted that it provide an enduring benefits package to ensure self-determination and long-term economic independence for the people of the Yamatji Nation. The State's negotiators embraced that philosophical position and came up with some innovative ideas for a package which the Government could deliver. It comprised a variety of components: cash, mining rental

[72] [2017] FCAFC 10.
[73] 'Majority rules! Parliament acts to make indigenous land use agreements viable again', *Clayton Utz* (Web Page, 14 June 2017) <https://www.claytonutz.com/knowledge/2017/june/majority-rules-parliament-acts-to-make-the-use-of-indigenous-land-use-agreements-a-viable-proposition-once-more>; *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth); 'Finally - a legislative fix for McGlade ILUAs', *Ashurst* (Web Page, 14 June 2017) <https://www.ashurst.com/en/news-and-insights/legal-updates/finally---a-legislative-fix-for-mcglade-iluas/>.
[74] [2019] FCAFC 238 (Allsop CJ, McKerracker and Mortimer JJ).
[75] 'Yamatji Nation Indigenous Land Use Agreement documents', *Western Australia Government* (Web Page, 6 November 2020) <https://www.wa.gov.au/government/document-collections/yamatji-nation-indigenous-land-use-agreement-documents>.
[76] 'Yamatji Nation Indigenous Land Use Agreement', *Department of Planning, Lands and Heritage* (Web Page, 26 October 2020) <https://www.dplh.wa.gov.au/yamatji>.

revenue, funding for governance and business development, joint venture and tourism opportunities, cultural heritage protection measures, recognition of native title, access to housing properties for sale, leasing or development, land transfers, including commercial land, granting of water licences, joint management with the state of the conservation estate.[77]

XIV COLLATERAL NEGATIVES

Over the past decade or so, I have had several people a year ring me to seek my advice about a grievance that the person has about:

(a) The exclusion of that person's family from a native title claimant or native title holding group; or
(b) The inclusion of a family in the native title holding or native title claimant group.

Sometimes that grievance is based on an assertion that the genealogical research conducted by or on behalf of the Native Title Representative Body was inadequate, sometimes it is asserted that there has been some deliberate misinformation taken into account in determining the definition of the group or the connection of particular families to the relevant area. In some cases, the inclusion or exclusion of members of the group will have significant economic consequences for those included or excluded, but the grievance is usually expressed in terms of very firmly held views as to the identity and status which ought to be accorded to those asserted, either to be entitled to be included in the group, or those who ought to be excluded from the group. One of the things I have observed is that accurate information concerning genealogy and connection to country is often held by very few people and generally those closest to the descent line in question. Broad community knowledge of particular descent lines is not common. This was not a consequence which I would have predicted 40 years ago that would be an effect on the recognition of land rights/native title. It is one of the impacts which leads to the often-expressed complaint that native title has only brought negative consequences for

[77] 'Historic Native Title agreement finalised – News Story: A historic Indigenous Land Use Agreement has been finalised with the people of the Yamatji Nation', *Wa.gov.au* (Media Release, 19 February 2020) <https://www.wa.gov.au/government/announcements/historic-native-title-agreement-finalised>; 'Yamatji Nation Agreement - Land Component', *Department of Planning, Lands and Heritage* (Web Page) <https://www.dplh.wa.gov.au/yamatji-nation-agreement-lands>.

Aboriginal and Torres Strait Islander people, dividing people who previously had no reason to be in dispute with one another.[78]

Most of the native title cases in which I have been engaged have either gone to a contested hearing because of an intra-indigenous dispute, sometimes running in parallel with issues being contested by the State[79] which usually involved significant disputes unable to be resolved by mediation,[80] or have been settled by negotiating an intra-indigenous agreement.[81]

XV COLLATERAL POSITIVES

One of the beneficial consequences of the native title regime which has emerged incidentally from the processes to which native title claimants have been subjected and often criticised as the irksome task of having to explain their claims and assert their legitimacy,[82] is the researching and recording of their culture. In some cases, it has led to a new focus upon and revival of culture. It is unlikely that the intensity of resources which have been devoted to genealogical and other research concerning Aboriginal and Torres Strait Islander culture would have occurred without the existence of the native title regime over the last 27 years. It has led to a degree of recognition of First Nations culture in the broader community, which is unlikely to have occurred without the *Mabo* decision or the legislation and litigation which followed it.

XVI SOVEREIGNTY, NATIVE TITLE AND SELF-DETERMINATION

As I have said, the *Mabo [No 2]* decision did not deliver all that it promised or that some hoped it would and it did not deliver self-determination. However, when it came to the

[78] Australian Human Rights Commission, *Native Title Report 2011* (Report, 2011) Ch 2.
[79] AB (deceased) (on behalf of the Ngarla People) v State of Western Australia [No 4] [2012] FCA 1268; David Stock & Ors and State of Western Australia & Ors (Nyiyaparli) (Federal Court Application WAD6280/1998); Drill on behalf of the Purnululu Native Title Claim Group v State of Western Australia [2020] FCA 1510.
[80] *Mabo v Queensland* (1992) Qd R 73; *Western Australia v Ward* [2000] 170 ALR 159; [2000] FCA 191; *Moses v State of Western Australia* [2007] FCAFC 78; *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* [2007] FCA 31; *Banjima People v WA* [2011] FCA 1454; (No 2) [2013] FCA 868; (No 3) [2014] FCA 201; [2015] FCAFC 84; *McGlade v South West Aboriginal Land and Sea Aboriginal Corporation [No 2]* [2019] FCAFC 238.
[81] Brooking on behalf of the Bunuba People (Bunuba #2 (Part B)) v State of Western Australia [2019] FCA 1162; Warlangurru #2 WAD744/2015; Holborow on behalf of the Yaburara & Mardudhunera People v State of Western Australia (No 3) [2018] FCA 1108; Taylor on behalf of the Yamatji Nation Claim v State of Western Australia [2020] FCA 42.
[82] Lisa Strelein, *Compromised Jurisprudence, Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 6.

pursuit of the quest for self-determination, it provided a platform from which to maintain the political struggle towards recognition and self-determination.

There are politically active groups of Indigenous people around Australia who rally under the catchcry that sovereignty was never ceded by them to the British Crown.[83] In *Cherokee Nations v Georgia*,[84] the Supreme Court of the United States of America said of the First Nations Peoples of America:

> The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.

It is this form of sovereignty which is readily able to be recognised in relation to Australia's First Nations, arising from the common law precedent which the *Cherokee Nations* case provides.

XVII HONOUR OF THE CROWN/FIDUCIARY DUTY

I have long been an advocate for judicial recognition of the Crown's fiduciary duty in relation to Australia's First Nations Peoples, having written on the topic in various iterations and lectures over the years.[85]

[83] Bede Harris, *A New Constitution for Australia* (Routledge, 2013) 174.
[84] 30 U.S. 1 (1831).
[85] For discussion of the Crown's fiduciary duty to Australia's First Nations Peoples see Greg McIntyre, 'The Toohey Legacy: Rights and Freedoms, Compassion and Honour" (2018) 43(1) University of Western Australia Law Review 57, 70-74; Greg McIntyre, 'Fiduciary Obligations of Government towards Indigenous Minorities' in Bryan Koen-Cohen (ed), Native Title in the New Millennium (Aboriginal Studies Press, 2001) 305-22; Greg McIntyre, Submission No 196 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait islander Peoples, Parliament of Australia (11 June 2018) 20-4. I have also presented this analysis (so far to no avail) in submissions in *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178; [2000] FCA 1609 and *Collard v State of Western Australia (No 4)* [2013] WASC 455; (2013) 47 WAR 1.

The notion of a fiduciary duty of the Crown towards Indigenous Peoples first arose in the 1831 United States Supreme Court case of *Cherokee Nation v Georgia*[86] in which a guardianship relationship was referred to. The Canadian Supreme Court first recognised such a fiduciary duty in the 1984 case of *Guerin v The Queen*,[87] and in 1990 in *R v Sparrow,*[88] said:

> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown, constituted the source of the fiduciary obligation …the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. … The honour of the Crown is at stake in dealing with aboriginal peoples…[89]

It was held in *Sparrow* that the exercise of indigenous rights could be regulated, but that the 'honour of the Crown' required that there be a valid objective of such legislation beyond the extinguishment of Indigenous interests.[90]

This fiduciary duty of the Crown has also been recognised in New Zealand[91] and it is beyond time, in my view, that it should be recognised in Australia.

XVIII CONCLUSION

I have fought several battles with and on behalf of Aboriginal and Torres Strait Islander Peoples and met and worked with the heroes of those campaigns and some incremental change has occurred. The recognition of native title was part of that.

However, taking into account my experience over the last 46 years of working for and with Aboriginal and Torres Strait Islander Peoples, my observation is that Australia, as a nation, has not yet arrived at a just settlement with its First Nations Peoples commensurate with the value to them of the lands and waters from which it has dispossessed them.

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[86] 30 US (5 Pet) 1 (1831), 16-17; see Darlene M Johnston, 'A Theory of Crown Trust Towards Aboriginal Peoples' (1986) 18 *Ottawa Law Review* 307, 320.
[87] (1984) 13 DLR (4TH) 321.
[88] (1990) 70 DLR (4TH) 395, 408; See commentary by Gath Nettheim, '*Sparrow v The Queen'* (1991) 2 *Aboriginal Law Bulletin* 12.
[89] *R v Sparrow* (n 88) 413.
[90] Ibid 416-17. See discussion by Brian Slattery, *Aboriginal Rights and the Honour of the Crown* (2005) 29 *Supreme Court Law Review* 433.
[91] In Te Runanga o Wharekauri v A-G [1993] 2 NZLR 301, 306.

There has been some positive activity by certain state governments in negotiating comprehensive settlement agreements,[92] and establishing platforms for negotiating treaties.[93]

Settlement agreements which have emerged out of native title claims, such as those with the Noongar and Yamatji Peoples, recognise the importance of a composite package of reparation including land and economic resources that have the capacity to empower First Nations Peoples to achieve a significant degree of self-determination. They are representative of the form of settlement which has, at its base, recognition of the obligation that the Crown has to repair the injustice wrought by the colonising acts. Such acts have progressively and arbitrarily dispossessed First Nations Peoples of their property, understood as a 'unitary' title to land, which would otherwise have given them power to control what occurred on their lands and its economic resources. That obligation is one which is consequential upon the 'Honour of the Crown' or the fiduciary relationship which has been recognised in other jurisdictions as the principled basis upon which to forge the relationship between a nation and its First Nations Peoples being similarly recognised in the several jurisdictions in Australia. As I wrote in my submission to the Australian Parliamentary Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait islander Peoples:[94]

> With the renewed call for treaty negotiations overseen by a Makarrata Commission, coming out of the Uluru Statement, made by the Indigenous people gathered at the 2017 National Constitutional Convention,[95] the need to pursue, in Australia, the development of the legal concept of the Government's fiduciary relationship with First Nations peoples may… [be important in

[92] *Traditional Owners Settlement Act 2010* (Vic); Western Australian Government, 'South West Native Title Settlement', *Department of Premier and Cabinet* (Web Page, 4 August 2020) <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>; Paul Harley and Liz Wreck, 'Latest on the Yamatjii Nation Indigenous land Use Agreement', *HopgoodGanim* (Web Page, 11 May 2020) <https://www.lexology.com/library/detail.aspx?g=9697f818-d165-496e-8aba-6ff1804ce724>.

[93] Andrew Tillett, 'Labor states lead the way on Indigenous treaty', *Financial Review* (Web Page, 15 July 2019) <https://www.afr.com/politics/federal/labor-states-lead-the-way-on-indigenous-treaty-20190715-p527c4>.

[94] Greg McIntyre, Submission No 196 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait islander Peoples, Parliament of Australia (11 June 2018) 20-4.

[95] A Yolngu term meaning 'coming together after a struggle'.

> reinforcing the movement towards self-determination of Australia's First Nations Peoples].

If there is a continuing disinterest of Australian governments in negotiating treaties at national or other levels, then the pursuit of a suitable test case to determine the issue of the Crown's fiduciary duty to Indigenous people is an alternative option to pursue. Such a test case may also provide an opportunity to challenge the conclusion in *Mabo (No 2)* that native title can be extinguished by an executive act without statutory authority of compensation.

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SOME ARE MORE EQUAL THAN OTHERS? DIGNITY, DIFFERENCE AND VILIFICATION

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Vilification is expression that objectifies a group and serves to harm, most saliently through reducing the participation in public life by members of that group. This article critiques the Australian anti-vilification regime, arguing that it is both appropriate and feasible for governments to foster individual and collective flourishing through coherent restrictions on hate speech. The article suggests that such restriction are founded on a respect for human dignity rather than merely a concern for public order. This respect invokes both statements by politicians that signal the community's disdain for vilification on the basis of gender and sexual orientation rather than merely traditional restrictions regarding vilification in relation to ethnicity and religious affiliation. Australia can develop a progressive and coherent regime that provides consistency across jurisdictions whilst accommodating concerns regarding free speech.

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I INTRODUCTION

Parents often advise that 'sticks and stones may break your bones, but names will never hurt you'. This folk wisdom builds resilience amongst children but is at odds with the reality that expression on occasion does cause – and is intended to cause – harm. Vilification is expression that objectifies a group, contrary to the dignity of individuals within that group and the respect for diversity that is inherent in international human rights frameworks. It is expression that is intended to injure, most saliently through reducing participation in public life for members of the targeted group. It is contrary to the fundamental principles of equality, democratic pluralism and respect for individual dignity at the heart of the protection of human rights.[1] It is antithetical to community consciousness and reparation of historic wrongs, signalled in 2020 by Australia's Black Lives Matter protests. It is not defensible simply as a matter of opinion or tradition. As such, it is legitimately restricted by law that serves to deter the incitement of violence and signals the wrongfulness of hatred.

This article offers a perspective on Australia's incoherent vilification regime,[2] through the lens of the Victorian Parliament's inquiry into said state's Racial & Religious Tolerance Act.[3] In doing so, it complements other scholarship about #MeToo, contention at the Commonwealth and state levels regarding religious freedom, and self-regulation by digital platforms such as Facebook, Twitter and YouTube. It suggests that incoherence in

[1] *Cottrell v Ross* [2019] VCC 2142, [98] (Kidd CJ).
[2] Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488.
[3] Racial and Religious Tolerance Act 2001 (Vic).

Australian law both should and can be addressed without disproportionately inhibiting the implied freedom of political communication, invading the private sphere or creating a 'lawyer's picnic'. Part II identifies the incoherence of Australian vilification law, a matter of inconsistency and omissions that should be addressed to reduce substantive harms. Part III considers the Victorian regime, highlighting the need to address omissions in protection against vilification. Part IV discusses the scope for regulation of online vilification in Victoria, highlighting the need for greater responsibility on the part of digital platform operators. Part V then considers vilification in relation to Australia's implied freedom of political communication, construed as a freedom to communicate but not harm. It argues that restriction of vilification is constitutionally permissible. Part VI offers a conclusion: systematic statute law changes in all jurisdictions alongside leadership by politicians.

II VULNERABILITY AND ERASURE

Australian law, as a manifestation of a settler state, has traditionally privileged some communities, denied the dignity of others and reinforced community norms that are at odds with the respect due to every individual as a person. This is evident in the history of overtly racist mass media alongside the White Australia policy and in the historic denial of sexual citizenship to people with a same-sex orientation; for example, the criminalisation of male same sex activity and law around personal relationships. Vilification affects social and therefore legal understandings of cognitive difference.[4] Australia's vilification and erasure is also evident in systemic discrimination on the basis of gender. It has resulted in an expression that objectifies particular communities on the basis of ethno-religious affinity, sexuality and gender. This expression might be a matter of discrimination in employment, disparagement in teaching or statements by politicians, desecration of graveyards or places of worship, and graffiti that denigrates the targeted community as 'un-Australian', innately inferior, dishonest, violent, lawless and unclean. It is broader than an express incitement to violence, such incitement being addressed under common and statute law.[5]

[4] Bruce Baer Arnold et al, 'It Just Doesn't ADD Up: ADHD/ADD, The Workplace and Discrimination' (2010) 34(2) *Melbourne University Law Review* 349.
[5] See eg, *Crimes Act 1900* (NSW) s 93Z.

This pernicious objectification is an erasure of individuality and of rights on the basis that denigration is a social norm unrestricted by law. Vilification has not yet been addressed through a justiciable Bill of Rights enshrined in the national Constitution, a 'grundnorm' that is essentially silent about human rights and the vulnerability identified by theorists such as Martha Fineman.[6] The Constitution importantly addresses the expression of vilification in two ways. The first, perhaps most recognised by rights scholars, is the narrow implied freedom of political communication.[7] The second is the scope for shaping some expression through the Commonwealth's powers regarding external affairs (salient for Australia's commitment to human rights protection through adherence to international rights agreements), alongside telecommunications and corporation powers relevant for regulating digital platforms.[8] States and territories have statutes that refer to human rights but this law is inconsistent, often restricted to discrimination relating to a specific attribute and often silent on vilification.[9] We are all formally equal before the law as citizens,[10] but some are less equal than others and, in other words, more vulnerable to the harms associated with vilification.[11]

This inequality is a matter of both vulnerability and legal incoherence: differences in legal recognition of and remedies for vilification on the basis of jurisdiction, exacerbated by uncertainties regarding common law protection of free speech.[12] Expression that serves to harm, particularly that is intended to harm,[13] has come to be addressed in two ways.

[6] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1, 9.
[7] See eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See also, Nicholas Aroney, 'The Constitutional (in) Validity of Religious Vilification Laws: Implications for Their Interpretation' (2006) 34(2) *Federal Law Review* 287; Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293.
[8] *Australian Constitution* s 51(i), (v), (xx), (xxix), (xxxvii).
[9] See generally Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld). See especially Discrimination Act 1991 (ACT); Equal Opportunity Act 1984 (SA).
[10] Wendy Bonython and Bruce Baer Arnold, 'Freedom of Speech Under the Southern Cross—It Arrived and Departed by Sea?' (2018) 107(2) *The Round Table* 203.
[11] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251, 267; Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133.
[12] Dan Meagher, 'Is There a Common Law 'Right' to Freedom of Speech?' (2019) 43(1) *Melbourne University Law Review* 269.
[13] Toben v Jones [2002] FCAFC 158; Executive Council of Australian Jewry v Scully [1998] 79 FCR 537.

The first is the articulation of human rights through over-arching statutes in only three jurisdictions: Victoria, the Australian Capital Territory and Queensland.[14] These enactments are in practice advisory rather than offering strong remedies for vilification, such as a fine or requirement for public apology. They are, however, a valuable basis for public critique of specific anti-discrimination statutes and policies; for example, contributions to the inquiry by the Victorian Parliament's Legislative Assembly Legal & Social Issues Committee into the State's *Racial & Religious Tolerance Act*, discussed in Part III below.[15]

The second way involves an incoherent patchwork of anti-discrimination enactments at the national, state and territory levels that only peripherally deal with speech. This patchwork embodies the demarcation of responsibilities between the different jurisdictions, with some (such as New South Wales) providing a statutory response to vilification that is more positive than efforts of the Commonwealth and their state peers.

Incoherence reflects both an emphasis on discrimination in employment/services and a privileging of particular attributes such as religious affinity. It thus remains permissible to engage in misogynistic speech, exemplified by egregious characterisations regarding Julia Gillard, but not to refuse employment or access to services on the basis of gender.[16] Thus, individuals and groups may be targeted through such speech, yet have no legal redress.

Importantly, the legislation features substantial exclusions regarding discrimination by religious entities on the basis of faith. This privileging of faith is the focus of the contentious Commonwealth Religious Freedoms Bills[17] and similar proposals, notably the New South Whale's Religious Freedoms and Equality Bill sponsored by Mark Latham

[14] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).
[15] *Racial and Religious Tolerance Act 2001* (Vic); Legislative Assembly Legal & Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (2020).
[16] Kate Galloway, 'Alan Jones and Contempt for Women in the Public Sphere: Vilification?' (2012) 3 (September) *Women's Agenda*.
[17] Religious Discrimination Bill 2019 (Cth); Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2019 (Cth).

and Fred Nile,[18] which can be read as intended to permit the vilification expressed by celebrities such as Israel Folau using the 'bully pulpit' of Twitter.[19]

III LOOKING BEYOND THE PRIVILEGED CATEGORIES

The article began by arguing that vilification is significant and has not yet been coherently addressed under Australian law. This section engages with that incoherence, suggesting governments should consistently provide redress for those who suffer vilification on the basis of gender and sexuality.

The Victorian Parliamentary inquiry at the heart of this article deals with an Act narrowly concerned with racial and religious tolerance, and the lack thereof.[20] It is thus similar to the national *Racial Discrimination Act* that centres on ethno-religious affinity, with people who engage in discrimination often conflating 'race' with a specific faith such as Islam.[21] The Victorian statute preceded the state's landmark Charter of Rights and Responsibilities.[22] It is narrower than anti-discrimination enactments in some Australian jurisdictions, which address vilification on the basis of sexual orientation and disability, thereby excluding some communities from redress.

Tasmania's *Anti-Discrimination Act* for example includes offences of inciting hatred, serious contempt or severe ridicule of a person or persons on the grounds of race, religious belief or activity, disability and sexual orientation.[23] In New South Wales, the *Anti-Discrimination Act* prohibits vilification,[24] complemented by the State's Crimes Act. The Discrimination statute in the Australian Capital Territory[25] and Anti-Discrimination statute in Queensland[26] similarly prohibit vilification. The Objects articulated when the Victorian Act was under initial consideration were to:

[18] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW).
[19] Chris Middleton, 'Wrestling with the Sacking of Israel Folau' (2019) 29(9) *Eureka Street* 41.
[20] Racial and Religious Tolerance Act 2001 (Vic) ss 3-4.
[21] *Racial Discrimination Act 1975* (Cth). See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002).
[22] Regarding responsibilities in relation to free expression see, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(3).
[23] Anti-Discrimination Act 1998 (Tas) ss 17, 19-20.
[24] *Anti-Discrimination Act 1977* (NSW) ss 20B-C, 38S, 49ZT. See also *Burns v Smith* [2019] NSWCATAD 56; *Crimes Act 1900* (NSW) s 93Z.
[25] Discrimination Act 1997 (ACT) s 67A.
[26] Anti-Discrimination Act 1997 (Qld) ss 124A, 131A.

- provide a way for the victims of racial and religious vilification to obtain civil redress which is inexpensive and accessible;
- prohibit extreme behaviour that denies the right of Victorians of all racial backgrounds and religious beliefs to participate as equals in the community;
- promote conciliation to resolve civil complaints and be a means of overcoming prejudice and ignorance; and
- strike a balance by prohibiting racial and religious vilification while still ensuring that freedom of expression can be exercised.[27]

As amended, under s 4(1) the Act aims to:

> (a) promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy; and
>
> (b) maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of persons.

On introduction of the Act, it was characterised as including 'communications that malign, abuse or seriously derogate other people or groups of people because of their racial background or religious beliefs and practices', accordingly encompassing 'intimidation, damage to property, graffiti and expressions of hatred or contempt by messages over the internet'. The expectation was that the legislation would prohibit extreme conduct that promote and urge the strongest feelings of revulsion, hatred or dislike of a person or group on the ground of the racial background or religious beliefs and practices of that person or group.[28]

In considering incoherence, it is important to recognise that vilification is a matter of harm rather than offended sensibilities. The harms attributable to vilification on the basis of ethnicity and/or faith are evident in expression targeting other attributes. The narrow

[27] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2001, 1619 (*John Pandazopoulos)*.
[28] Parliament of Victoria, *Parliamentary Debates*, Legislative Council, 7 June 2001, 1215 (*Monica Gould)*.

coverage of the Victorian Act thus represents omissions that are inconsistent with the coverage of the *Charter*.[29] Saliently, the *Charter* does not identify Victorians as somehow less worthy of respect and thereby, appropriately denies protection from harm on the basis of gender (highlighted by the #MeToo movement), physical/mental difference, sexual orientation or other attributes outside ethno-religious identity.

The Act is currently silent about sexuality, for example same-sex orientation. Despite removal of civil disabilities through the decriminalisation of male same-sex activity and changes to superannuation and marriage laws, being – or merely perceived as being – gay or lesbian still results in violence and/or denigration on the part of both individuals and some institutions.[30] The Victorian Parliament in 2016 apologised for past criminalisation of consensual gay activity, with the Premier condemning:

> [L]aws that criminalised homosexuality in this state; laws which validated hateful views, ruined people's lives and forced generations of Victorians to suffer in fear, silence and isolation … represented nothing less than official, state-sanctioned homophobia ...
>
> And we wonder why, Speaker – we wonder why gay and lesbian and bi and trans teenagers are still the target of a red-hot hatred.
>
> And we wonder why so many people are still forced to drape their lives in shame.
>
> These laws did not just punish homosexual acts, they punished homosexual thought. They had no place in a liberal democracy. They have no place anywhere. The Victorian Parliament and the Victorian Government were at fault. For this we are sorry … we are so sorry; humbly, deeply sorry.[31]

To address incoherence, we might expect a similar apology in all Australian jurisdictions rather than silence about a historic denial of dignity. Criminalisation historically signalled that 'homosexual thought' and deed was wrong and properly condemned. In 2020,

[29] Michael Brett Young, From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (Final Report, 2015). See also, Department of Justice and Community Safety, Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act (2015).
[30] The reference to institutions is deliberate, given the likelihood that the proposed Commonwealth Religious Freedoms regime will enshrine discrimination on the part of some aged care, health, employment, and other service providers.
[31] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2016, 1937 (Daniel Andrews).

condemnation is still evident in vilification, often most viscerally experienced by the young and members of unsupportive religious communities, some of which medicalise difference by endorsing 'gay conversion therapy'.[32] Amendment of the Act is an opportunity for the Victorian Parliament to give effect to the apology and reflect recognition among most Australians that an individual is not somehow less of a person and deserving of less respect in law merely because of that person's sexual orientation.

Reinforcing dignity requires uniform legislation across Australia to address incoherence, consistent with judgments in jurisdictions which have addressed vilification on the basis of sexuality[33] and with unheeded law reform proposals.[34] Bathurst CJ in *Sunol v Collier* commented that:

> … seeking to prevent homosexual vilification is a legitimate end of government. A law seeking to prevent the incitement of such conduct appears compatible with the maintenance of the constitutionally provided system of government. It does not seem to me that debate, however robust, needs to descend to public acts which incite hatred, serious contempt or severe ridicule of a particular group of persons.[35]

Legislation in Victoria and elsewhere should further proscribe vilification on the basis of gender, in particular misogynistic hate speech. The #MeToo movement over the past two years has highlighted vilification on the basis of gender, including expression targeting women, intersex and transgender people. It is a matter of harming women and other people with words – a harm on which Australian law is disquietingly silent and is perpetuated by indifference on the part of media organisations and the controllers of digital platforms such as Facebook. A cogent recent analysis thus commented:

> In Australia, gendered hate speech against women is so pervasive and insidious that it is a normalised feature of everyday public discourse. It is often aimed at silencing women, and hindering their ability to participate effectively in civil society. As governmental bodies have recognised, sexist and misogynist

[32] See *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) ss 8-9. See also *Health Legislation Amendment Act 2020* (Qld) s 28. This practice is banned in two Australian jurisdictions.
[33] See, e.g, Passas v Comensoli [2019] NSWCATAP 298; Burns v Smith [2019] NSWCATAD 56; Sunol v Collier (No 2) [2012] NSWCA 44; Thurston v Anti-Discrimination Tribunal (No 2) [2018] TASSC 48.
[34] Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (Consultation Report, 2011).
[35] *Sunol v Collier (No 2)* [2012] NSWCA 44, 66 [52].

> language perpetuates gender-based violence by contributing to strict gender norms and constructing women as legitimate objects of hostility. Thus, gendered hate speech, like other forms of hate speech, produces a range of harms which ripple out beyond the targeted individual.[36]

The harmful nature of vilification is recognised by various Australian laws that prohibit or address other forms of hate speech. Nonetheless, gendered hate speech is glaringly absent from most of this legislation. We argue that by failing to address gendered hate speech, Australian law permits the marginalisation of women and girls, and actively exacerbates their vulnerability to exclusion and gender-based harm.[37] Importantly, although religious affinity might be obfuscated or invisible and ethnicity is often undiscernible, gender is typically more intractable. If Australian legislatures are going to signal and deter the inappropriateness of vilification around ethnicity and faith they should, on the basis of principle and consistent with international human rights frameworks, address vilification that embodies disrespect for over half of the population – a historically vulnerable class. One response has been the Reason Party's 2019 'Elimination of Vilification' Bill to 'stop trolling in its tracks' by extending the Victorian Act to cover hate speech based on 'gender, disability, sexual orientation, gender identity and sex characteristics'.[38]

IV DIGITAL PLATFORMS

Vilification may be a matter of face-to-face slurs or communication in 'old media'. Increasingly, it occurs through digital platforms such as Facebook, Twitter, and YouTube. A coherent response requires action by the operators of those platforms. The scope for that action has been highlighted in the current pandemic. Vilification is unhealthy. It injures individuals rather than merely the body politic.[39] This observation is pertinent because all jurisdictions in Australia have responsibilities regarding health and take action to restrict expression that is contrary to health, for example claims regarding

[36] Tanya D'Souza et al, 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech' (2018) 41(3) *University of New South Wales Law Journal* 939.
[37] See ibid.
[38] Racial and Religious Tolerance Amendment Bill 2019 (Vic); See also Victoria, *Parliamentary Debates*, Legislative Council, 28 August 2019, 2725 (Fiona Patten).
[39] See eg, Toby Lea, John de Wit and Robert Reynolds, 'Minority Stress in Lesbian, Gay, and Bisexual Young Adults in Australia: Associations with Psychological Distress, Suicidality, and Substance Use' (2014) 43(8) *Archives of Sexual Behavior* 1571; William Leonard, Anthony Lyons and Emily Bariola, 'A Closer Look at Private Lives 2: Addressing the Mental Health and Wellbeing of Lesbian, Gay, Bisexual, and Transgender (LGBT) Australians' (Australian Research Centre in Sex, Health & Society, La Trobe University, 2015).

products and health services. COVID-19 has seen digital platforms publicly commit to an ethic of corporate responsibility, vowing to minimise 'fake health news' on their platforms. That commitment reflects increasing community criticism and appears to be an effort to pre-empt regulation by consumer protection and other watchdogs in several jurisdictions, for example by the Australian Competition & Consumer Commission.[40] Action by digital platforms, whose revenue in Australia dwarfs that of the commercial media groups, is significant for two reasons regarding vilification. The first is that the withering of 'traditional media', exacerbated by COVID-19, has not been offset by platform operators proactively addressing hate speech. The platforms are, for many people, the dominant provider of news and a source of legitimacy for opinions or values on the basis that users who encounter vilification by their peers are likely to gain a sense that hateful expression regarding objectified communities is normative.[41] The second reason is that action to exclude propagators of harmful health-related expression and to otherwise restrict the dissemination of fake health news, products and services demonstrates that platform operators have the ability to filter what is expressed on their digital platforms. The operators have traditionally resisted regulation, arguing that they are mere conduits unable to restrict expression and should not be required to do so, tacitly because they – along with the overall internet – are a manifestation of a global *lex informatica* founded on United States values regarding free speech.[42]

Given that vilification harms health, action by the platform operators to restrict improper health-related information might be extended to restrict vilification online. Such a restriction would be consistent with the *International Convention on Civil and Political Rights*,[43] the salient global human rights framework, and with the broader body of statute

[40] Australian Competition and Consumer Commission, *Digital Platforms* (Final Report, 2019).
[41] Ariadna Matamoros-Fernández, 'Platformed Racism: The Mediation and Circulation of an Australian Race-based Controversy on Twitter, Facebook and YouTube' (2017) 20(6) *Information, Communication & Society* 930.
[42] Aron Mefford, 'Lex Informatica: Foundations of Law on the Internet' (1997) 5(1) *Indiana Journal of Global Legal Studies* 211; John Barlow, 'A Declaration of the Independence of Cyberspace' in Peter Ludlow (ed), *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press, 2001) 27; Thomas Streeter, 'That Deep Romantic Chasm: Libertarianism, Neoliberalism and the Computer Culture' in Andrew Calabrese and Jean-Claude Burgelman (eds), *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield, 1999) 49.
[43] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3)(b).

law that limits speech through restrictions in the form of defamation, trade secrets, confidentiality, privacy, tort of malicious falsehood, electoral and other law.[44]

In a liberal democratic state, there is no freedom from being offended, in part because offence is subjective and in part because offence fosters the discourse that is a basis of democracy. Offence or potential offence is, however, very different from the hatred and inducement of fear, anger, violence, or disengagement discussed above. This vilifying expression is legitimately proscribed on a proportionate basis. There is no absolute freedom of expression. Thus, United States' jurisprudence, often misread as at the heart of an online/offline 'anything goes' regime, has for many years restricted what one eminent judge characterised as falsely shouting fire in a crowded theatre with consequential harm.[45] There is increasing Australian case law to the effect that Commonwealth and state/territory courts have authority over what takes place online,[46] albeit recognising that in the absence of coherent international agreements and cooperation by overseas authorities and online service providers it may be difficult to enforce decisions regarding individuals who are located offshore. It is therefore appropriate to encourage platform operators to act responsibly, justifying their social licence.

The recent decision in *Cottrell v Ross* demonstrates that there is scope to address harms emanating online within Victoria.[47] Achievement of a coherent national regime would mean that Victorians who are harmed by vilification emanating from, for example, New South Wales, should be able to look to that state's government or national government for action on behalf of any Australian. An engagement with social media and digital platform providers must involve both the Commonwealth (given its head of power under the national Constitution) and the state/territory governments, alongside more sustained public consultation and care with drafting than that evident in the national Sharing of Abhorrent Violent Material enactment, which failed to address vilification.[48]

[44] See the discussion of *Eatock v Bolt* [2011] FCA 1103 in Wendy Bonython, 'Power Failure? The Distracting Effect of Legislation on Common Law Torts' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart, 2017) 131.
[45] *Schenck v United States*, 249 US 47 (1919).
[46] *Gutnick v Dow Jones & Co Inc* (2002) 210 CLR 575; *Google Inc v Duffy* [2017] SASCFC 130.
[47] *Cottrell v Ross* [2019] VCC 2142.
[48] Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth).

Looking overseas, we can see the 2016 European Union voluntary Code of Conduct on Hate Speech obliges platforms to have set standards to regulate the blocking or removal of undesirable content,[49] reflecting the 2008 European Council Framework Decision on racism and xenophobia and the European Convention on Human Rights.[50] This has been deepened by a growing body of European jurisprudence, for example the recent European Court of Human Rights chamber judgment in *Beizaras v Lithuania*.[51] That jurisprudence is not determinative in Australia, but does offer a benchmark for Australia as a nation with a commitment to fostering the flourishing of all people. This commitment is not at odds with the Australian Constitution and requires law reform.

V A FREEDOM TO COMMUNICATE BUT NOT TO HARM

Stanley Fish claims that 'there is no such thing as free speech', with someone always having to pay.[52] In embracing notions of a marketplace of ideas and of individual responsibility, some proponents of free expression consider that restrictions on objectification through vilification are unnecessary or outweighed by the benefits derived from robust communication. Submissions to a range of consultations have accordingly argued that restrictions are at odds with Australia's implied freedom of political communication. In considering those arguments, it is useful to recognise judgments endorsing the proposition that anti-vilification legislation enhances and promotes the implied freedom of communication and more broadly embodies values that the freedom is meant to enable.[53] The notion of an online 'market place for ideas' derived from theorisation by Milton, Locke and Mill disregards the inequality of many participants and the reality that vilification either silences minorities within that market place or drives them away. Consistent with the aforementioned statement by Kidd CJ, restrictions on vilification serve to encourage public participation in democratic processes and have not been found by the High Court or Victorian Supreme Court to be contrary to the implied

[49] European Commission, Information note - Progress on combating hate speech online through the EU Code of conduct 2016-2019 (27 September 2019).
[50] Council of the European Union, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008).
[51] *Beizaras and Levickas v. Lithuania* (application no. 41288/15) ECHR.
[52] Stanley Fish, There's No Such Thing as Free Speech … and it's a Good Thing Too (Oxford University Press, 1994).
[53] *Sunol v Collier (No 2)* (2012) 289 ALR 128, [89]; *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48, [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571, [72].

freedom of political communication articulated in, for example, *Australian Capital Television v Commonwealth* and *Nationwide v Wills*.[54] They have similarly not been found to conflict with the Victorian *Charter.*

VI CONCLUSION

What can be done? Pending establishment of a justiciable Bill of Rights in the national Constitution, each state and territory can systematically enact law that specifically prohibits vilification and is not restricted to ethno-religious hate speech. Given its external affairs power, the Commonwealth could act too. The Australian Human Rights Commission in 2011 noted that:

> A federal law would make it clear to all Australians that vilification, and harassment on the basis of sexual orientation and sex and/or gender identity is never acceptable. Unless there is a clear law against it, it is too easy for bigots to feel their actions are justified, when actions based on prejudice and hatred are not, and never can be, just.[55]

More is needed. Within a legal system that respects dignity and fosters wellbeing it is incumbent on politicians to display leadership in giving effect to the civil and political rights of everyone, rather than just privileged communities. Dignity is inextricably associated with agency. We should hold politicians accountable when leaders choose to deny responsibility. Given an increasing democratic deficit, with a growing distrust of politicians as self-interested and unresponsive,[56] ordinary people need to express their dignity by persuading leaders of the need for reform and challenging the objectification that affects less fortunate peers in online/other fora.

[54] Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
[55] Australian Human Rights Commission, Protection from Vilification and Harassment on the Basis of Sexual Orientation and Sex and/or Gender Identity (Consultation Report, 2011) 18.
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Google Inc v Duffy [2017] SASCFC 130

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PRISONER ISOLATION AND COVID-19 IN QUEENSLAND

HELEN BLABER, TAMARA WALSH AND LUCY CORNWELL*

'Medical segregation' is being used extensively to limit the possibility of infection and spread of COVID-19. However, there is a real risk that medical segregation may amount to 'de facto solitary confinement.' Research around the world has demonstrated that placing prisoners in solitary confinement, even for short periods of time, can cause serious psychological harm which may be irreversible. It is also a serious encroachment on prisoners' human rights. Queensland's Human Rights Act has recently come into effect and this has legal implications for COVID-related responses in correctional settings. We argue here that the incursions on prisoners' human rights that have occurred in Queensland during COVID have, at times, been disproportionate to the risks posed.

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I INTRODUCTION

COVID-19 created an emergency situation unprecedented in our lifetimes. Pandemic conditions pose particular challenges in closed environments such as prisons. Since social distancing is not practicable in over-crowded prison settings, 'medical segregation' is being extensively used to limit the possibility of infection. However, there is a real risk that medical segregation may amount to 'de facto solitary confinement,'[1] and research around the world has demonstrated that placing prisoners in solitary confinement, even for short periods of time, can cause serious psychological harm that may be irreversible.[2]

[1] 'Coronavirus: Healthcare and human rights of people in prison', *Penal Reform International* (Briefing Note, 16 March 2020) 8.

[2] Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 *Washington Journal of Law & Policy* 325, 332; Terry Kupers, 'What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement' (2008) 35(8) *Criminal Justice and Behaviour* 1005, 1006.

In this paper, we present a series of case studies to illustrate the conditions experienced by Queensland prisoners who were placed in medical isolation during COVID-19. We argue that the incursions on prisoners' human rights that occurred during this time were sometimes disproportionate to the risks posed, and that less restrictive alternatives are available.

II LEGISLATIVE POWERS TO DECLARE A 'STATE OF EMERGENCY' AND ISOLATE PRISONERS

In Queensland, legislative powers exist under the *Corrective Services Act 2006* (Qld) to enable restrictions on prisoner movement to be imposed, and visits and access to privileges to be limited, in response to COVID-19. Under Section 263 of the *Corrective Services Act 2006* (Qld) ('*Corrective Services Act*'), the Chief Executive (that is, the Commissioner) is made responsible for 'the security and management of all corrective services facilities' and 'the safe custody and welfare of all prisoners,' and is given the power to 'do all things necessary or convenient' in the performance of these functions. Section 268 of the *Corrective Services Act* allows the Commissioner to 'declare that an emergency exists' in relation to a prison in circumstances where the security, good order or safety of a person in the prison is threatened. The declaration may restrict activity in or access to the prison, and order the withdrawal of privileges.

The Commissioner made a series of declarations that an emergency exists in relation to all prisons in 2020. In his first declaration in March, the Commissioner stated that all visits would cease, although visits by certain professionals could still occur subject to approval.[3] The restriction on personal visits was lifted in July but was then re-introduced for South-East Queensland prisons following new recorded cases of COVID-19 in the community. Initially, a separate declaration was made in respect of Wolston Correctional Centre because a staff member had tested positive to COVID-19, so higher level restrictions were imposed, involving the suspension of 'all activities in the prison' and the withholding of all prisoner privileges unless the Commissioner approved otherwise. Contact tracing was undertaken and no prisoners tested positive, so three days later it was announced that Wolston Correctional Centre would be brought into line with the other prisons.

[3] Specifically, visits from accredited visitors, government visitors, commercial visitors, religious visitors, professional visitors (health and psychological), and cultural visitors (elders, respected persons and spiritual healers).

In April 2020, Queensland's corrective services facilities began implementing 'medical segregation' measures — that is, certain prisoners were isolated to limit the risk of COVID-19 infection.[4] Between April and June 2020, there were four different groups of prisoners in Queensland who were subjected to COVID-19 isolation measures:

1. New admissions: People who entered prison from a police watch house.
2. Transfers/returns: People who were transferred between prisons or who had returned from a temporary absence from prison, such as a hospital appointment or court appearance.
3. COVID-19 contact: People who were identified as having contact with a correctional officer who tested positive to COVID-19 at a particular prison.
4. Vulnerable prisoners: Defined by the Australian Health Protection Principal Committee (AHPPC) as:
    a. Aboriginal and Torres Strait Islander people 50 years and older with one or more chronic medical conditions;
    b. people 65 years and older with chronic medical conditions;
    c. people 70 years and older; and
    d. people with compromised immune systems.

New policies relating to the medical segregation of prisoners have been introduced, adapted, withdrawn and re-introduced over time in response to the assessed risk of transmission. For example, the 'Managing Prisoner Receptions and Transfers' policy, which was introduced on 8 April, required that all new admissions and transferred prisoners be subjected to health and temperature checks and held in isolation in high security centres for 14 days. Transfers between centres were only to occur where essential, however transfers from reception and remand facilities to placement facilities continued to take place. Queensland Corrective Services (QCS) reported that isolated

[4] 'High Level Summary of QCS Management of COVID-19 within Correctional Centres: Current 23/04/2020', *Queensland Corrective Services* (Summary, 23 April 2020) <https://corrections.qld.gov.au/wp-content/uploads/2020/04/QCS-Stakeholder-infomation_lr.pdf>.

prisoners would be provided with access to medical assessment and treatment, including specialist mental health services, and would receive activities such as books, drawing and writing materials. In addition, access was to be provided to normal mail processes, calls with legal representatives and facilitated telephone calls and/or videoconference connections with families.

Initially, prisoners were required to restart their isolation period if they were transferred between centres or required to leave their cell to attend an essential appointment during their 14 days of isolation. From 2 May, this policy changed and isolation periods became cumulative: prisoners who were transferred between centres or required to leave their cells would not be required to restart their 14 day isolation period unless they were transferred into police custody, a court or watchhouse, or they undertook a leave of absence. Vulnerable prisoners were grouped together in accommodation areas to minimise their contact with the broader prisoner population and staff, but they were no longer isolated in their cells.

QCS acknowledged that these policies significantly departed from usual procedures but all measures were described by QCS as 'responsive and proportionate' to the goal of preventing COVID-19 from entering Queensland prisons.[5] Of course, policy documents are not always reflective of actual practice, and during the COVID-19 lockdown, lawyers and family members received reports from prisoners that isolation measures were being conducted in a manner that seemed unduly restrictive and sometimes illogical.

III COVID-19 AND QUEENSLAND PRISONS IN PRACTICE

Reporting on the current circumstances within prisons is challenging in Queensland. Section 132 of the *Corrective Services Act 2006* (Qld) states that a person must not interview or obtain a written or recorded statement from a prisoner without written approval from the Chief Executive.[6] In light of this, our analysis draws on a series of hypothetical case studies based on lawyers' observations in the course of their work between April and June 2020. Each case study describes the conditions experienced by

[5] Queensland Government, 'Changes to Isolation Policies for New and Transfer Prisoners', *Queensland Corrective Services* (Media Release, 1 May 2020).
[6] Prisoner is defined to include people subject to parole orders: *Corrective Services Act 2006* (Qld) sch 4; see further Tamara Walsh, 'Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK' (2007) 33(1) *Monash University Law Review* 72.

prisoners held under the four different categories of isolation listed above: newly admitted prisoners; prisoners who have returned or been transferred from somewhere external; prisoners who had contact with an officer who was diagnosed with COVID-19; and vulnerable prisoners.

A *Case Study 1: New Admission*

'David' was placed into isolation immediately upon his admission into prison. He was told by correctional staff that he was being isolated for 14 days because of COVID-19, however he was not given any documents relating to his isolation or confirmation of when his 14 days would expire. When David needed to leave his cell for an appointment, his isolation period had to recommence and he spent a total of 20 days in isolation. During his isolation, David was locked in his cell for 24 hours each day. His cell contained a bed, bedding, toilet, sink, shower, dustpan, and television. The toilet could only be flushed six times a day. At times, there was human waste sitting in the toilet because the flush allowance had been used.

David did not receive any access to exercise or fresh air and could not go outside. He was provided with a small number of photocopied pages of puzzles (including crosswords and word searches) to occupy his time. Several times a day, correctional staff would walk past the cell and call out asking if he needed anything. They would write down if he needed essentials, such as soap, which was later delivered through a hatch that opened in the door of the cell.

David was offered one telephone call on his admission to prison but was not able to make any telephone calls to friends or family during his isolation. He did not have access to the prison Arunta telephone system[7] so he could not call professional agencies such as Legal Aid or Prisoners Legal Service. The lack of access to a lawyer meant that David's criminal charges were delayed for a period of two weeks because he was not able to arrange legal representation or apply for bail. He was not offered the opportunity to talk to an external

[7] The Arunta Prisoner Telephone System is a prisoner telephone system that operates in prisons around Australia. It allows prisoners to place calls to up to 20 nominated phone numbers free of charge including Legal Aid and other legal services (including Prisoners Legal Service), ombudsmen and other independent monitors.

agency or an official visitor.[8] The Cultural Liaison Officer came and spoke to him once but the conversation was brief and perfunctory. David did not see or speak to a doctor, psychologist or counsellor while he was in isolation. He was not provided with access to the medication he had been taking in the community prior to his incarceration.

B *Case Study 2: Returning from a Temporary Absence*

'Jess' was placed in isolation after she returned to prison from an external appointment. She was told by correctional staff that she was being isolated for 14 days because everyone who temporarily leaves the prison must isolate because of COVID-19, but she was not informed as to when this period would end. During her isolation, Jess was locked in her cell for 24 hours each day. She had no access to fresh air.

A psychologist employed by the prison came to speak to her every day to do a welfare check. Her lawyer attempted to arrange a telephone link but was informed by correctional staff that this would require Jess to exit her cell and restart her 14-day isolation period. As such, her lawyer waited to arrange a telephone link until the isolation period ended. This caused delays in Jess providing instructions to her lawyer about her criminal charges. Jess was given access to a headset in her cell to call her family two times while she was in isolation, but the calls were limited to approximately 15 minutes each.

She was not offered the opportunity to talk to an external agency or an official visitor. She was not offered a test for COVID-19.

C *Case Study 3: COVID-19 Contact*

'Peter' was placed in isolation after it was discovered he had come into contact with a correctional officer who had tested positive for COVID-19. Medical staff came to his unit and took his temperature along with a number of other prisoners. He was tested for COVID-19. The following day, he was told that he needed to be isolated because he had come into contact with a correctional officer who had tested positive, but he was not informed as to when this period would end.

[8] Official visitors are members of the community appointed under the *Corrective Services Act* for the purpose of visiting prisoners to investigate, manage and resolve complaints.

Peter was moved from the residential unit to the secure unit within the prison, together with approximately 20 other prisoners. The secure unit is a more restrictive area than the residential unit and it is perceived by many sentenced prisoners as the 'punishment unit'.

During his isolation, Peter was doubled up in a cell with another prisoner who had also been in contact with the correctional officer who tested positive. They were locked together in the cell for 24 hours each day. Peter did not receive any access to exercise and could not go outside during his isolation. He had difficulty getting access to sufficient food and drink.

Peter was not provided access to any telephone calls in isolation. He was not offered the opportunity to talk to an external agency or an official visitor. Peter did not see or speak to a doctor, psychologist or counsellor while he was in isolation. After several days of isolation, he received test results stating that he was negative for COVID-19. The following day, he was released from isolation and returned to the residential unit.

D *Case Study 4: Vulnerable People*

'James' falls into one of the categories of vulnerable prisoners who is at a higher risk of serious illness if infected with COVID-19. In mid-April 2020, he was moved into medical isolation with several other prisoners who also fall into the one of the categories of vulnerable prisoners, but he was not informed as to when this period would end.

During the first 11 weeks of isolation, James was locked in his cell for 22 hours each day. There was a window in his cell but it did not open, so he had no access to fresh air in the cell.

James received access to two hours of exercise outside of his cell each day. All of the medically vulnerable prisoners in the unit were able to access an outside exercise area at the same time. The exercise area has a concrete floor, exercise equipment and access to the Arunta telephone system. However, not everyone was able to telephone friends and family as it depended on whether they had money on their telephone account and the time of day they were permitted exercise (for example family members with commitments that conflicted with the exercise yard time could not be contacted).

After approximately six weeks of isolation, James and the other medically vulnerable prisoners were provided with weekly access to an iPad to have scheduled video calls with family.

After approximately 11 weeks, James was removed from isolation. He remained in the same unit with other vulnerable prisoners, some of whom came in and out of the unit without being tested for COVID-19.

IV WERE PRISONERS' RIGHTS REASONABLY LIMITED?

A *Solitary Confinement and Human Rights*

Prisoners in medical isolation in Queensland are being held in effective solitary confinement. United Nations agencies have defined solitary confinement as being locked down in a cell for at least 22 hours a day with limited or no association with other prisoners and limited access to privileges.[9] It is well-established that placement in solitary confinement conditions can result in serious psychological harm which may be irreversible. Recent research of ours suggests that people in solitary confinement can display symptoms of psychosis after only a short period of time.[10] They also frequently engage in disordered and obsessive behaviour as well as acts of self-harm.[11]

Courts around the world have found conditions in solitary confinement to breach prisoners' human rights to life, liberty and security of person, humane treatment when deprived of liberty, and freedom from cruel, inhuman and degrading treatment.[12] Each of these rights is protected in Queensland's new *Human Rights Act 2019* ('*Human Rights Act*').[13] The *Human Rights Act* came into effect in January 2020. Under this Act, public entities, including QCS,[14] are required to act and make decisions in a way that is

[9] United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) rule 44 ('*The Nelson Mandela Rules'*).
[10] Tamara Walsh et al, 'Legal Perspectives on Solitary Confinement in Queensland', *University of Queensland School of Law* (Report, 2020) 45-50; See also Juan Mendez, Special Rapporteur, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/66/268 (5 August 2011) 16.
[11] Walsh et al (n 10) 45-50.
[12] Ibid.
[13] *Human Rights Act 2019* (Qld) ss 16, 17, 30, 37. Of course, cultural rights of Aboriginal and Torres Strait Islander peoples and the right to non-interference with family may also be relevant: *Human Rights Act 2019* (Qld) ss 25, 28
[14] Human Rights Act 2019 (Qld) s 9(1).

compatible with human rights, and in making decisions, give proper consideration to relevant human rights.[15] The Act recognises that rights may be limited, but only where they are reasonable and demonstrably justified.[16] When deciding whether or not a limit is reasonable and justified, factors to be considered include the nature and purpose of the limitation, whether there are any less restrictive ways of achieving the purpose, and the importance of both the limitation and the right.[17]

Of course, in the context of COVID-19, certain limitations on human rights may well be reasonable and justifiable. There is clearly a legitimate purpose in preventing the spread or risk of infection, so some degree of segregation may be justified on medical grounds. However, in order to be human rights compliant, QCS is required to turn its mind to whether any less restrictive alternatives exist to achieve the same purpose. The WHO has stated that medical isolation should only occur as a matter of 'medical necessity' and that, even in the context of COVID-19, human rights protections still apply.[18] Based on the case studies above, we argue that options for less restrictive limitations on human rights were available and total isolation was not always a proportionate response to the risk of infection.

B *Conditions in Isolation are not Consistent with Basic Legal Protections*

The *Corrective Services Regulation 2017* (Qld) establishes certain minimum requirements for prisoners subjected to separate confinement. Prisoners in solitary confinement must have access to reticulated water, a toilet and shower facilities, and they must be given the opportunity to exercise in fresh air for at least two daylight hours a day, unless a doctor or nurse has advised otherwise. As our case studies demonstrate, these minimum requirements were not always met in respect of medically isolated prisoners in Queensland. Some prisoners had limited access to food and drinking water, and restrictions on the number of toilet flushes. Neither of these conditions would seem consistent with the goal of limiting the spread of COVID-19.

[15] Ibid s 58(1).
[16] Ibid s 13(1).
[17] Ibid s 13(2).
[18] World Health Organisation, 'Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance', *World Health Organisation Regional Office for Europe* (Report, 15 March 2020) 5.

Failing to provide prisoners with two hours out of cell time cannot be considered reasonable or demonstrably justified. Indeed, locking a prisoner down in their cell for 24 hours a day with no opportunity for fresh air or exercise may amount to cruel, inhuman and degrading treatment.[19] Further, access to fresh air is vital in light of medical advice suggesting that COVID-19 is spread not only by droplets but also by aerosols.

Prisoners in isolation were often not provided with information or documentation regarding when their medical segregation period would end. *The Nelson Mandela Rules* state that a person should never be placed in indefinite solitary confinement.[20] The Supreme Court of British Columbia has found that not knowing when they would be released was often 'the worst part' of solitary confinement for prisoners.[21]

Australian courts have reduced prisoners' sentences on the basis of the harshness of conditions in solitary confinement. For example, in *Callanan v Attendee X,*[22] *Callanan v Attendee Y*,[23] and *Callanan v Attendee Z*,[24] Justice Applegarth stated that a sentencing judge 'can make allowance for the fact that a person has spent part of their time in custody in unusually harsh circumstances'.[25] It has been confirmed in Victoria that prisoners will be able to apply for their sentence to be commuted by four days for each day spent in isolation,[26] and in *Scott v R,* the New South Wales (NSW) Court of Criminal Appeal reviewed the sentence of a prisoner as a result of the 'onerous' conditions he experienced during COVID-19 medical segregation.[27] Yet, the Queensland Government has made no commitment to commuting prisoners' sentences as a result of the time they spent in medical isolation during COVID-19.

C *Extreme Social Isolation and Lack of Access to Services*

The WHO has acknowledged the likelihood of prisoners reacting to further restrictions differently to other members of the population, in light of the restrictions on their liberty

[19] Walsh et al (n 10) 64-65.
[20] *The Nelson Mandela Rules* (n 9) rule 43; Mendez (n 10) 16.
[21] British Columbia Civil Liberties Association v Canada (Attorney-General) [2018] BCSC 62, [159], [545].
[22] [2013] QSC 340.
[23] [2013] QSC 341.
[24] [2014] 2 Qd R 11.
[25] *Callanan v Attendee X* [2013] QSC 340, [25]; *Callanan v Attendee Y* [2013] QSC 341, [25]; *Callanan v Attendee Z* [2014] 2 Qd R 11, [24].
[26] *Corrections Act 1986* (Vic) s 58E (Emergency Management Days).
[27] *Scott v R* [2020] NSWCCA 81, [166]; see also *R v KAX* [2020] QCA 218, 31.

they are already faced with.[28] Since contact with family members — including their children — and friends is already substantially limited, restricting contact with their support networks even further is likely to cause substantial distress.

Prisoners in medical segregation are spending extended periods of time in complete social isolation. Since many segregated prisoners are permitted to exercise together, placement in isolation for the rest of the day seems unnecessary and inconsistent. Regardless, it is important that contact with family and friends is maintained. Our case studies demonstrate that some prisoners did not have contact with family and friends at all during medical isolation, not even by phone, either because one was not made available to them or because they did not have enough funds in their prison account. The WHO has noted the importance of maintaining human contact during medical isolation, even if this can only be done remotely.[29] Mobile phones, free calls on the telephone system and access to videoconferencing (through iPads and other devices) could have been rapidly provided to prisoners in medical segregation. As was seen from our case studies, after many weeks some prisoners were provided with access to devices for the purpose of virtual visits. However, this could and should have occurred as a matter of urgency, particularly for prisoners with children.[30]

Our case studies also indicated that prisoners' access to health and psychological services was often limited in medical isolation. Prisoners were not always examined by medical practitioners, despite the relevant legislative requirements.[31] Further to this, prisoners in medical isolation did not always have access to external monitors, including official visitors.[32] *The Nelson Mandela Rules* state that the use of solitary confinement should be 'subject to independent review and only pursuant to the authorisation by a competent authority'.[33] Access to lawyers has also been restricted. Since many prisoners do not have ongoing contact with family or friends, lawyers may be the only people who are

[28] World Health Organisation (n 18) 1, 5.
[29] Ibid 5.
[30] Catherine Flynn, 'Getting There and Being There: Visits to Prisons in Victoria – the Experiences of Women Prisoners and Their Children' (2014) 61(2) *Probation Journal* 176, 178.
[31] Corrective Services Act 2006 (Qld) ss 56-57, 63-64.
[32] Ibid s 121.
[33] The Nelson Mandela Rules (n 9) rule 45(1).

advocating for their wellbeing, and legal representation enables criminal charges or parole decisions to progress which can lead to a prisoner being released.

D *Release from Prison as an Alternative to Isolation*

Both the case studies presented above, and the relevant policy documents, demonstrate that isolation practices were not always logical or consistent with medical advice. Not all prisoners were provided with a COVID-19 test, despite the fact that not all infections are symptomatic infections. Prisoners who were at risk of having COVID-19, including those at Wolston Correctional Centre, were doubled up in cells and prisons were significantly over-crowded. Prior to COVID-19, Queensland prisons were operating at 130% of capacity, and with the recent closure of work camps, over-crowding has increased. The Coalition for the Human Rights of Imprisoned People has described this as a 'tinderbox environment' when it comes to infection control.[34]

All Aboriginal and Torres Strait Islander people, elderly people, pregnant women and people with chronic health conditions should be considered vulnerable to COVID-19.[35] In April 2020, there were 3179 prisoners in Queensland that identified as Aboriginal and/or Torres Strait Islander.[36] Almost one in three Australian prisoners report having a chronic health condition[37] and 3% of prisoners are aged over 65 years.[38] Therefore, a significant proportion of the prison population should be considered vulnerable.

Of course, the least restrictive alternative to medical segregation for low-risk prisoners is that they be released from prison. Many prisoners could be safely released to prevent outbreaks and protect the health and welfare of both staff and prisoners, including: prisoners on remand, prisoners serving sentences of less than six months, prisoners who are within six months of the expiration of their sentence, prisoners who are eligible for

[34] Coalition for the Human Rights of People Imprisoned in Australia, 'Suspending Family Visits Will Not Prevent COVID-19' (Media Release, 23 March 2020) 1.
[35] 'Novel Coronavirus (COVID-19)', *Queensland Government* (Web Page, 2020) <http://conditions.health.qld.gov.au/HealthCondition/condition/14/217/838/novel-coronavirus>; Tamara Power et al, 'COVID-19 and Indigenous Peoples: An Imperative for Action' (2020) 29(15-16) *Journal of Clinical Nursing* 2737.
[36] 'Custodial Offender Snapshot April 2020', *Queensland Government Open Data Portal* (Web Page, 2020) <https://www.data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/ea617acb-a927-4036-b994-308d8b37dfaa>.
[37] Australian Institute of Health and Welfare, 'The Health of Australia's Prisoners 2018' (Report, 30 May 2019) vii.
[38] 'Prisoners in Australia in 2019', *Australian Bureau of Statistics* (Web Page, 5 December 2019). <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2019>.

parole, prisoners who are in custody on parole suspensions or cancellations, and elderly and immunocompromised prisoners. A substantial proportion of prisoners are at low risk of reoffending: 12% of prisoners in Queensland are 'low security' prisoners and 62% of sentences are for non-violent offences.[39] The median prison term in Queensland is 3.9 months, so a substantial proportion of prisoners are serving very short sentences.[40] Many of these offenders pose a low risk to the community and could be safely released. Further to this, 30% of prisoners in Queensland are unsentenced,[41] and could be granted bail in circumstances where the court considers this appropriate, subject to conditions if necessary.[42]

In NSW, the *Crimes (Administration of Sentences) Act 1999* (NSW) was amended to allow the NSW Commissioner to make an order releasing low-risk prisoners on parole if the Commissioner was satisfied this was 'reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic', taking into account their vulnerability and any risk to community safety.[43] No direct equivalent exists in Queensland, however powers already exist under the *Corrective Services Act 2006* (Qld) that allow for the release of prisoners in certain circumstances. The Commissioner has the power to grant a prisoner leave of absence for compassionate reasons, or for any other purpose the Commissioner considers justified.[44] Also, the Parole Board of Queensland has wide discretionary powers to release prisoners on parole, including in circumstances where it is satisfied that exceptional circumstances exist in relation to the prisoner.[45]

Many people are in custody for short periods due to temporary suspensions of parole orders and in many instances, prisoners' parole is revoked in circumstances where they do not pose any significant risk to the community. In 2018/19, a total of 4015 parole

[39] Queensland Productivity Commission, 'Inquiry into Imprisonment and Recidivism' (Report, 31 January 2020) 192.
[40] Ibid 40.
[41] Custodial Offender Snapshot April 2020 (n 36).
[42] *Bail Act 1980* (Qld) ss 8 (general powers relating to bail), 10(1) (availability of Supreme Court bail), 11 (bail conditions).
[43] Crimes (Administration of Sentences) Act 1999 (NSW) s 276(1); *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW).
[44] Corrective Services Act 2006 (Qld) s 72(1).
[45] Ibid s 194(1)(a). A prisoner can apply for exceptional circumstances parole at any time: s 176.

orders were suspended[46] and 1016 of these parole suspensions were issued because a person failed to comply with a condition of their parole order.[47] Only nine parole suspensions were issued because a person posed a serious and immediate risk of harm to another.[48] Limiting the use of parole suspensions is one means by which the prison population in Queensland could be dramatically reduced during the pandemic without compromising community safety.

V CONCLUSION

The COVID-19 pandemic has created a situation in which prisoners' human rights may have to be limited to some extent. However, placing prisoners in solitary confinement — often with no opportunity for fresh air, exercise, or contact with the outside world and for prolonged periods — cannot be considered reasonable or demonstrably justified. Less restrictive alternatives are available. Many prisoners could be released safely into the community; virtual contact with family members could be facilitated; and increased access to medical and psychological support could be available. Instead, there is a reasonable likelihood that some of the prisoners who were subject to medical isolation will experience ongoing adverse effects as a result of their time in solitary confinement. There are important lessons to be learned from this period of time. While COVID-19 transmission continues to occur in Australia, medical isolation will continue to be used in prisons and it is important that we build upon these learnings.

[46] Queensland Government, Parole Board Queensland, 'Annual Report: 2018–2019' (Report, September 2019) 27.
[47] Queensland Government, Parole Board Queensland, 'Submission to Queensland Sentencing Advisory Council: Intermediate Sentencing Options and Parole', *Queensland Sentencing and Advisory Council* (Report, 31 May 2019) 6 (data current as at May 2019 for the 2018/19 financial year).
[48] An additional 1672 parole suspensions were made because a person was considered to pose an unacceptable risk to the community and 803 were made for 'multiple reasons'. Ibid.

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THE INNER CIRCLE OF THE WINNER'S CIRCLE: EXCLUSIONARY TREATMENT OF TRANSGENDER AND GENDER DIVERSE ATHLETES IN ELITE SPORTS

ROSE BURBERY*

Transgender and gender diverse athletes' participation in elite sports has been a controversial topic of debate in mainstream media following several high-profile cases. Testosterone testing for female athletes can be discriminatory and exclusionary, particularly for transgender and gender diverse athletes, and is an area of ambiguity given the lack of consensus internationally on accepted testosterone levels for female athletes. This article intends to examine this issue from a social and theoretical perspective and use this to analyse the relevant Australian legislation governing the issue. An examination of the cases of Caster Semenya, Hannan Mouncey and Laurel Hubbard will be used to demonstrate the current attitude towards transgender and gender-diverse athletes in elite sports, and of the use of queer and gender theories will aid in analysis of the law and policy on gender diversity in elite sports in Australia.

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CONTENTS

I INTRODUCTION

In the current social and political climate, public discourse on allowing transgender and gender-diverse athletes to compete in elite sports is varied and complex. For transgender athletes, controversy arises from the change in policy by the International Olympic Committee ('IOC') allowing not only surgically transitioned athletes, but also those who have undergone hormonal transitioning.[1] Whilst there is limited research as to the effects of transitioning in athletes, researchers have found a rise in discriminatory sentiments towards non-cisgender athletes.[2]

Those against allowing transgender or gender diverse athletes in elite sports contend it is necessary to protect the sanctity of women's athletic experiences, given the biological advantage afforded to men.[3] Where transgender and gender-diverse athletes are allowed to compete, concerns arise as to the 'slippery slope' of excluding cisgender female athletes in sport altogether, as they are unable to keep up with those who have higher testosterone levels.[4] Naysayers thereby claim this will be the end of cisgender women

[1] Richard Ewart, 'Transgender athlete's controversy swirls after Laurel Hubbard wins gold at Pacific Games', *ABC News* (online, 30 July 2019) <https://www.abc.net.au/news/2019-07-30/transgender-athletes-in-the-pacific-under-fire/11360854>.
[2] Cisgender Can Be Defined as 'a Person Whose Gender Identity Matches Their Sex Assigned at Birth': Sam Winter et al, 'Transgender People: Health at the Margins of Society' (2016) 388 *The Lancet* 390, 391.
[3] Joanna Harper, 'Sport's transgender debate needs compromise not conflict', *The Guardian* (online, 1 April 2019) <https://www.theguardian.com/sport/blog/2019/apr/01/sports-transgender-debate-compromise-not-conflict>.
[4] Julian Savulescu, 'Ten ethical flaws in the Caster Semenya decision on intersex in sport', *The Conversation* (Web Page, 9 May 2019) <http://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448>.

competing in elite sports, as all contestants will have the advantages of male athletes with the ability to 'out-perform' their female counterparts.

This attitude excludes an already marginalised group of society to maintain the status quo by disadvantaging transgender and gender diverse athletes. These concerns also do not take into account the effect of hormone therapy on transgender individuals transitioning from male to female, as maintaining high testosterone levels is not beneficial in the transition process. Further, a limited study found that athletes who had transitioned from male to female had slower race times,[5] mitigating some of the concern as to the potential exclusion of cisgender women in elite sports. Several famous cases have shed light on the issue that is testosterone testing in elite sports.

A *Case Studies*

Caster Semenya is a South African runner who identifies as a woman. At just 18 years old, her gold-medal win at the world championships in Berlin sparked suspicion over her gender, leading to testing by the International Association of Athletics Federation ('IAAF') to determine if she is allowed to continue to race as a woman.[6] Semenya was found to have higher testosterone levels than most women, and while she was allowed to continue to compete, Semenya was on the receiving end of discrimination.[7] Although her sex test results were not officially published, Semenya's gender was widely discussed in the media due to claims she was intersex. Despite support from her home country and the president of South African athletics,[8] one female elite runner stated of Semenya: '[f]or me, she is not a woman. She is a man'.[9] Despite gold medal wins in the 2012 and 2016 Olympics, in 2018 the IAAF ruled that runners with high testosterone levels would need

[5] Joanna Harper, 'Race Times for Transgender Athletes' (2015) 6(1) *Journal of Sporting Cultures and Identities* 1.
[6] Anna North, '"I am a woman and I am fast": what Caster Semenya's story says about gender and race in sports', *Vox* (Web Page, 3 May 2019) <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>.
[7] Rick Maese, 'Court rules Olympic runner Caster Semenya must use hormone-suppressing drugs to compete', *Washington Post* (online, 1 May 2019) <https://www.washingtonpost.com/sports/2019/05/01/court-decides-against-caster-semenyas-appeal-controversial-rule/>.
[8] Tavia Nyong'o, 'The Unforgiveable Transgression of Being Caster Semenya' (2010) 20(1) *Women & Performance* 95.
[9] North (n 6).

to take medication to lower their hormones in order to compete.[10] Whilst Semenya appealed the discriminatory and restrictive rules, the Court of Arbitration for Sport denied this before it was temporarily suspended by the Swiss Federal Supreme Court.[11]

Hannah Mouncey is an Australian transgender AFL player who was ruled ineligible for selection in the 2018 AFLW draft.[12] Mouncey had previously competed in sports as an elite athlete at an international level prior to transitioning, and despite maintaining testosterone levels below the required threshold, she was subject to discrimination.[13] Whilst the AFL had contended Mouncey may be eligible for future drafts, she withdrew from selection in 2018 due to the poor treatment she received on the part of the AFL.[14]

Laurel Hubbard is a transgender weightlifter from New Zealand who has been subject to criticism following her transition from male to female,[15] and her decision to continue to compete at an elite level.[16] For 15 years, Hubbard held the New Zealand weightlifting record and has continued to excel in female categories, recently winning gold at the Pacific Games in 2019. This win was controversial, with Samoan Prime Minister condemning her participation, stating, 'No matter how we look at it, he's a man and it's shocking this was allowed in the first place'.[17]

These cases demonstrate that the current status of elite sports is not conducive to a supportive and gender diverse environment. Athletes face difficulty, uncertainty and

[10] *Semenya, ASA and IAAF: Executive Summary* (Court of Arbitration for Sport, Case No 2018/O/5794, 1 May 2019) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf>.
[11] 'Caster Semenya can run without testosterone restriction', *DW News* (online, 3 June 2019) <https://www.dw.com/en/caster-semenya-can-run-without-testosterone-restriction/a-49040851>.
[12] Salvatore Monaco, 'Sports Beyond Genders. Sociological Analysis on the Participation of Transgender Women in Female Sport Competitions' (2020) *Comunicación y género* 3(2) 105, 112; 'Transgender footballer Hannah Mouncey ineligible for AFL Women's draft', *SBS News* (online, 17 October 2017) <https://www.sbs.com.au/news/transgender-footballer-hannah-mouncey-ineligible-for-afl-women-s-draft>.
[13] 'Transgender footballer Hannah Mouncey ruled ineligible for 2018 AFLW draft', *ABC News* (online, 18 October 2017) <https://www.abc.net.au/news/2017-10-17/transgender-footballer-ruled-ineligible-for-aflw-draft/9059108>.
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[15] Sharon West-Sell, John Mark VanNess and Margaret Ciccolella, 'Law, Policy, and Physiology as Determinants of Fairness for Transgender Athletes' (2019) 22(2) *Professionalization of Exercise Physiology* 1.
[16] University of Otago, 'Gender binary in elite sports should be abandoned, researchers urge', *ScienceDaily* (Web Page, 23 July 2019) <https://www.sciencedaily.com/releases/2019/07/190723092111.htm>.
[17] Ewart (n 1).

adversity about their future in elite sports when identifying as transgender or gender diverse. Despite the purportedly feminist argument that trans and gender diverse inclusion will deprive cisgender women of opportunity, it is not the case that all people assigned male at birth have advantages in every sport or will make an impact so as to deprive cisgender women of sporting opportunities. More needs to be done to accommodate all athletes at a professional level and ensure inclusion of non-cisgender participants. In discerning whether transgender and gender-diverse women can compete in sports at an elite level, they are subjected to hormone testing to examine their testosterone levels.

B *Testosterone Testing*

Testosterone testing is used to determine whether transgender or gender diverse athletes can compete at an elite level in female categories based on their levels of the hormone testosterone. This testing is controversial, particularly due to the fact that different sporting authorities have differing requirements for serum testosterone limits. This lack of uniformity is particularly evidenced in the policies of the IAAF,[18] IOC,[19] and Cricket Australia,[20] all of which have been featured in the media due to their stance on testosterone levels in female athletes.

The IAAF's newly instituted regulations, which posed issues for Caster Semenya, stipulate that any athlete with a difference in sexual development must have circulating testosterone levels below 5nmol/L for a continuous period of six months.[21] Further, IAAF regulations stipulate that male-to-female athletes must have proof of gender reassignment surgery, details of treatments and an assessment of hormones before being allowed to compete;[22] although, it should be noted that the transgender and gender-

[18] International Association of Athletics Federation, 'New Eligibility Regulations for Female Classification' (Media Release, 26 April 2018) <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>.
[19] International Olympic Committee, IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism (at November 2015).
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[21] International Association of Athletics Federation (n 18).
[22] International Association of Athletics Federation, 'IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations' (Press Release, 7 May 2019) <https://www.iaaf.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>.

diverse population includes individuals who have not undergone and may never use or embrace the risks of hormone therapy and/or undergo gender-affirming surgeries. These limitations are extremely restrictive, especially when compared to those of the IOC, which allows transgender athletes to compete once they have undergone hormonal transitioning, so long as individuals maintain testosterone levels below 10nmol/L over the course of 12 months.[23] Cricket Australia has also adopted a more inclusive policy, allowing transgender players to compete in line with their gender identity, rather than the sex they were born with. These requirements reflect the IOC regulations, as transgender players must also demonstrate a testosterone level of less than 10nmol/L for 12 months or longer.[24]

Whilst testosterone is an anabolic steroid naturally occurring in both men and women, levels of testosterone in athletes are contentious due to the beneficial anabolic effects. These include increased muscle mass, bone density and maturation, which ultimately results in greater strength and physiological advantages for those with higher levels.[25] As the primary male sex hormone, testosterone is far more prevalent in men with normal endogenous production, ranging from approximately 8nmol/L to 33nmol/L.[26] For women, these parameters are lessened and often occur between 0.2nmol/L to 2.7nmol/L.[27] Despite this, cisgender female athletes can exceed these limits naturally, with one study finding a small percentage of female athletes with over 8nmol/L of testosterone.[28]

For those transitioning from male to female, clinical guidelines prescribe hormone medication with the intent of achieving hormone levels within the accepted female range. This is often achieved through anti-androgen drugs which act by competitively binding to

[23] International Olympic Committee (n 19).
[24] Australian Associated Press, 'Cricket Australia launches inclusion policy for transgender and gender diverse players', *The Guardian* (online, 8 August 2019) <https://www.theguardian.com/sport/2019/aug/08/cricket-australia-launches-inclusion-policy-for-transgender-and-gender-diverse-players>.
[25] Vineet Tyagi et al, 'Revisiting the Role of Testosterone: Are we Missing Something?' (2017) 19(1) *Reviews in Urology* 16.
[26] Thomas Travison et al, 'Harmonised Reference Ranges for Circulating Testosterone Levels in Men of Four Cohort Studies in the United States and Europe' (2017) 102(4) *The Journal of Clinical Endocrinology and Metabolism* 1161.
[27] Ibid.
[28] Marie-Louise Healy et al, 'Endocrine Profiles in 693 Elite Athletes in the Postcompetition Setting' (2014) 81(2) *Clinical Endocrinology* 294, 295-6.

androgen receptors and suppressing the production of androgens in the body.[29] It can take patients over nine months to reach a steady state of lowered testosterone, with diverse fluctuation occurring during this time.[30] Further, these levels are affected by extraneous factors such as weight, lifestyle, time of day,[31] season,[32] where you live, and how wealthy you are.[33] The effects can vary in individuals, with one medication plan achieving testosterone levels in the female range at all times in only the highest suppressing quartile of participants.[34] Once commencing hormone treatment, transgender women may have to experiment with different combinations of medication to achieve lowered testosterone levels.

Given the natural fluctuations that can occur, hormone testing has been criticised as an inadequate measure for determining whether female athletes should be allowed to compete in elite sports,[35] and as a questionable practice. The varying natural levels of testosterone in cisgender women demonstrate the increased difficulty for those that are transgender or gender diverse and have higher natural levels as a result. Furthermore, the differing regulations by sporting authorities complicates matters, as transgender and gender diverse athletes struggle to know where they stand among different competitive bodies and are subject to changing rules. This policing of women's bodies is particularly harsh when considering that male athletes are not subject to the same levels of testing or restrictive requirements.

II THEORETICAL ANALYSIS OF GENDER IN SPORTS

Whilst definitions of gender are unfixed and variable, theorists often define gender as predicated on attitudes associated with sex category, as a social development based on normative conceptions associated with men or women.[36] Gender theorist Judith Butler

[29] Cor W Kuil and Eppo Mulder, 'Mechanism of Antiandrogen Action: Conformational Changes of the Receptor' (1994) 102(1-2) *Molecular and Cellular Endocrinology* 1.
[30] Jennifer Liang et al, 'Testosterone Levels Achieved by Medically Treated Transgender Women in a United States Endocrinology Clinic Cohort' (2018) 24(2) *Endocrine Practice* 135, 136.
[31] Juan Mario Barberia et al, 'Diurnal Variations of Plasma Testosterone in Men' (1973) 22(5) *Steroids* 615.
[32] Daniel Moskovic et al, 'Seasonal Fluctuations in Testosterone-Estrogen Ratio in Men from the Southwest United States' (2012) 33(6) *Journal of Andrology* 1298, 1299-1300.
[33] Kesson Magid et al, 'Childhood Ecology Influences Salivary Testosterone, Pubertal Age and Stature of Bangladeshi UK migrant men' (2018) 2(7) *Nature Ecology & Evolution* 1146.
[34] Liang (n 30) 148-9.
[35] University of Otago (n 16).
[36] Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1(2) *Gender & Society* 125, 127.

identifies gender as a product of a regulatory and disciplinary regime that embraces gendered normative practices and punishes those who rebel against them.[37] She identifies this promotion and punishment regime as reinforcing the norm of 'man' and 'woman', which essentially relegates anybody outside the system to be considered 'other'. This application of gender is evident in the issue of transgender and gender diverse athlete treatment in elite sports, as hormone testing plays into this understanding by requiring all diverse individuals to be compared to an arbitrary set of standards by which their fitness for participation is to be judged. Whilst many deem it necessary to abide by rigid standards so as to regulate fair participation in sport, the difference in regulations across sporting bodies, such as the IAAF, IOC and Cricket Australia, demonstrate the subjectivity of testing. On this model, transgender and gender diverse individuals are evaluated for acceptable hormone levels against the norm that is 'man' or 'woman'.

This is further reflected in the way transgender and gender diverse female athletes are discussed in the media. As aforementioned, the struggles of Caster Semenya, Hannah Mouncey and Laurel Hubbard were not without controversy, and this can be noted in online literature and media, as evidenced by fellow athletes and journalists regarding these situations. Such commentary and regulations set by the sporting bodies reinforces and forms the subject and brings it into being seen as a subject in this sense, according to Butler.[38] Consequently, the way sporting authorities deal with transgender and gender diverse athletes by comparing them to the norm of cisgender male and female hormone levels, reinforces their difference and causes these individuals to be seen as 'other'.

This problematisation of gender boundaries is further considered in the application of queer theory. Law as a static entity considers male/female as the dyad to informing the law and its processes, and only accepts or allows the 'other' upon condition.[39] This is no different from the testosterone testing that transgender and gender diverse women are subject to. Their bodies must be acceptable within the framework of the relevant sporting authority, in comparison to male and female set values, in order to be deemed acceptable and allowed to participate. Sharpe states that 'the policing of category boundaries

[37] Judith Butler, *Undoing Gender* (Routledge, 2004), 41-42.
[38] Ibid 41.
[39] Linnéa Wegerstad and Niklas Selberg, '"Law's Outsiders": An Interview with Alex Sharpe' (2012) 138(3) *Retfærd Nordisk juridisk tidsskrift* 85, 88.

whereby some individuals who locate themselves within a group are legally positioned outside it…'[40] and recognises that views of transgender people are tied to biological factors at birth,[41] in that policy and law is always informed by what is considered self-evident and natural within wider culture.

Understandings of gender are (and continue to play) a defining role in law and policy, which is no different when considering the treatment of transgender and gender diverse athletes. With regard to hormone testing for elite athletes, those who are considered the 'norm' are not subjected to the same level of scrutiny, and the same can be said for male athletes. Although sporting institutions no longer conduct visual examinations of female competitors' genitals, there are concerns that rigorous policing of women's bodies is essentially a modern form of this sex testing.[42] For MacKinnon, this reinforces a male leviathan state that monitors women and polices their bodies.[43] It reinforces a system of power to allow the norm of seeing women as a consumable object, and subjects them to gendered harm through invasive testing procedures.[44] When considering an already marginalised female population, such as transgender and gender diverse individuals, the monitoring and approval of their bodies is already a concept they are subjected to by society in the form of judgment and criticism. Having these practices embedded into the culture of elite sports further exemplifies and informs individuals that their bodies need to be monitored and considered acceptable before they can perform or demonstrate their own gender identity or live their life in an authentic way.

III LEGAL ANALYSIS OF GENDER IN SPORTS IN AUSTRALIA

Anti-discrimination legislation in Australia comprises of international, federal and state regulation. At an international level, individuals are afforded protections under the *International Covenant on Civil and Political Rights*, which Australia ratified in 1980.[45]

[40] Ibid 90.
[41] Ibid 92.
[42] Amanda Shalala, 'IAAF female classification rules slammed as "blatantly racist"', *ABC News* (online, 28 April 2018) <https://www.abc.net.au/news/2018-04-28/critics-say-iaaf-testosterone-rules-blatantly-racist/9706744>.
[43] Catherine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) *Signs* 8(4) 635.
[44] Ibid.
[45] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

This treaty stipulates the need to respect all persons 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[46] Whilst it does not specify protections for gender orientation, it can be encompassed under this provision and signatories must take necessary steps to adopt laws or measures which give effect to this.[47] Further, this treaty ensures all persons are equal before the law and that law should prohibit any form of discrimination.[48] Consequently, Australian legislation needs to ensure it protects the rights of transgender and gender diverse individuals and take steps to prevent discrimination against such persons.

Additionally, participation in sport is a human right under the *International Charter of Physical Education, Physical Activity and Sport*, which extends to include a right to sport without discrimination on the basis of gender, as well as inclusive and safe opportunities to participate.[49] The Australian Human Rights Commission recently published guidelines to this effect, seeking to expand on the legislation in dealing with discrimination and harassment and promoting inclusivity in sports.[50] Whilst this publication is beneficial in promoting participation in sport for all within sporting clubs in Australia, issues remain for transgender and gender diverse athletes at an elite level.

Although international law is clear in that it recognises the right to participate in sport and to not be subject to discriminatory practices on the basis of gender, there is no requirement or specification regarding elite sports. This is further demonstrated in Australia's national law, the *Sex Discrimination Act 1984* (Cth), which is the primary federal legislation in eliminating discrimination against persons on the ground of sex, sexual orientation, gender identity and intersex status.[51] This legislation stipulates where circumstances of discrimination occur on the grounds of gender identity and intersex status.[52] Despite this, it specifically states it is not unlawful to 'discriminate on the ground

[46] Ibid art 2(1).
[47] Ibid art 2(2).
[48] Ibid art 26.
[49] United Nations Educational, Scientific and Cultural Organization, *International Charter of Physical Education, Physical Activity and Sport* (21 November 1978) art 1.1-3.
[50] Australian Human Rights Commission, 'Guidelines for the inclusion of transgender and gender diverse people in sport' (at June 2019).
[51] Sex Discrimination Act 1984 (Cth) s 3(b).
[52] Ibid s 5B-5C.

of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of the competitors is relevant'.[53] While the law fails to clarify the strength, stamina and physique of the competitors, the *Guidelines for the inclusion of transgender and gender diverse people in sport* indicate this exemption is likely to apply to people of different gender identities, as this exclusion has been found to operate where the competition would be uneven due to disparity by the Victorian Civil and Administrative Tribunal in their equivalent legislation.[54] Further, such an interpretation has been supported by the Federal Court of Australia in the case of *Ferneley v Boxing Authority of New South Wales*.[55] Consequently, transgender and gender diverse athletes are essentially unprotected in seeking to participate at an elite level and subject to the regulations of the individual sporting organisation.

As such, the protections against discrimination in the national legislation fail to adequately consider the needs of transgender and gender diverse athletes in elite sportsmanship. Therefore, despite protections enshrined in international law, Australian legislation fails to properly cater to transgender and gender diverse individuals seeking to take part in elite sports, instead leaving authority to sporting bodies with varying regulations regarding participation for non-cisgender individuals.

IV CONCLUSION

The cases of Caster Semenya, Hannah Mouncey and Laurel Hubbard demonstrate the adversity transgender and gender diverse athletes face in elite sports from peers, the general public and institutions. Testosterone testing and regulations in elite sports are discriminatory, in that transgender and gender diverse women are subject to the varying policies of different sporting authorities, whose non-uniformity and fluctuating guidelines create difficulty in fair and equal participation. These rigid guidelines that dictate determinations of gender, further marginalise minority groups, as supported by gender and queer theory. The use of male and female set values as the norm fails to properly encompass those who are not cisgender. In reference to Semenya, Nyong'o questions,

[53] Ibid s 42.
[54] Taylor and others v Moorabbin Saints Junior Football League and another [2004] VCAT 158, [19]-[20].
[55] (2001) 115 FCR 306, 323-4.

'instead of insisting upon the naturalness of her gender, how about turning the question around and denaturalizing the world of gender segregated, performance-obsessed, commercially-driven sports, a world that can neither seem to do with or without excessive bodies like Semenya's and their virtuosic performances?'[56]

Ultimately, the solution to exclusionary practices in elite sports is the abolition of binary gender division and testosterone testing. Monaco notes: 'if the aim of the exclusion of transgender women by female sports activities is to ensure fairness in the competition, it should check the levels of testosterone present in all athletes … However, reducing everything to a DNA or hormone levels question is disqualifying for the professionalism of these people and belittles the sport of its value and aggregator of social device, exchange, debate and mutual enrichment'.[57] However, such a proposal is impractical in that a complete restructure of competitive sports is an unlikely outcome. Whilst testosterone testing is more problematic for transgender and gender diverse women than any other category, at the bare minimum testosterone regulations should treat non-cisgender women under the same standards by maintaining consistency in testosterone levels across international sporting authorities. Such an outcome would provide the basis for a more uniform approach and clarify the unpredictability which plagues non-cisgender athletes in elite sports.

Whilst there is a need for international regulation and uniformity on hormone testing, Australian legislation needs to ensure its own laws and policies are non-discriminatory and supportive of transgender and gender-diverse athletes in elite sports. It is imperative that the law promotes inclusivity and prevents discrimination, as it seeks to achieve. Although reform may be necessary to ensure fair outcomes, education is essential, particularly as amending Australia's laws alone will have little to no effect on major international sporting events wherein elite athletes intend to compete. While it is not a perfect solution as it still portrays gender as a duality of men and women as the standard for comparison, there is a need to ensure uniformity and dignity in the way transgender and gender diverse elite athletes are treated in Australia. Such reform would ultimately reinforce the international covenants Australia has purportedly ratified and allow

[56] Tavia Nyong'o, 'The Unforgiveable Transgression of Being Caster Semenya' (2010) 20(1) *Women & Performance* 95.
[57] Monaco (n 12) 112.

influence over national sporting bodies, allowing more permissive and inclusive policies as seen in recreational and amateur levels of sport (such as Cricket Australia's policy). Ultimately, non-cisgender athletes deserve certainty and impartiality in all aspects of their lives, let alone their chosen profession. Regulation and legislation must evolve to ensure inclusivity is a primary consideration in the future development of sporting practices for both amateur and elite athletes alike.

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JULIAN ASSANGE, DAVID HICKS AND WHETHER CITIZENS HAVE RIGHTS TO LAWFUL CONSIDERATION OF REQUESTS FOR DIPLOMATIC PROTECTION

MICHAEL HEAD*

This article examines insufficiently explored questions about whether—as a matter of Australian domestic law—a citizen has the right to seek diplomatic protection from the Australian government and to have that application determined lawfully. It does so primarily by considering the possible precedent set more than a decade ago by the David Hicks case and asking whether Julian Assange may have been unlawfully denied diplomatic protection. Australian governments have declined to intervene with the British and United States authorities to protect Assange, an Australian citizen, from being extradited to the United States on charges under the Espionage Act 1917 (US). This is despite evidence that his human rights may be being violated. In particular, United Nations bodies have ruled his detention to be arbitrary and amounting to psychological torture. Moreover, there appear to be defects in the legal proceedings, including violations of lawyer-client confidentiality. These facts could bring Assange's case within the precedent arguably set by the Hicks case, which decided that the government had a duty to consider an application by an Australian detained in the US military facility at Guantanamo Bay for diplomatic intervention if his human rights were being violated 'clearly', and to consider that application lawfully, that is, without irrelevant considerations or improper purpose.

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CONTENTS

I INTRODUCTION

This article examines an insufficiently explored issue: Whether Australian governments have a duty to lawfully consider an application by an Australian citizen for diplomatic protection where 'clear' violations of internationally-recognised human rights are allegedly occurring. It primarily examines that question through the prism of the David Hicks and Julian Assange cases.

Successive Australian governments have offered the WikiLeaks founder only consular assistance. Given the outcome of the Hicks case, the following question arises: Have

Australian governments unlawfully declined to consider, or rejected on unlawful grounds, intervening with the British and United States authorities to seek the release of Assange, an Australian citizen, or protect him from being extradited to the United States to face charges under the *Espionage Act 1917* (US) ('US Espionage Act')?

This article considers whether Assange's case could come within the precedent arguably set by the Hicks ruling in 2007. In that case, the Federal Court decided that the government had a duty to consider an application by Hicks, an Australian citizen detained in the US military facility at Guantanamo Bay, for diplomatic intervention if his human rights may be being clearly violated, or if he were subject to a procedure contrary to international law, and to consider that application lawfully, that is, without irrelevant considerations or improper purpose.[1]

This article then considers whether, on the facts of Assange's case, the government has unlawfully failed to consider diplomatic intervention, on the grounds of relevant/irrelevant considerations or improper purpose, perceived bias or unreasonableness, at least in the sense of discrimination.

Any intervention would be required only if Assange's human rights may be being clearly violated. Arguably, evidence exists. Two United Nations bodies have ruled his detention to be arbitrary and amounting to psychological torture. The UK and US proceedings against Assange also contain apparent defects, such as violations of lawyer-client confidentiality, which could constitute breaches of human rights or procedures contrary to international law.

II AUSTRALIAN GOVERNMENTS HAVE OFFERED ONLY CONSULAR ASSISTANCE

Like each of its predecessors since 2010, the current Liberal-National government has rejected calls to use any applicable legal and diplomatic powers to intervene on behalf of Assange to prevent his extradition to the United States. Rather, the government has offered him only consular assistance, insisting that it cannot intervene in Assange's legal proceedings. In response to Assange's arrest in April 2019, Prime Minister Scott Morrison said: 'It has got nothing to do with' Australia and 'it is a matter for the US'.[2]

[1] *Hicks v Ruddock* (2007) 156 FCR 574.
[2] SBS News, 'PM says no special treatment for Assange as his legal team vows to fight extradition', *SBS*

Prime Minister Morrison reiterated the government's stance in a published letter to Assange supporter, actress Pamela Anderson, on 20 November 2019. On this occasion, the prime minister referred to the UK as the relevant foreign government. Morrison wrote:

> The Australian government continues to monitor Mr Assange's case closely, as it would for any other Australian citizen in detention overseas… Beyond providing consular assistance, it is important to note that Australia has no standing and is unable to intervene in Mr Assange's legal proceedings.[3]

It is true, as a matter of international law, that states do not have a right of diplomatic protection until local remedies before judicial or administrative courts or bodies are exhausted. Discussion of international law and Assange's possible recourse to it is beyond the scope of this article.

However, it must be noted there are exceptions to this rule for 'no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress'.[4] Judicial authorities support the application of those exceptions where the local courts are notoriously lacking in independence or there is a consistent and well-established line of precedents adverse to the alien.[5] Article 19 of the Draft Articles of the International Law Commission on Diplomatic Protection also recommends that states should give 'due consideration to the possibility of exercising diplomatic protection especially when significant injury has occurred'.[6] Moreover, the content of a state's right of diplomatic protection has developed in recent times,[7] and may be augmented by treaties, including consular agreements, mutual legal assistance treaties and prisoner transfer agreements.

News (11 April 2019) <https://www.sbs.com.au/news/pm-says-no-special-treatment-for-assange-as-his-legal-team-vows-to-fight-extradition>.

[3] Steve Jackson, 'Scott Morrison responds to Pamela Anderson's Julian Assange plea', *The Australian* (online at 26 November 2019) <https://www.theaustralian.com.au/nation/scott-morrison-responds-to-pamela-andersons-julian-assange-plea/news-story/ff122bb5d32842ee9fd630e188945e9d>.

[4] Article 15(a) of The Draft Articles of the International Law Commission on Diplomatic Protection <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf>; John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' [2005] *AUYrBkIntLaw* 6; (2005) 24 *Australian Year Book of International Law* 75.

[5] The Draft Articles of the International Law Commission on Diplomatic Protection (n 4) 47.

[6] Ibid 53.

[7] See International Law Commission, *Report of the International Law Commission*, UN GAOR, 58th sess, Supp No 10, UN Doc A/61/10 (1 May 2006) 13–100.

As explored below, apparent defects in the UK and US proceedings could raise questions about effective redress. But whether or not Australian governments have a strict legal right to intervene in Assange's extradition proceedings, it does not preclude Australian governments from exercising diplomatic and political means of intervention. Suffice to say also that Australian courts have recognised that proposition. Citing authorities in customary international law, Finkelstein J stated in *Tji, Lay Kon v Minister for Immigration & Ethnic*:[8]

> [I]f a person has been injured in breach of international law, whether of a convention or a principle of customary international law, the state of nationality of that person has standing to intervene on behalf of its national. Diplomatic protection may be exercised by amicable or non-amicable means. It may be exercised informally such as by negotiation or mediation, or more formally, by international inquiry or arbitration or by litigation in courts such as the International Court of Justice.

Exercising this right, the Australian government offers consular services to its citizens arrested and imprisoned abroad, including visiting the prisoner, discussing 'justified and serious complaints about ill-treatment or discrimination with the local authorities',[9] raising medical issues with local authorities, monitoring court trials, and possibly attending as an observer. These services do not extend to seeking to protect a citizen from punitive or unlawful detention or legal proceeding.[10]

In the past, however, Australian governments have secured the release of Australian citizens or residents facing political charges in other countries, including David Hicks who had been imprisoned by the US government at Guantanamo Bay, Cuba. In 2007, the Howard government intervened to ask the US government to release Hicks, albeit as part of an agreement that required Hicks to plead guilty to a minor terrorist-related charge (which was later annulled) and serve six months imprisonment in an Australian jail.[11]

[8] [1998] FCA 1380; 158 ALR 681.
[9] 'Fact sheet: Arrested or jailed overseas', *smartraveller.gov.au* (Web Page) <https://www.smartraveler.gov.au/consular-services/resources/arrested-jailed-overseas-factsheet>.
[10] Sangeetha Pillai, 'The rights and responsibilities of Australian citizenship: A legislative analysis' (2014) 37 *Melbourne University Law Review* 736, 769.
[11] Timothy McCormack, 'David Hicks and the Charade of Guantanamo Bay' (2007) 8 (2) *Melbourne Journal of International Law* 273.

Not all Australian citizens facing criminal proceedings, by any means, have received such assistance.[12] However, apart from Hicks, whose case is examined below, other well-known instances include:

- James Ricketson, a documentary filmmaker, was convicted of espionage charges in Cambodia. He was released in 2018 after the Liberal-National government made 'high-level' diplomatic representations on his behalf.
- Peter Greste, an Australian journalist working for *Al Jazeera*, was detained by Egypt's military dictatorship and found guilty of 'terrorism' offences. He was freed after Liberal-National government action in 2015.
- Melinda Taylor, a lawyer who was appointed by the International Criminal Court to advocate on behalf of Saif al-Islam Gaddafi in 2012, was arrested by a 'rebel' government and accused of spying. The Labor government's Foreign Minister Bob Carr personally flew to Tripoli to secure her release and return to Australia.[13]

In addition, a non-citizen asylum seeker resident in Australia was freed from detention as the result of intervention by Prime Minister Morrison's government in 2019. To secure the release of footballer Hakeem al-Araibi, the Prime Minister wrote twice to the Thai prime minister. Both governments had been under public pressure to release al-Araibi who had been granted asylum in Australia and claimed his life was at risk if he were returned to Bahrain.[14]

These cases demonstrate that the Australian government has a range of diplomatic powers that could be employed in Assange's defence. However, the evidence indicates that the opposite has occurred with regard to Assange. In fact, Australian governments have supported efforts by US governments to arrest Assange and extradite him. In 2010, Prime Minister Julia Gillard condemned WikiLeaks' publication of thousands of secret US

[12] See Klein, Natalie, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of Its Citizens Abroad' (2011) 35(1) *Melbourne University Law Review* 134.
[13] Nick Baker, 'The WikiLeaks editor-in-chief wants Scott Morrison to help bring Julian Assange home', *SBS News* (online at 3 December 2019) <https://www.sbs.com.au/news/the-wikileaks-editor-in-chief-wants-scott-morrison-to-help-bring-julian-assange-home>.
[14] Benedict Brook, 'Hakeem al-Araibi released as extradition proceedings dropped', news.com.au (online, 11 February 2019) <https://www.news.com.au/sport/sports-life/hakeem-alaraibi-set-to-be-released-as-extradition-proceedings-dropped/news-story/6c9c68b07b8f52d5ab39e6f61efae943>.

documents exposing war crimes in Afghanistan and Iraq, and US diplomatic intrigues around the world as 'illegal' and 'grossly irresponsible'.[15] Attorney-General Robert McClelland said Australia was providing 'every assistance' to US authorities in their investigation.[16] The Gillard government established a military, intelligence and departmental taskforce to investigate whether Assange could be convicted of any crime under Australia law, and may have concluded that he could not.[17]

In February 2020, Mat Kimberley, the assistant secretary for consular operations at the Department of Foreign Affairs and Trade (DFAT), outlined the current government's position. Replying to several open letters from doctors to the government, his letter rejected the United Nations Special Rapporteur on Torture Nils Melzer's findings that Assange is being subjected to psychological torture; dismissed the doctors' professional opinion that Assange has not received adequate medical care; and said the government was confident that Assange would receive 'due process' in the legal proceedings in both the UK and US.[18]

III THE RELEVANT BACKGROUND TO THE US EXTRADITION APPLICATION

In 2010, under Assange's editorship, WikiLeaks began publishing more than two million leaked internal US documents, including videos, diplomatic cables and State Department files. The documents included 91,000 files on the war in Afghanistan, 391,000 files on the war in Iraq, 251,287 US diplomacy cables and 779 files regarding Guantanamo Bay detainees. Some of these files were published by the *New York Times*, the *Guardian*, *Der Spiegel,* the *Sydney Morning Herald* and other well-known media outlets around the world, which partnered with WikiLeaks, and some have been cited in courts and scholarly works.[19]

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[15] News.com.au, 'Julian Assange bids to sue Julia Gillard for defamation over WikiLeaks comments,' news.com.au (online, 8 October 2012) <https://www.news.com.au/national/assange-bids-to-sue-gillard-for-defamation/news-story/132a6b415fd8bbd71bc1265577f87fb3>.

[16] Josh Gordon, 'PM has betrayed me: Assange' *Sydney Morning Herald* (online, 5 December 2010) <https://www.smh.com.au/technology/pm-has-betrayed-me-assange-20101204-18ks8.html>.

[17] Dylan Welch, 'Government considered Assange treason charge' *Sydney Morning Herald*, (online, March 12, 2011) <https://www.smh.com.au/technology/government-considered-assange-treason-charge-20110311-1br8n.html>.

[18] Oscar Grenfell, 'Doctors condemn Australian government's refusal to defend Julian Assange' *World Socialist Web Site* (online, 19 March 2020) <https://www.wsws.org/en/articles/2020/03/19/assa-m19.html>.

[19] Julian Assange et al, *The WikiLeaks Files* (Verso, 2015), 1-11.

According to a summary published by WikiLeaks, the documents raised serious allegations, including:

> [T]hat the United States has bombed civilian targets; carried out raids in which children were handcuffed and shot in the head, then summoned an air strike to conceal the deed; gunned down civilians and journalists; deployed 'black' units of special forces to carry out extrajudicial captures and killings; side-stepped an international ban on cluster bombs; strong-armed the Italian judiciary over the indictment of CIA agents involved in extraordinary rendition; engaged in an undeclared ground war in Pakistan; and tortured detainees at Guantanamo Bay, few of whom have ever been charged with any crime.[20]

For these publications, Assange received numerous international journalism awards, including the 2011 Walkley Award for most outstanding contribution to Australian journalism.[21] However, US government figures and politicians denounced the WikiLeaks' publications. Secretary of State Hillary Clinton called the Wikileaks disclosures 'an attack on the international community' that endangered innocent people.[22] Republican Congressman Peter King asserted that the publication of classified diplomatic cables was 'worse even than a physical attack on Americans' and that Wikileaks should be officially designed as a terrorist organisation.[23]

Similar statements were made in 2017, when WikiLeaks released thousands of pages of documents describing software tools and techniques used by the Central Intelligence Agency (CIA) to break into smartphones, computers and internet-connected televisions. In his first speech as director of the CIA, Mike Pompeo, who later became US Secretary of State, attacked WikiLeaks as a stateless hostile intelligence unit.[24] Such remarks could be

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[20] Ibid 74-5.
[21] Joe Lauria, 'Julian Assange Wins 2020 Gary Webb Freedom of the Press Award' *Consortium News* (online, 10 February 2020) <https://consortiumnews.com/2020/02/10/julian-assange-wins-2020-gary-webb-freedom-of-the-press-award/>.
[22] Katie Connnolly, 'Has release of Wikileaks documents cost lives?', *BBC News* (online, 1 December 2010) <https://www.bbc.com/news/world-us-canada-11882092>.
[23] David Samuels, 'The Shameful Attacks on Julian Assange', *The Atlantic* (online, 3 December 2010) <https://www.theatlantic.com/international/archive/2010/12/the-shameful-attacks-on-julian-assange/67440/>.
[24] Matthew Rosenberg, 'Mike Pompeo, Once a WikiLeaks Fan, Attacks It as Hostile Agent', *New York Times* (online, 13 April 2017) <https://www.nytimes.com/2017/04/13/us/politics/mike-pompeo-cia-wikileaks.html>.

seen as prejudicing the prospect of a fair trial for Assange.

IV THE AUSTRALIAN GOVERNMENT'S POSSIBLE PROTECTIVE DIPLOMATIC DUTY

The legal and diplomatic options potentially available to Australia to intervene to protect citizens imprisoned abroad were illustrated by the case of David Hicks, an Australian citizen who was detained by the United States in Guantanamo Bay for six years.[25] Confronted by growing public opposition to the treatment of Hicks, the Australian government sought a range of assurances from the US regarding his treatment.[26] These included that the United States would not seek the death penalty in Hicks' case, that Australia would seek his extradition to Australia to serve any sentence, that Hicks would have confidential access to his lawyer, and that Australian officials would be permitted to monitor his trial.[27] Ultimately, the two governments agreed to repatriate Hicks to Australia, albeit subject to a nine-month imprisonment.

A *The Possible Hicks Precedent*

During the six-year US detention without trial of David Hicks at Guantanamo Bay, concerns were raised about the human rights violations committed against him, regarding due process rights in military confinement and trials, as well as the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

In *Hicks v Ruddock* (2007) 156 FCR 574 ('*Hicks*'), Hicks sought a writ of habeas corpus instructing the Australian government to ask the US authorities to release him. Hicks also applied for an order that the government acted on irrelevant considerations and for improper purposes in refusing to request his release.

The law of justiciability, which previously could have barred such a legal challenge to an executive decision not to intervene, has become more fluid in recent years, particularly when the conduct of foreign affairs involves alleged violations of human rights. Thus, in *Abbasi v Secretary of State* [2002] EWCA Civ 1598 ('*Abassi*'), the English Court of Appeal

[25] For a discussion of this and other significant cases, see Klein (n 12) 134.
[26] See Mason, Sir Anthony; Lindell, Geoffrey, 'Detainee 002: The Case of David Hicks by Leah Sales' (2008) 9(2) *Melbourne Journal of International Law* 515.
[27] Klein (n 12) 164.

was prepared to consider an application for relief by an English citizen detained at Guantanamo Bay. Their Lordships said the 'forbidden area' of foreign policy previously identified in the *Council of Civil Service Unions* case could be impinged upon where 'a clear breach of a fundamental human right' occurred.[28]

Tamberlin J followed this approach in *Hicks*. He rejected a government application to have Hicks' case summarily dismissed on the grounds that it had no reasonable prospects of success. The judge rejected the proposition that courts could not interfere in negotiations between two countries. Tamberlin J stated:

> The concept of a 'forbidden area' arguably states the position far too generally to be applied at face value and such a broad proposition will not readily apply in Australia where executive power is vested by and subject to the limitations spelt out in s 61 of the Australian Constitution.[29]

As in *Abbasi*, Tamberlin J couched his judgment in terms such as 'a clear breach of international law, particularly in the area of human rights' and 'the fundamental right to have cause shown as to why a citizen is deprived of liberty' by procedures that 'may be found to be contrary to the requirements of international law'.[30] Tamberlin J noted that whereas Abbasi had been interned for eight months, the injustice in Hicks' case 'could be seen to be substantially greater', given his internment for over five years.[31]

Some two weeks after Tamberlin J's decision, an agreement was struck whereby Hicks pled guilty to a minor US military charge in return for being repatriated to Australia to serve nine months' imprisonment. The fact that this agreement was made suggested that the government's legal advice indicated that it could have lost the case if it had proceeded, although the pressure of public opinion was no doubt another factor.[32]

As indicated by Tamberlin J, the prerogative powers are arguably subject to the Constitution. By s 61, the Constitution vests executive power in the Crown and by s 75, it establishes the inherent jurisdiction of the High Court. The judge did not have to rule on

[28] [2002] EWCA Civ 1598, [66], [107].
[29] (2007) 156 FCR 574, [85].
[30] Ibid [81] and [90].
[31] Ibid [86].
[32] James Cogan, 'Australian rallies demand release of David Hicks from Guantánamo Bay' *World Socialist Web Site* (online, 12 December 2006) <https://www.wsws.org/en/articles/2006/12/hick-d12.html>.

these issues, but he regarded these arguments as sufficiently substantial to reject the government's application for summary dismissal. Tamberlin J noted that Hicks submitted that 'under the Australian Constitution, and in particular s 61, the federal executive government owes a duty of protection to a citizen' in his predicament.[33]

The judge stated that 'although this protective duty cannot be enforced by Mr Hicks, it is a duty of imperfect obligation which must be taken into account in the respondents' consideration as to whether to make a request'.[34] It would be 'inconsistent with this duty of protection to take into account' the irrelevant consideration that Hicks would not be prosecuted if returned.[35] Tamberlin J added:

> Likewise, it is said, the respondents' purpose of further co-operating with the United States authorities in relation to the continued detention and prosecution of Mr Hicks in Guantanamo Bay is not consistent with the Executive's duty to protect a citizen. Therefore, the applicant submits, both of these considerations are extraneous to the protective duty. The function of the Executive under s 61 is to protect against – and not enable – the punitive detention and prosecution of an Australian citizen in a 'legal black hole', to use the terminology of the English Court of Appeal in *Abbasi*.[36]

By this argument, diplomatic considerations, bound up with preserving cooperation with the United States government in its extradition application for Assange, may be irrelevant and prohibited from being taken into consideration in making decisions about protecting citizens from punitive detention. The duty of the Executive is to protect a citizen against punitive detention, not enable it, in the words of Tamberlin J.

It is true that *Hicks* was the first test of the 'imperfect duty' of protective intervention and no final decision was required to be made. Moreover, the decision was made by a single Federal Court judge, and the issue has not reached the High Court. Nevertheless, *Hicks* sets a possible precedent for the proposition that an application for diplomatic protection cannot be rejected on unlawful grounds, at least where 'clear' evidence of

[33] *Hicks* (n 28) [61].
[34] Ibid.
[35] Ibid.
[36] Ibid.

human rights violations exists.

It is also true that in *Abbassi*, the English doctrine of legitimate expectations imposed a legal duty on the UK government to consider an application for diplomatic assistance. Ministerial statements of government policy had generated that duty. Australian courts have not accepted the extension of the legitimate expectations doctrine to cover substantive rather than procedural fairness rights. Yet, as reviewed above, governments have intervened to protect detained Australian citizens or lawful residents in arguably similar circumstances to those of Assange.

B *The Habib Case*

The case of Mamdouh Habib, another Guantanamo Bay detainee, who sought to sue the Australian government for the alleged torture and other abuses he had suffered, arguably set a related precedent regarding the common law 'act of state' doctrine, by which courts will not generally judge the actions of a foreign government done within its own territory.

This doctrine has been long accepted in Australia.[37] Where, however, the official conduct allegedly involved grave violations of human rights and international law, courts have been prepared to rule that the doctrine does not apply. In *Habib v Commonwealth* (2010) 183 FCR 62 ('*Habib*') Habib, an Australian citizen, had been detained in Pakistan as a suspected terrorist in 2001. After being secretly held in Egypt and at the US Bagram Airforce base in Afghanistan, in 2002 he was transferred to Guantanamo Bay. He was eventually released in 2005 without any charges being laid against him and returned to Australia.

During an earlier challenge to the cancellation of his Australian passport, the Administrative Appeals Tribunal had expressed disquiet about the treatment of Habib during his detention. In that hearing it was common ground that, when interviewed at Guantanamo Bay by representatives of the Department of Foreign Affairs and Trade, the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police, he

[37] *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; *Attorney-General (UK) v Heinemann Publishers (Australia) Pty Ltd* (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 3.

had been manacled and shackled.[38]

Habib alleged that officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt, Afghanistan, and at Guantanamo Bay. The government argued that those claims would require a determination of the unlawfulness of acts of foreign states within the territories of foreign states, so those claims are not justiciable and gave rise to no 'matter' under s 39B of the *Judiciary Act 1903* (Cth) and s 77(i) of the Constitution, or at common law.

The Full Federal Court ruled unanimously that the common law did not support the application of the act of state doctrine in Habib's case. Black CJ and Jagot J held that the doctrine does not apply where grave violations of international human rights law are alleged. Jagot J stated:

> To the contrary, the development of Anglo-American jurisprudence indicates that the act of state doctrine does not exclude judicial determination of Mr Habib's claim as it involves alleged acts of torture constituting grave breaches of human rights, serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect.[39]

Black CJ cited the applicable torture legislation.[40] The chief justice referred to the *Crimes (Torture) Act 1988* (Cth), the *Geneva Conventions Act 1957* (Cth) and ss 268.26 and 268.74 of the Criminal Code, giving effect to the Torture Convention of 1984 and the Third and Fourth Geneva Conventions of 1949 on the treatment of prisoners of war and the protection of civilians in time of war. Black CJ elaborated on the significance and universal applicability of the prohibitions on torture, stating:

> The *Crimes (Torture) Act* reflects the status of the prohibition against torture as a peremptory norm of international law from which no

[38] *Re Habib and Minister for Foreign Affairs and Trade* [2007] AATA 1908, [4].
[39] (2010) 183 FCR 62, [135].
[40] Ibid [3].

> derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy. As well, and again consistently with Australia's obligations under the Torture Convention, the Parliament has spoken with clarity about the moral issues that may confront officials of governments, whether foreign or our own, and persons acting in an official capacity. It has proscribed torture in all circumstances ...[41]

Perram J found the application of the act of state doctrine in this case to be inconsistent with Constitutional norms because it would prevent judicial review of conduct of Commonwealth officials that was allegedly outside their scope of authority.[42]

Habib's accusations remained untested as his case was settled prior to any decision on the merits. It is arguable, however, that the court's decision supports the *Hicks* proposition of a duty to consider, in a lawful manner, exercising the power of diplomatic protection of an Australian citizen imprisoned abroad who is allegedly subject to torture or other 'grave' or 'serious' violations of international law and human rights.

V ASSANGE'S POSSIBLE GROUNDS FOR UNLAWFUL DENIAL OF PROTECTION

Drawing on the *Hicks* precedent, Assange may have been denied protection by Australian governments on an unlawful basis. That is, the government, on an unlawful ground, may have declined to consider, or considered and rejected, an application by Assange for it to exercise its obligation of diplomatic protection of a citizen who may be suffering a 'clear breach' of human rights or procedures that 'may be found to be contrary to the requirements of international law'.[43] The potential grounds of unlawfulness include improper purpose and/or irrelevant considerations, that is, ignoring relevant considerations or taking into account irrelevant considerations. Other prospective arguments are perceived bias and unreasonableness, particularly in the sense of political discrimination.

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[41] Ibid [9]-[10].
[42] Ibid [29].
[43] 'Hicks to get Federal Court hearing', *The Sydney Morning Herald* (online, 9 March 2007) <https://www.smh.com.au/national/hicks-to-get-federal-court-hearing-20070309-gdpmkl.html>.

A *Improper Purpose*

Executive decisions, including those involving the exercise of a discretionary power, must be designed to achieve a purpose or object permitted by the authorising legislation or executive power. 'Improper purpose' does not mean 'improper' in a moral or ethical sense; simply that the power was used for a purpose not authorised by the applicable statute or source of executive power. Of course, decisions will be invalid also if bad faith or fraud is proven.[44]

Moreover, the improper purpose need not be the only purpose pursued by the decision-maker. If a power was partly exercised for a proper purpose and partly for an improper purpose, the test is whether the unlawful purpose was a 'substantial' purpose, in the 'but for' sense that the decision would not have been taken except for that purpose.[45] In addition, the purpose need not be an underhanded or hidden one. At the same time, a court can look behind an officially stated purpose in order to determine the actual purpose of a decision.[46]

Thus, even if the government argues that it had no improper purpose in declining to protect Assange, and that it had a proper purpose, such as to safeguard national security, that does not end the matter. In the first place, a court would be obliged to consider any evidence that this consideration was the real purpose, and not the punishment of Assange on a political basis. Second, a court would have to consider whether such considerations are legally legitimate in the context of protecting a citizen from alleged human rights abuses. Third, if a court agreed with that proposition, it would have to decide whether this was the sole purpose, or whether the government had another political motivation, but for which it would have intervened, as it did in the cases of others, such as Hicks, Greste, Ricketson and Taylor.

B *Relevant and Irrelevant Considerations*

This legal test involves both a positive requirement to take into account all relevant considerations and a negative command not to take into account irrelevant matters.

[44] *Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146.
[45] *Thompson v Randwick Municipal Council* (1950) 81 CLR 87. See also *R & R Fazzolari Pty Limited v Parramatta City Council* (2009) 237 CLR 603.
[46] *R v Toohey (Aboriginal Land Commissioner)*; *Ex parte Northern Land Council* (1981) 151 CLR 170.

Which factors are relevant may not be explicitly stated in the relevant legislation or source of executive power. In this case, they must be implied from an examination of the government's obligations as a whole. As Deane J stated in *Sean Investments v MacKellar* (1981) 38 ALR 363:

> [W]here relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.[47]

This distinction between considerations a decision-maker is entitled to entertain, and those he or she is bound to take into account, was endorsed by the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24. There, Mason J said a court would set aside a decision only where the ignored factor would materially affect the decision, even if it may not have led the decision-maker to reverse it. Mason J also stated that where a Minister makes a decision, due allowance may have to be made for 'broader policy considerations' that 'may be relevant to the exercise of a ministerial discretion'.[48]

Nevertheless, real limits may exist on the right of ministers to ignore relevant factors or take into account irrelevant matters, as shown in *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (2009) 75 NSWLR 269.[49] There, a ministerial authorisation of a land swap with a property developer was struck down on the grounds of irrelevant considerations. Citing Mason J in the *Peko-Wallsend* case, the court said 'there may be found in the subject matter, scope and purpose of the statute some implied limitation'.[50] The same could perhaps be said of the executive exercise of the foreign affairs power.

[47] (1981) 38 ALR 363, 375.
[48] (1986) 162 CLR 24, 42.
[49] (2009) 75 NSWLR 269
[50] Ibid, [141].

As in *Hicks*, it could be an irrelevant consideration for the government to take into account the likelihood that Assange could not be charged with any offence if he were freed to return to Australia. As discussed earlier, the Gillard government conducted an investigation into whether Assange could be convicted of any crime under Australia law, and may have concluded that he could not. It also could be irrelevant for the government to take into account the political views of Assange or any request from the US government in declining to intervene on Assange's behalf.

C *Perceived Bias*

To prove bias, it is not necessary to prove actual bias. It is enough to show perceived bias: that is, that in all the circumstances a fair-minded observer might entertain a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.[51]

Because of the often inherently discretionary and politicised nature of their decision-making responsibilities, ministers may be held to a lesser standard of impartiality.[52] However, they are not immune from the law of bias, even if the High Court has proven reluctant to find against a minister in a politically contentious area, such as immigration.[53]

Given the adverse statements made against Assange by Australian governments, beginning with Prime Minister Gillard in 2010, a court could conclude that a fair-minded observer would reasonably apprehend that the government might not have brought an impartial or unprejudiced mind to the decision to refuse to intervene to seek to protect Assange. Prejudicial material produced before a decision was made has been considered significant by the High Court. In *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, Nettle and Gordon JJ stated (at [69]):

> The test for apprehended bias requires the court to consider what it is which *might* lead a decision-maker to stray from the merits of the case, and then to articulate a logical connection between that thing and the feared deviation from the merits. These points can be, and often are,

[51] *Isbester v Knox City Council* (2015) 255 CLR 135.
[52] *Hot Holdings v Creasy* (2002) 210 CLR 438.
[53] As in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

considered *before* the decision is made… (italics in original).

In that case a refugee who had been refused a safe haven enterprise visa had a narrow 3-2 High Court win on bias. However, the split on the court illustrates the difficulties of applying the rule against bias.

D *Unreasonableness*

The law test of unreasonableness is often referred to as *Wednesbury* unreasonableness, following the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. This traditional test is that decision-makers may not make decisions that are so unreasonable that no reasonable decision-maker, acting according to law, could have made them. In his *Wednesbury* judgment, Lord Greene famously gave the example of a decision-maker discriminating against someone who had red hair.

Wednesbury is no longer the only test of unreasonableness in Australian law. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Hayne, Kiefel and Bell JJ concluded that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.[54] French CJ said decisions that were 'arbitrary or capricious' or 'abandon[ed] common sense' would fail the unreasonableness test.[55]

Subsequently, in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, the High Court said the test remained a stringent one. Nevertheless, the Australian courts, including the High Court, have been prepared to make findings of unreasonableness, including where the facts show discrimination.

Thus, in *Parramatta City Council v Pestell* (1972) 128 CLR 305, the High Court declared invalid a rate struck by the Parramatta Council that favoured residential ratepayers over industrial ones, even though industrial activity places heavier strains on streets and drainage. Likewise, in *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 59 FCR 369, Hill J ruled that the Aboriginal and Torres

[54] (2013) 249 CLR 332, [76].
[55] Ibid [28].

Strait Islander Commission had unlawfully discriminated in favour of Northern Territory Indigenous people, over those from New South Wales. That approach has been extended to where a guideline was applied inconsistently to reject an application.[56]

Assange may not have red hair, but it could be argued that the government has discriminated against him because of his political opinions and record of exposing the secret activities of governments and their military and intelligence agencies.

VI EVIDENCE OF VIOLATIONS OF ASSANGE'S HUMAN RIGHTS

A *Arbitrary Detention and Psychological Torture*

In 2015, the United Nations Working Group on Arbitrary Detention (UNWGAD) ruled that Assange was being detained unlawfully by Britain and Sweden and that any continued arbitrary detention would amount to torture.[57] In December 2018, the UNWGAD issued a further statement opposing the continued detention of Assange. It stated:

> The WGAD is further concerned that the modalities of the continued arbitrary deprivation of liberty of Mr Assange is undermining his health, and may possibly endanger his life given the disproportionate amount of anxiety and stress that such prolonged deprivation of liberty entails.[58]

In May 2019, following Assange's arrest by UK police, the UNWGAD said it was 'deeply concerned' over Assange's sentence of 50 weeks' imprisonment, stating: 'The Working Group regrets that the [UK] Government has not complied with its Opinion and has now furthered the arbitrary deprivation of liberty of Mr Assange.'[59]

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[56] *Re Sunshine Coast Broadcasters Limited v the Honourable Peter Duncan*; *Minister of Land Transport and Infrastructure Support and the Australian Broadcasting Tribunal* [1988] FCA 235.
[57] Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015, Opinion No 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland).
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17012&LangID=E>.
[58] 'UN Experts Urge UK to Honour Rights Obligations and Let Mr. Julian Assange Leave Ecuador Embassy in London Freely', *United Nations Human Rights Office of the High Commissioner* (Web Page, 21 December 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24042>.
[59] 'United Kingdom: Working Group on Arbitrary Detention Expresses Concern About Assange Proceedings', *United Nations Human Rights Office of the High Commissioner* (Web Page, 3 May 2019) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24552&LangID=E>.

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professor Nils Melzer, visited Assange in Belmarsh Prison in May 2019. Melzer was accompanied by two medical experts specialised in examining victims of torture and other ill treatment. Melzer's report stated:

> Mr Assange showed all symptoms typical for prolonged exposure to psychological torture, including extreme stress, chronic anxiety and intense psychological trauma … The evidence is overwhelming and clear. Mr Assange has been deliberately exposed, for a period of several years, to progressively severe forms of cruel, inhuman or degrading treatment or punishment, the cumulative effects of which can only be described as psychological torture.[60]

Delivering his annual report to the 74th session of the UN General Assembly in October 2019, Melzer stated: 'I regret to report that none of the concerned States have agreed to investigate or redress their alleged involvement in his abuse as required of them under human rights law.'[61]

In November 2019, Melzer reiterated his concern at the continued deterioration of Assange's health since his arrest and detention, saying his life was at risk. Melzer said:

> What we have seen from the UK Government is outright contempt for Mr Assange's rights and integrity … Despite the medical urgency of my appeal, and the seriousness of the alleged violations, the UK has not undertaken any measures of investigation, prevention and redress required under international law.[62]

In November 2019, some 65 medical doctors from around the world issued an open letter to the UK and Australian governments calling for urgent action to protect the life of

[60] Nils Melzer (online, 31 May 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665>.
[61] Nils Melzer to the Seventy-fourth session of the UN General Assembly (online, 14 October 2019) <https://peds-ansichten.de/wp-content/uploads/2019/11/FinalSRTStatementGA14Oct-2019.pdf>. See also 'UN expert says 'collective persecution' of Julian Assange must end now' (Web Page , date??) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665&LangID=E>.
[62] 'UN Expert On Torture Sounds Alarm Again That Julian Assange's Life May be at Risk', *United Nations Human Rights Office of the High Commissioner* (Web Page, 1 November 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25249&LangID=E>.

Assange. They cited medical examination assessments and Melzer's reports on the impact of prolonged psychological torture. The letter listed a series of ailments with which Assange had been diagnosed by visiting dentists, doctors and a trauma and psychosocial expert, and for which Assange was unable to access adequate medical care, including severe dental problems, an inflamed shoulder that required an MRI scan, and moderate to severe depression.[63] The doctors warned there could be serious health consequences if Assange were not moved from Belmarsh Prison to a university teaching hospital where he could be assessed and treated by an expert medical team.[64]

In March 2020, about 200 medical doctors wrote to Australian Foreign Minister Marise Payne to warn that Assange's health was at increased risk from the COVID-19 pandemic, because the Prison Governors Association had warned that prisons provided 'fertile breeding grounds for coronavirus'.[65]

B *Infringement of Client-Lawyer Confidentiality*

Evidence has been produced in a Spanish court that the CIA illegally recorded conversations between Assange and his lawyers, and all other visitors, while he was confined inside Ecuador's London embassy before he was arrested. The Spanish newspaper *El País* reported in January 2020 that three people who worked for the Spanish security company UC Global S.L. testified as protected witnesses in Spain's High Court, the Audencia Nacional, and that the company's head, David Morales, handed over the surveillance material to the CIA.[66]

According to the evidence provided by the witnesses — videos, audio tapes and emails — Assange's meetings with his legal team were videoed and recorded in order to gain material to try to incriminate him and to identify the evidence and legal arguments they would marshal against any prosecution under the US Espionage Act. Some of the videos

[63] 'An open letter from doctors: Julian Assange "could die in prison"', *World Socialist Web Site* (online, 24 November 2019) <https://www.wsws.org/en/articles/2019/11/25/open-n25.html>.
[64] Ibid.
[65] John McEvoy, 'Almost 200 medical doctors say Julian Assange's health is at increased risk from coronavirus' *The Canary* (online, 18 March 2020) <https://www.thecanary.co/global/world-news/2020/03/18/almost-200-medical-doctors-say-julian-assanges-health-is-at-increased-risk-from-coronavirus/>.
[66] Jose Maria Irujo, 'Three protected witnesses accuse Spanish ex-marine of spying on Julian Assange', *El Pais* 21 January 2020 not sure this is correct.

of Assange's discussions with his lawyers were later broadcast by the Australian Broadcasting Corporation (ABC).[67]

Morales, a former Spanish military officer, was prosecuted in Spain, after being charged in October with privacy violation, bribery and money laundering. His company was officially employed by the Ecuadorian government to provide security at the embassy. According to *El País*, however, two of the witnesses confirmed that, in December 2017, Morales ordered workers to change the surveillance cameras in the embassy in order to capture audio. From then on, they monitored conversations between Assange and his lawyers, even in the female toilet that Assange and his legal team used in attempt to avoid illegal bugging.[68]

Under Morales' orders, the security company photographed the passports of all Assange's visitors, dismantled their cell phones, downloaded content from their iPads, took notes and compiled reports on each meeting.[69] Camera and microphone recordings were delivered to Morales at the headquarters of UC Global, located in southern Spain. Morales travelled to the US regularly, allegedly to hand over the material to 'the Americans.' Morales also had installed remote-operated computer servers that collected the illegally obtained information, which could be accessed from the United States.[70] The witnesses testified that the material on Assange was handed over to the CIA by a member of the security service of Sheldon Adelson, the owner of the casino and resort company Las Vegas Sands Corporation.[71]

Among the lawyers spied upon was Professor Guy Goodwin-Gill, a well-known expert in international refugee law. Goodwin-Gill told the media that the sworn witness testimony provided to the Spanish court included evidence that a seven-hour meeting held between Assange and his legal team on 19 June 2016 was recorded. The contents of Goodwin-Gill's iPad, which had to be left outside the room during that meeting, also

[67] Dylan Welch, Suzanne Dredge and Clare Blumer, 'Julian Assange and his Australian lawyers were secretly recorded in Ecuador's London embassy', *ABC Investigations* (online, 24 February 2020) <https://www.abc.net.au/news/2020-02-23/surveillance-of-julian-assange-captured-lawyers-conversations/11985872>.
[68] Irujo (n 6) 4.
[69] Ibid.
[70] Ibid.
[71] Ibid.

were downloaded and the information passed to the US authorities.[72]

This evidence suggests that the US extradition application should be dismissed on the grounds of illegality. In criminal proceedings, evidence that the prosecution had recorded conversations between the defendant and his lawyers could result in a mistrial, the dropping of charges, and the release of the defendant. There is a precedent for doing so in circumstances similar to those of Assange: the Daniel Ellsberg case.

C *The Ellsberg Precedent*

In 1973, US President Richard Nixon's administration invoked the US Espionage Act to prosecute Daniel Ellsberg for releasing the Pentagon Papers exposing criminal wrongdoing in the Vietnam War. The case collapsed after evidence showed that the Nixon administration had overseen illegal spying on consultations between the whistleblower and his doctors. Ellsberg, a former Defense Department and Rand Corporation researcher, was prosecuted under the Act for leaking documents to the *New York Times* and the *Washington Post*.

The 47-volume Pentagon Papers documented how the US government had lied to the public since 1945 in order to enter and expand the Vietnam War, which led to the deaths of three million Vietnamese people and 55,000 US soldiers. The documents showed that successive US governments had carried out secret illegal operations in Vietnam, militarily intervened on false pretenses and killed thousands of Vietnamese civilians.[73]

In 1971, the Nixon administration also had invoked the US Espionage Act to attempt to stop the release of the Pentagon Papers. It filed an injunction alleging that by publishing an initial article disclosing previously secret contents of the leaked documents, the *Washington Post* had violated the Act by willfully communicating information 'it knew or had reason to believe ... could be used to the injury of the United States ... to persons not entitled to receive such information'.[74]

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[72] Ben Doherty and Amy Remeikis, 'Julian Assange's extradition fight could turn on reports he was spied on for CIA', *The Guardian* (online, 17 December 2019) <https://www.theguardian.com/media/2019/dec/17/julian-assanges-extradition-fight-could-turn-on-reports-he-was-spied-on-for-cia>.
[73] Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (Norton Stone, 2005?) 507.
[74] Ibid.

By the time that the Nixon administration's injunction was considered by the US Supreme Court, some 20 newspapers had published material from the Pentagon Papers.[75] In that context, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the court ruled 6 to 3 that the injunction would violate the US Constitution's First Amendment. The government had not met the 'heavy burden of showing justification' for a prior restraint on the press.[76]

In the meantime, Ellsberg and an associate, Anthony Russo, were indicted on a range of charges, including conspiracy to violate the US Espionage Act, carrying possible total sentences of 125 years in prison. These charges were dismissed two years later as a result of the Watergate burglary—White House-organised 'plumbers' had broken into the offices of Ellsberg's psychiatrist and wire-tapped his phone in an effort to obtain information to smear Ellsberg in the media. In 1973, the trial judge ruled that the 'unprecedented' government misconduct had 'incurably infected the prosecution of this case'.[77]

Equally, the US government's misconduct toward Assange, particularly the bugging and videotaping of his discussions with his lawyers, in violation of lawyer-client confidentiality, could have 'incurably infected' the prosecution of his case.

D *Denial of Ability to Prepare Defence*

Assange also has arguably been prevented from being able to adequately prepare his defence during the extradition hearings. His counsel Gareth Pierce told the presiding judge, District Judge Vanessa Baraitser, in January 2020 that Assange had been denied access to evidence, adequate time to consult with and brief his legal team, and basic items like paper and pens by British prison officials. Pierce argued that denying Assange his 'human right' to legal access was putting his case on the brink of a judicial review.[78]

The apparent violation of Assange's right to legal consultation and access to legal advice continued during the first week of the extradition hearing in February 2020. Assange's

[75] Ibid 508.
[76] Ibid 511.
[77] Ibid 515.
[78] 'Assange "denied access" to lawyers in UK', *Nine News* (online, 16 January 2020) <https://www.9news.com.au/world/assange-denied-access-to-lawyers-in-uk/39382389-facc-40e3-92ab-03dd3d575427>.

counsel, Edward Fitzgerald QC, told Judge Baraitser that Assange was handcuffed 11 times and stripped naked twice by Belmarsh prison guards on the opening day of hearing. Fitzgerald reported that his client's legal documents were confiscated by prison authorities, who later moved him to five different cells.[79]

Judge Baraitser rejected a submission from Assange's lawyers that their client be allowed to sit with them in court for the purposes of necessary consultation. The judge ruled that Assange must remain in a bullet-proof glass-encased dock and that would remain so when the hearing resumed for the evidence phase of the hearing.[80] In a submission to Judge Baraitser, Assange's lawyers submitted that their client's right to a fair trial was being violated in various ways. These included:

> i) [T]he physical layout of the court and the distance it places between Mr Assange and his legal team, ii) the high occupancy level of the court meaning that defence lawyers are unable to meet freely to receive instructions or impart advice, iii) the court's poor acoustics and amplification, especially behind glass and proximity to audible protests, iv) the security procedures in place in the dock at Woolwich Crown Court which do not permit the passing of notes and which inhibit confidential instruction taking, v) the limited access to legal visits outside of court sitting times during the court day and vi) Mr Assange's precarious psychiatric vulnerability, ongoing medication and the consequent elevated emotional strain of these proceedings of which the court is aware.[81]

VII FURTHER APPARENT DEFECTS IN THE US AND UK PROCEEDINGS

A *The US Extradition Application*

In April 2019, the original US indictment charged Assange with one count of conspiring with Chelsea Manning, a US soldier, to gain unauthorised access to Defence Department

[79] Thomas Scripps and Laura Tiernan, 'Persecuted journalist Assange handcuffed, stripped naked on first day of extradition trial', *World Socialist Web Site* (online, 26 February 2020) <https://www.wsws.org/en/articles/2020/02/26/assa-f26.html>.
[80] Thomas Scripps and Laura Tiernan, 'Judge rules Assange cannot sit with lawyers during extradition hearing', *World Socialist Web Site* (online, 28 February 2020) <https://www.wsws.org/en/articles/2020/02/28/assa-f28.html>.
[81] Ibid.

computers. That charge carries up to five years' imprisonment. However, an amended indictment, issued a month later, added 17 counts based on the US Espionage Act.[82] In June 2020, months after the extradition hearing had commenced, and just weeks before it was due to resume, the US Justice Department announced a 'second superseding indictment'. It did not add new counts but broadened them by charging Assange with recruiting and agreeing with hackers to 'commit computer intrusions'.[83]

The US Espionage Act charges, each with a maximum prison term of 10 years, carry a cumulative maximum sentence of 170 years in prison.[84] These charges arguably violate the US Constitution's First Amendment. The importance of that protection for journalists and publishers was affirmed in *New York Times Co. v. United States*, 403 U.S. 713 (1971). The US Supreme Court struck down as unconstitutional the Nixon administration's attempt to block the publication of the classified Pentagon Papers.

The *New York Times* commented that it and other news organisations had obtained the same documents as Wikileaks, also without government authorisation.[85] Assange pursued the journalistic practice of obtaining information, including assisting a source to conceal their identity. However, when the extradition hearing opened in London in February 2020, the counsel for the US Justice Department asserted that the First Amendment did not protect Assange, a non-US citizen.[86]

This proposition seems contrary to the language of the First Amendment[87] and previous US Supreme Court authority.[88] Moreover, none of Assange's actions were carried out in

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[82] Charlie Savage, 'Assange Indicted Under Espionage Act, Raising First Amendment Issues', *New York Times* (online, 23 May 2019) <https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html>.
[83] Department of Justice, 'WikiLeaks Founder Charged in Superseding Indictment' media release (Web Page, 24 June 2020) <https://www.justice.gov/opa/pr/wikileaks-founder-charged-superseding-indictment>.
[84] *Espionage Act 1917* (Title 18 US Code) s 793.
[85] Zoe Tillman, 'The New Charges Against Julian Assange Are Unprecedented. Press Freedom Groups Say They're A Threat to All Journalists', *BuzzFeed News* (online, 23 May 2019).
[86] 'Julian Assange may not be able to use First Amendment press protection if extradited', *SBS News* (online, 24 January 2020) <https://www.sbs.com.au/news/julian-assange-may-not-be-able-to-use-first-amendment-press-protection-if-extradited>.
[87] Without qualification, the First Amendment prohibits any law 'abridging the freedom of speech, or of the press'.
[88] *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that a non-citizen who published communist literature was protected by First Amendment). This case concerned Harry Bridges, an Australian trade union leader who entered and lived in the United States legally from 1920 to 1938, when the government sought to deport him because of his previous affiliation with the Communist Party (326 U.S. at 137–38).

the US. If granted, the extradition could establish a precedent for any journalist or publisher, anywhere in the world, who allegedly publishes US classified material to be charged under the US Espionage Act.

B *Extradition to Face Political Charges, Human Rights Abuses or Potential Death Penalty*

The US extradition application may breach both the *Extradition Act 2003* (UK) ('Extradition Act') and the UK-US extradition treaty.

Part 2 of the Extradition Act — Extradition to category 2 territories (non-European Arrest Warrant territories) — removed the previous requirement for the US to provide *prima facie* evidence in extraditions from the UK, requiring instead only the weaker standard of 'reasonable suspicion'. Under section 71 of the Act, requests from designated Part 2 countries (including requests from the US) must be accompanied by sufficient information to 'justify the issue of a warrant for the arrest of a person accused of the offence' (known in the UK as the 'reasonable suspicion' test).[89]

Nevertheless, Article 4.1 of the UK–US extradition treaty of 2003, which was ratified in 2007, retains a prohibition on extradition for 'a political offense'. It states that 'extradition shall not be granted if the offence for which extradition is requested is a political offense'.[90]

In the opening week of Assange's extradition hearing in February 2020, the counsel for the US argued that this article was overridden by the absence of such a provision in the

See also Michael Kagan, 'When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment' (2016) 57(issue?) *Boston College Law Review?* 1237.

[89] *A Review of the United Kingdom's Extradition Arrangements* (Report, 30 September 2011) 214 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf>.

[90] Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America with Exchange of Notes, Treaty Series No. 13 (2007) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243246/7146.pdf>.

Extradition Act.[91] Judge Baraitser said it was plain that parliament had intended that there could be extradition for political offences.[92]

However, while the Extradition Act does not bar extraditions for political offences, it does not prohibit such a bar in extradition treaties. The extradition treaty was ratified in 2007, after the Extradition Act. Moreover, international law has accepted for more than a century that extraditions of political offenders should not be permitted. Prohibitions on such extraditions were included in many international extradition conventions and treaties. The ban is in most US extradition treaties with another country.[93]

To interpret the Extradition Act as erasing the customary international law prohibition on extraditions for political offences, without explicitly saying so, infringes the common law presumption against the overriding of fundamental rights. The courts require clear expressions of parliamentary intent to override this presumption. In Australia, such rulings have been made about freedom of speech, the right to procedural fairness and freedom from unauthorised detention.[94] In *Coco v R*, the High Court said:

> The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[95]

Furthermore, it seems legally illogical to say that Assange's extradition is not governed by the terms of the treaty under which it is sought. There also is judicial authority that treaty rights are enforceable, even if not incorporated into domestic legislation,

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[91] Reporters Without Borders, 'UK: Legal arguments during the first week of Julian Assange's extradition hearing highlight lack of US evidence,' *Reporters Without Borders* (online, 28 February 2020) <https://rsf.org/en/news/uk-legal-arguments-during-first-week-julian-assanges-extradition-hearing-highlight-lack-us-evidence>.
[92] Craig Murray, 'Assange Show Trial: Your Man in the Public Gallery – The Assange Hearing Day 3 & 4', *Information Clearing House* (online, 27 February 2020) <http://www.informationclearinghouse.info/53049.htm>.
[93] See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press, 6th ed, 2014) at Appendix I (listing multilateral conventions containing provisions on extradition).
[94] *Watson v Marshall* (1971) CLR 621.
[95] (1994) 179 CLR 427, 437.

particularly in order to stop people being extradited to potential execution from British colonies.[96]

In Assange's extradition hearing, the US counsel further argued that espionage was not a political offence. The US extradition application accuses Assange of seeking to harm the political and military interests of the United States. That seems to constitute a political offence, although American courts generally require that a person seeking to avoid extradition 'demonstrat[e] that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion'.[97]

In addition, the Extradition Act has several provisions that could be violated if Assange were to be extradited. Section 81 bars a person's extradition if it appears that the extradition warrant, although purporting to be issued as part of an ordinary prosecution, has in fact been issued for the purpose of prosecuting or punishing the person for reasons of his race, religion, nationality, gender, sexual orientation or political opinions. That section further bars extradition if it appears that the person would be 'prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions'.

The Act also states that if judges find that extradition would infringe the requested person's human rights, they cannot order that person's extradition and must discharge them. Section 87 of the Extradition Act specifies a test of whether the person's extradition would be compatible with the rights protected by the *Human Rights Act 1998* (UK). This means that extradition is barred by s 87: (i) [u]nder Article 2 of the European Convention on Human Rights (the right to life), if the loss of life is shown to be a near certainty (or a real risk); (ii) [u]nder Article 3 (prohibition against torture, inhuman or

[96] In *R v Mullen* [2000] QB 520, the Court of Appeal (Criminal Division) ruled that an abuse of process had been committed because the British authorities were 'acting in breach of public international law' in the extradition procedures pinpoint?. In *Thomas and Haniff Hilaire v Cipriani Baptiste (Trinidad and Tobago)* [1999] UKPC 13, the Privy Council allowed defendants to appeal to a treaty unincorporated into domestic Trinidadian law. In *Lewis, Patrick Taylor and Anthony McLeod, Christopher Brown, Desmond Taylor and Steve Shaw v The Attorney General of Jamaica and Another (Jamaica)* [2000] UKPC 35, the Privy Council made a similar finding.

[97] *Nezirovic v. Holt*, 779 F.3d 233, 240 (4th Cir. 2015); *Meza v. United States Attorney General*, 693 F.3d 1350, 1359 (11th Cir. 2012); *Kostotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991) (citing *Eain v. Wilkes*, 641 F.2d 504, 512 (7th Cir. 1981)); *Vo v. Benov*, 447 F.3d 1235, 1241 (9th Cir. 2006); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980); *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980); *Ornelas v. Ruiz*, 161 U.S. 689, 692 (1896).

degrading treatment), if there are strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to inhuman or degrading treatment; (iii) [u]nder Article 5 (right to liberty), if the person risks suffering a flagrant denial of his right to liberty; (iv) [u]nder Article 6 (right to a fair trial), if the person risks suffering a flagrant denial of his right to a fair trial; (v) [u]nder Article 8 (right to respect for family life), where the consequences of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition.[98]

Arguably, several of these prohibitions could apply to Assange, including those against torture, inhuman or degrading treatment, and against flagrant denial of his right to a fair trial. There are also precedents that UK courts should refuse to recognise the laws of other countries that are an affront to human rights. In *Oppenheimer v Cattermole* [1976] AC 249, the House of Lords declared that the courts would not recognise a Nazi law that constituted a grave infringement of human rights by stripping Jews of German citizenship.

Section 94 of the Extradition Act further prohibits the Secretary of State from ordering an extradition if the requested person could be sentenced to death for the extradition offence in the requesting state, unless the secretary gets adequate written assurance that it will not be imposed, or carried out, if imposed.

The US Espionage Act offences alleged against Assange do not carry the death penalty, but certain charges under that Act do. Section 794 of the act contains the death penalty as possible punishment 'in time of war' for publishing information that is intended to be communicated to 'the enemy'.[99] Once Assange was in the US, the government could add additional charges, as Australian Department of Foreign Affairs and Trade officials admitted during a Senate estimates hearing in March 2020.[100]

C *The UK Legal Proceedings and Imprisonment*

Other aspects of the UK proceedings raise questions. When Assange was arrested in April

[98] *A Review of the United Kingdom's Extradition Arrangements*, n 87.
[99] 18 U.S. Code § 794: Gathering or delivering defense information to aid foreign government.
[100] Daniel McCulloch, 'Consular officials watching Assange trial', *Australian Associated Press* (online, 5 March 2020) <https://www.bellingencourier.com.au/story/6663733/consular-officials-watching-assange-trial/?cs=9397>.

2019, UK government leaders made comments that potentially tainted the subsequent legal proceedings. Prime Minister Theresa May said that 'no one is above the law'.[101] Another leader, Boris Johnson, who later became prime minister, tweeted: 'It's only right that Julian Assange finally faces justice. Credit to @foreignoffice officials who have worked tirelessly to secure this outcome'.[102]

On the afternoon of his arrest, Assange was charged with breaching the *Bail Act* and found guilty after a short hearing at Westminster Magistrates' Court. Without an examination of Assange, Judge Michael Snow asserted that the WikiLeaks publisher was 'a narcissist who cannot get beyond his own selfish interest'.[103]

Assange was remanded to a maximum-security jail, HM Prison Belmarsh, and three weeks' later he was sentenced at Southwark Crown Court to 50 weeks' imprisonment.[104] The UNWGAD issued a statement that the verdict contravened 'principles of necessity and proportionality' for a 'minor violation'.[105]

In September 2019, Judge Baraitser ruled that Assange would not be released, even at the end of his expired sentence on the bail infringement. This left him in a maximum-security prison, potentially for the many months, if not years, for which the extradition application could continue, possibly on appeal to the UK Supreme Court.[106]

VIII CONCLUSION

It is possible to argue that Australian governments have a duty to lawfully consider a citizen's application for diplomatic protection from 'clear' or 'grave' violations of internationally-recognised human rights and lawful procedures. If so, it can be submitted that Australian governments have unlawfully declined to intervene with the British and

[101] 'Julian Assange's arrest draws fierce international reaction', *Fox News Channel* (online, 11 April 2019) <https://www.foxnews.com/world/wikileaks-julian-assange-arrest-international-reaction>.
[102] @BorisJohnson (Boris Johnson) (Twitter, 11 April 2019, 10:16PM AEST) <https://twitter.com/borisjohnson/status/1116314059815694336?lang=en>.
[103] 'Out of the embassy, straight into custody: Assange's court hearing', *Reuters* (online, 11 April 2019) <https://fr.reuters.com/article/uk-ecuador-assange-court-idUKKCN1RN2JB>.
[104] Ibid.
[105] Stephanie Nebehay, 'U.N. rights experts cite concern at 'disproportionate' Assange detention', *Reuters* (online, 3 May 2019) <https://www.reuters.com/article/us-wikileaks-assange-un/u-n-rights-experts-cite-concern-at-disproportionate-assange-detention-idUSKCN1S90XR>.
[106] 'Julian Assange to remain in jail pending extradition to US', *The Guardian* (online, 14 September 2019) <https://www.theguardian.com/media/2019/sep/14/julian-assange-to-remain-in-jail-pending-extradition-to-us>.

US authorities to secure the release of Assange or protect him from being extradited to the United States on charges under the US Espionage Act. United Nations bodies have ruled his detention to be arbitrary and amounting to psychological torture. Assange arguably has been denied adequate medical treatment and suffered defective legal proceedings. His extradition to the US could be in breach of the UK Extradition Act and the UK-US extradition treaty and in violation of lawyer-client confidentiality.

These facts could bring Assange's case within the precedent suggested by *Hicks*, which indicates that the government has a duty to lawfully consider an application for diplomatic protection in similarly serious circumstances. On the facts of Assange's case, he may have been wrongly denied diplomatic intervention, due to government responses displaying irrelevant considerations, improper purpose, unreasonableness or perceived bias.

More broadly, in light of the possible reversal of the precedents set nearly five decades ago in the *New York Times* and Daniel Ellsberg cases, Assange's prosecution may have serious implications for free speech, media freedom, the rights of journalists and other basic democratic rights. A legal challenge to the government's denial of diplomatic protection could be an important test case for a citizen's rights in similar kinds of circumstances.

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Torture Convention of 1984

Third and Fourth Geneva Conventions of 1949

THE PRACTICE OF SOLITARY CONFINEMENT OF CHILDREN IN JUVENILE DETENTION IN VICTORIA: A HUMAN-RIGHTS BASED ARGUMENT FOR PROHIBITION

ANITA MACKAY AND MOHAMED NALEEMUDEEN*

When I'm locked in my cell for 23 hours, I feel like I am losing my mind. It is lonely, boring and depressing.

– Andrew Pound's (pseudonym) evidence to the Supreme Court of Victoria (2017).[1]

In 2017, Victoria's practices surrounding the solitary confinement of detained children were found by the Supreme Court to have breached the Charter of Human Rights and Responsibilities Act 2006 (Vic), including the right to be treated with 'humanity and with respect for the inherent dignity of the human person' when deprived of liberty. This was in the context of children aged between 15 and 18 being held in a precinct of the Barwon maximum security adult prison from November 2016. This article contextualises the Supreme Court's findings by outlining the problematic use of solitary confinement of children in juvenile detention in Victoria in the years preceding the judgment (since 2010) and following. Numerous investigative reports have raised concerns about solitary confinement that is extremely detrimental to children. Through the findings of investigative reports, this article demonstrates that the use of solitary confinement in Victoria violates Australia's international human rights law obligations. It argues that, consequently, the practice should be prohibited, as consistent with the 2015 recommendation by the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

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[1] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children & Others [No 2]* (2017) 52 VR 441, 554 [367].

CONTENTS

I INTRODUCTION AND OVERVIEW

Public knowledge about the use of solitary confinement and other harmful practices in juvenile detention facilities,[2] particularly in the Northern Territory, Queensland and Victoria,[3] has increased in recent years. For instance, practices in the Northern Territory's Don Dale Centre, exposed by the ABC in July 2016,[4] prompted a Royal Commission. At the time the Royal Commission was announced (within 12 hours of the ABC's report), there were calls for it to have national coverage and investigate juvenile detention in every state and territory.[5] This was in part because of the ABC's exposure

[2] Such as the use of restraint and capsicum spray: see generally Jodie O'Leary, 'Protecting Children from Harm in Juvenile Detention' (2016) 41(4) *Alternative Law Journal* 239.
[3] For a discussion on Western Australia (which has not received as much media attention), see Llifen Palacios Nunez and Anna Copeland, 'Solitary Confinement within Juvenile Detention Centres in Western Australia' (2017) 25(3-4) *International Journal of Children's Rights* 716.
[4] See, eg, Elizabeth Grant, Rohan Lulham and Bronwyn Naylor, 'The Use of Segregation for Children in Australian Youth Detention Systems: An Argument for Prohibition' (2017) 3 *Advancing Corrections* 117; Kate Fitz-Gibbon, 'The Treatment of Australian Children in Detention: A Human Rights Law Analysis of Media Coverage in the Wake of Abuses at the Don Dale Detention Centre' (2018) 41(1) *UNSW Law Journal* 100.
[5] Greens Victoria, 'Royal Commission into youth detention should be national: Greens' (Media Release, 27 July 2016) <https://greens.org.au/vic/news/media-release/royal-commission-youth-detention-should-be-national-greens>; Matt Doran and James Dunlevie, 'Four Corners: PM Turnbull to set up royal commission into mistreatment of children in detention', *ABC News* (online, 26 July 2016)

of concerning practices in Queensland in August 2016,[6] as well as a series of complex circumstances in Victoria which culminated in a riot at the Parkville detention centre later in the same year.[7] This riot led to children being moved to a maximum security adult prison in Barwon.

It was Victoria's decision to move children to the Barwon Prison that led to a very significant finding of the Victorian Supreme Court: that is, the human rights of the children — incorporated into domestic law by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') — had been violated.[8] Their rights are first that '[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child',[9] and second that 'all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'.[10] The Court identified several practices detained children were subjected to in Barwon that breached human rights but central to the finding was the use of prolonged solitary confinement. Justice Dixon summarised the finding as follows:

> Put simply, combined effects of the extensive use of isolation, the handcuffing, the requirement to take children through the adult prison to get outdoors, the physical high security prison environment, its lack of natural light and fresh air, the noise, the visible presence of prison officers, the lack of privacy, education,

<https://www.abc.net.au/news/2016-07-26/turnbull-calls-for-royal-commission-into-don-dale/7660164>; Fergus Hunter, 'Malcolm Turnbull rejects calls for royal commission into juvenile justice system to go national', *Sydney Morning Herald* (online, 27 July 2016) <https://www.smh.com.au/politics/federal/malcolm-turnbull-rejects-calls-for-royal-commission-into-juvenile-justice-system-to-go-national-20160727-gqemi4.html>. These calls were not heeded and the focus of the Royal Commission remained on the Northern Territory child protection and juvenile justice systems. For details about this Royal Commission, see generally Taylah Cramp and Anita Mackay, 'Protecting Victims and Vulnerable Witnesses Participating in Royal Commissions: Lessons from the 2016–2017 Royal Commission into the Protection and Detention of Children in the Northern Territory' (2019) 29 *Journal of Judicial Administration* 3.

[6] O'Leary (n 2).

[7] The history is summarised by Judith Bessant and Rob Watts, 'Child Prisoners, Human Rights, and Human Rights Activism: Beyond "Emergency" and "Exceptionality" — An Australian Case Study' in Gabriel Blouin-Genest, Marie-Christine Doran and Sylvie Paquerot (eds), *Human Rights as Battlefields: Changing Practices and Contestations Human Rights Interventions* (Springer Nature , 1st ed, 2019) 105–108.

[8] This was in a series of decisions: *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* (2016) 51 VR 473 ('*Certain Children Garde J Decision*'); *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* (2016) 51 VR 597 ('*Certain Children Appeal*'); *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children & Others* [No 2] (2017) 52 VR 441 ('*Certain Children Dixon J Decision*').

[9] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter') s 17(2).

[10] Ibid s 22(1).

> stimulation, time out of doors, confined outdoor space, in combination with the youth of the detainees, meant that their detention in Grevillea has limited their *Charter* rights.[11]

Solitary confinement is extremely detrimental to all persons, but the risks are intensified for children. Australian Children's Commissioners and Guardians have summarised the risks as follows:

> Children are particularly vulnerable because they are still in crucial stages of development — socially, psychologically, and neurologically. The experience of isolation can interfere with and damage these developmental processes. For children and young people with mental health problems or past experiences of trauma, isolation practices can have severely damaging psychological effects. Where children and young people are at risk of suicide or self-harm, isolation is likely to increase their distress and suicidal ideation and rumination.[12]

This article examines the imposition of solitary confinement on detained children in Victoria to demonstrate the ways in which it breaches the *Charter*, as well as other international human rights law obligations that apply to all states and territories, due to Australia being a signatory to several treaties.[13] It is a practice that will be under increased scrutiny as Australia operationalises the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT').[14] Given international law prohibits the use of solitary confinement of children on the basis that it may constitute 'cruel, inhuman or degrading

[11] *Certain Children Dixon J Decision* (n 8) 566 [424].
[12] Australian Children's Commissioners and Guardians, 'Statement on Conditions and Treatment in Youth Justice Detention' (Statement, November 2017) 21. See also Sharon Shalev, 'Solitary Confinement as a Prison Health Issue' in Stefan Enggist, Lars Møller, Gauden Galea and Caroline Udesen (eds), *Prisons and Health* (WHO Regional Office for Europe, 2014) 30; Andrew B Clark, 'Juvenile Solitary Confinement as a Form of Child Abuse' (2017) 45 *The Journal of the American Academy of Psychiatry and the Law* 350, 352.
[13] *Convention on the Rights of the Child*, opened for signature 22 August 1990, ATS 4 (entered into force 16 January 1991) ('CROC'); *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). *The Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) is also highly relevant due to the over-representation of people with mental illnesses and cognitive disabilities in adult prisons and juvenile detention, but it is beyond the scope of this article to deal with this Convention.
[14] *Optional Protocol to the Convention against Torture*, opened for signature 18 December 2002, UN Doc A/RES/57/199 (entered into force 22 June 2006) ('OPCAT'). For a detailed analysis of the OPCAT see the Special Issue of *Australian Journal of Human Rights* (2019) 25(1).

treatment',[15] and that ratification of the OPCAT obliges Australia to put in place a system of monitoring to *prevent* torture, cruel, inhuman or degrading treatment or punishment ('TCID'), this article calls for prohibition of its use.[16]

Part II of this article outlines the international law governing solitary confinement.[17] Part III briefly outlines the circumstances that led to the Supreme Court of Victoria finding that the *Charter* had been breached in the *Certain Children* cases.[18] Part IV provides evidence from investigatory reports by organisations, including the Victorian Ombudsman and Victorian Commission for Children and Young People, which demonstrates that solitary confinement is over-used in Victoria and is not used in a human rights compliant manner. Finally, the article concludes with human-rights law based justifications for the prohibition of the solitary confinement of children in juvenile detention, both in Victoria and nationally.

II INTERNATIONAL LAW ON SOLITARY CONFINEMENT

Australia has ratified numerous treaties that prohibit TCID and impose a positive duty to treat people deprived of their liberty with humanity and respect for their human dignity. The *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') and *International Covenant on Civil and Political Rights* ('ICCPR') apply to everyone (that is, children and adults), and the *Convention on the Rights of the Child* ('CROC') applies to children (anyone aged under 18)[19] specifically.

The following table outlines the relevant Articles.[20]

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[15] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty,* GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990) rule 67.

[16] This is supported by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Committee on the Rights of the Child has also recommended that Australia prohibit solitary confinement, and will be discussed in Part V of this article.

[17] There are a number of labels given to this practice in legislation and places of detention, including 'segregation, isolation, separation, lockdown, Supermax, the hole, the slot' (Deborah Glass, 'Common Sense and Clean Hands: An Ombudsman's View of Justice' (2019) 43(1) *Melbourne University Law Review* 369, 381) but this article will use the term adopted by international human rights law i.e. 'solitary confinement'.

[18] The focus of this article will be on the 2017 judgment.

[19] CROC art 1.

[20] This is a very brief overview of the provisions. For a more detailed examination of the interplay between all the relevant treaty provisions, see Juan Ernesto Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015) 4–7.

Table 1: Treaty Provisions

Prohibition of torture, cruel, inhuman or degrading treatment or punishment	**Obligation to treat persons deprived of liberty with humanity and respect**
CROC Art 37(a): 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.	CROC Art 37(c): 'Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.
The CAT requires State Parties to: • 'ensure that all acts of torture are offences under its criminal law': Art 4 ('torture' is defined in Art 1(1)); • 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction': Art 2(1), and; • 'undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture': Art 16(1).	ICCPR Art 10(1): '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.[21]
ICCPR Art 7: '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.	

More detail about how the treaty provisions should be interpreted is provided by the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (known as the *'Havana Rules'*), the *United Nations Standard Minimum Rules for the Treatment of*

[21] Australia's solitary confinement of a 16-year-old Indigenous boy was found to have violated Art 10(1) of the ICCPR: Human Rights Committee, *Views: Communication No 1184/2003*, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) *('Brough v Australia').* For a discussion of how Art 10(1) applies to prisons in Australia more broadly see Anita Mackay, 'Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) and Australian prisons' (2017) 23(3) *Australian Journal of Human Rights* 368.

Prisoners (updated in 2015 and re-named the '*Mandela Rules*'),[22] General Comments issued by the Treaty Monitoring Bodies responsible for interpreting each of the Treaties,[23] and reports of Special Rapporteurs whose role is to 'examine, monitor, advise and publicly report on human rights situations'.[24]

Rule 67 of the *Havana Rules* stipulates that 'disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited' on juveniles and gives solitary confinement as an example of such a measure. Rule 44 of the *Mandela Rules* defines solitary confinement as confinement 'for 22 hours or more a day without meaningful contact' and defines 'prolonged solitary confinement' as 'in excess of 15 consecutive days'. Further, Rule 45 stipulates that solitary confinement 'shall be used only in exceptional cases as a last resort, for as short a time as possible' and requires it to be authorised by 'a competent authority' and subject to 'independent review'.[25] Rule 45(2) reiterates the prohibition of its use on children, cross-referencing Rule 67 of the *Havana Rules*.

The Committee on the Rights of the Child has issued a General Comment providing the following details to assist with the interpretation of Article 37 of the *CROC*:

> Disciplinary measures in violation of Article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned.[26]

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[22] *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, GA Res 70/175, 70th sess, 80th plen mtg, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015) ('*Mandela Rules*'). International Rules are known as 'soft law' because they do not go through the same negotiation process and treaties. See also Harmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10(3) *European Journal of International Law* 499.

[23] Committee on the Rights of the Child in relation to CROC; Committee against Torture in relation to the CAT and the Human Rights Committee in relation to the ICCPR.

[24] Kate Eastman, 'Australia's Engagement with the United Nations' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) Need pinpoint as it's a quote.

[25] For a discussion of the history that led the United Nations to develop these rules on solitary confinement, see Mandred Nowak, 'Global Perspectives on Solitary Confinement – Practices and Reforms Worldwide' in Jules Lobel and Peter Scharff Smith (eds), *Solitary Confinement. Effects, Practices, and Pathways Toward Reform* (Oxford University Press, 2020). For a discussion about the relevance of the rules to adult imprisonment in Australia, including solitary confinement, see Anita Mackay, 'The Relevance of the United Nations Mandela Rules for Australian Prisons' (2017) 42(4) *Alternative Law Journal* 279.

[26] Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's rights in juvenile justice*, 44th sess, CRC/C/GC/10 (25 April 2007) [89].

The Human Rights Committee has issued a General Comment on the interpretation of Article 7 of the ICCPR that clarifies that 'prolonged solitary confinement' may constitute TCID.[27] Thus, it is clear that the solitary confinement of adults per se is not necessarily TCID, but the duration of confinement is significant.

The Special Rapporteur on TCID has clarified that for children in detention, the 'threshold' at which 'treatment or punishment may be classified as torture or ill-treatment is therefore lower' and goes on to report that 'the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture.'[28] This has led the Special Rapporteur to recommend that solitary confinement of children be prohibited entirely — a proposal that will be discussed further in Part V. This article now moves on to discuss how solitary confinement of juveniles in Victoria has been considered by the Supreme Court.

III SUPREME COURT OF VICTORIA'S DECISIONS IN THE *CERTAIN CHILDREN* CASES

The *Charter* has incorporated into Victorian law the dual treaty requirements that people deprived of their liberty be treated with humanity and respect.[29] The *Charter* also imposes a requirement to consider the best interests of the child,[30] that draws on Articles contained in the ICCPR and the CROC.[31] The *Certain Children* cases was the first time that the Supreme Court comprehensively considered the manner in which these provisions applied to juvenile detention. The rights were considered in the context of the need to accommodate the children at short notice (due to damage caused to a juvenile detention centre by a riot) in a specific unit (Grevillea) in Barwon prison that was designated as a youth justice precinct by Orders in Council.[32] The fundamental issue was whether the establishment of a youth justice centre in a maximum security adult prison was lawful.[33]

[27] United Nations Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 44th sess, UN Doc A/44/40 (10 March 1992) [6].
[28] Juan Ernesto Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/28/68 (5 March 2015) [33], [44].
[29] *Charter* (n 9) s 22(1) and for prohibition against TCID: s 10(b).
[30] Ibid s 17(2).
[31] Art 24(1) of the ICCPR and art 3(1) of the CROC: *Certain Children Dixon J Decision* (n 9) 521 [259]–[260].
[32] *Certain Children Dixon J Decision* (n 8) 447 [4]–[8].
[33] Ibid 446 [2].

The Court found that it was not and ordered the children to be removed from the precinct immediately.[34]

The Court found that the conditions the children were subjected to (summarised in the quote by Dixon J in Part I) breached two of the rights protected by the *Charter* — the right to be treated with humanity and respect, and the requirement to take into account the best interests of the child. In ruling that Section 10(b) had not been breached, the Court found that the purpose of keeping the children in Grevillea was not inappropriate and that there had been no intention to deliberately or intentionally 'harm humiliate or debase' the children.[35]

Of particular concern to the Court was that the government had less restrictive options available, particularly if more resources were allocated. Dixon J opined:

> [T]he limitation that the plaintiffs have suffered on their human rights has been substantial. I am satisfied that the allocation of much greater financial resources was an option that was reasonably available to achieve the purposes of management of safety and security.[36]

The Court found that the children were subject to a regime that involved keeping them in their cells for 23 hours per day and handcuffed for the hour they were outside their cell.[37] Appropriate authorisation of solitary confinement was lacking because it was deemed to only require authorisation (from the Director of Secure Services) if it was longer than 24 hours.[38] As the detained children were held in solitary confinement between 21-23 hours, authorisation for its use was not required.[39]

Further, Individual Behaviour Management Plans ('IBMP') were employed for children who were assessed to be a risk to the security or safety of the centre, which also involved solitary confinement for 23 hours per day.[40] The Principal Commissioner for Children and

[34] Ibid 529 [588]
[35] Ibid 520 [256].
[36] Ibid 74 [472].
[37] Ibid 551 [355]. A report by the Victorian Ombudsman provides a sample 'Separation Safety Management Plan' that details the daily routine of a child in Grevillea who was only allowed out of their cell for one hour per day: Victorian Ombudsman, *Report on Youth Justice Facilities at the Grevillea Unit of Barwon Prison, Malmsbury and Parkville* (2017) 42–45 (Appendix 1).
[38] Certain Children Dixon J Decision (n 8) 540 [310].
[39] Ibid 551 [310](d).
[40] Ibid 543 [318].

Young People in Victoria gave evidence for the plaintiffs about her concerns regarding the use of the IBMP and its detrimental impact on the mental health and wellbeing of the children.[41] The Court was also persuaded by the evidence of a psychiatrist that '[c]hildren subjected to sustained periods of isolation in that environment are at risk of developing profound psychological damage'.[42]

The judgments in the *Certain Children* cases provide a clear indictment of the solitary confinement of children based on extensive evidence of the harmful effects. There can be no doubt that it violates the human rights protected by the *Charter*. The broader context for the Supreme Court's findings is considered in the next Part.

IV THE PRACTICE OF SOLITARY CONFINEMENT IN VICTORIA

The decisions in the *Certain Children* cases would not have been a surprise to anyone familiar with the numerous reports about juvenile detention in Victoria that preceded the judgment. This is because investigatory reports have been raising concerns about the use of solitary confinement in juvenile detention and on young people in adult prisons since 2010. As Boughey observes:

> [T]his history indicates that the government had fair warning that detaining young people in a facility designed for high risk adult prisoners was a breach of their human rights, but pursued the strategy anyway, without implementing sufficient measures to minimise the harm to young prisoners.[43]

The significant reports from before and after the Supreme Court's decisions are:

- Victorian Ombudsman, *Investigation into conditions at the Melbourne Youth Justice Precinct* (2010);
- Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (2013);
- Victorian Ombudsman, *Report on Youth Justice Facilities at the Grevillea Unit of Barwon Prison, Malmsbury and Parkville* (2017);

[41] Ibid 557 [391], [462].
[42] Ibid [463].
[43] Janina Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing, 2019) 208.

- Commission for Children and Young People, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in Victoria youth justice system* (2017);
- Legislative Council Legal and Social Issues Committee (Parliament of Victoria) (hereafter 'the Committee'), *Inquiry into Youth Justice Centres in Victoria* (2018);
- Jesuit Social Services, *All Alone: Young Adults in the Victorian Justice System* (2018); and
- Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (2019).[44]

Detailed examination of the publicly available investigative reports reveals several recurring themes in relation to the use of solitary confinement on children and young people detained in Victoria that violate Australia's international human rights law obligations as well as provisions in the *Charter*. These are (1) use of solitary confinement not only 'as a last resort', (2) prolonged solitary confinement, (3) inadequate record-keeping, and (4) lack of appropriate authorisation.

Before examining these themes, some background is required. Victoria has two youth detention facilities: Parkville Youth Justice Precinct ('Parkville') and Malmsbury Youth Justice Precinct ('Malmsbury').[45] Between 2017–2018, 4,933 children in Victoria were in detention for some time during the year.[46] The examination of the investigatory reports will include treatment of children in both Parkville and Malmsbury, as well as the treatment of young people (defined as ages 18–25) in the Port Phillip Prison ('PPP') because the Ombudsman's 2013 and 2019 investigations and the report by Jesuit Social Services included critique of the treatment of young people in this facility.[47] Collectively,

[44] There was also a confidential report into some riots in 2016 (Bessant and Watts (n 7) 106) and a Victorian Parliamentary Committee report refers to a consultant's report: Merlo Consulting, *Isolation Review Secure Services – DHHS* (2016); see Legislative Council Legal and Social Issues Committee (Parliament of Victoria), *Inquiry into Youth Justice Centres in Victoria* (2018) 113 ('*The Committee inquiry into Youth Justice in Victoria*').

[45] Another facility is being built to house 15–18-year-old males. The Cherry Creek facility is due to open in 2021: Minister for Corrections and Youth Justice (Vic), 'Building A Safer And More Secure Youth Justice System' (Media Release, 27 September 2019) <https://www.premier.vic.gov.au/wp-content/uploads/2019/09/190927-Building-A-Safer-And-More-Secure-Youth-Justice-System.pdf>.

[46] Australian Institute of Health and Welfare, *Youth Justice in Australia* (Report, 2019) 16.

[47] There is also evidence that solitary confinement is highly detrimental for young people: Victorian Ombudsman, *OPCAT in Victoria, A thematic investigation of practices related to solitary confinement of children and young people* (Final Report, 2019) 6, 17–18 ('*Ombudsman investigation into solitary confinement of children and young people*'). There is also one section of Malmsbury that accommodates young people between the ages of 18 and 21: at 141 [711]. It is important to note that the PPP is not

the reports paint a picture of practices in Malmsbury, Parkville and PPP that are in breach of Australia's international obligations and the *Charter*.[48]

It is important to be cognisant that improper record-keeping (one of the aforementioned themes) has resulted in the failure to properly measure how long children and young people are in fact placed in solitary confinement.[49] Therefore, it is likely that the reported statistics of children and young people being confined are significantly lower than the actual number who have been subjected to solitary confinement and that the duration of solitary confinement may be under-estimated.[50] Despite not having accurate data about the use of solitary confinement on children and young people in Victoria, the investigatory reports clearly demonstrate it is over-used and there are significant mental and physical consequences for children and young people subjected to the practice (as per the findings of the Supreme Court).

A *Use of Solitary Confinement is Not Only a Last Resort*

The Committee reported that solitary confinement was used 42.4 times per day across youth detention facilities in 2016.[51] As outlined in Part II, the international law position is that children should not be subjected to solitary confinement and, in relation to adults, the *Mandela Rule's* Rule 45 requires solitary confinement only be used 'as a last resort'. The most concerning trend identified in the investigatory reports regarding this practice was the inappropriate use of both solitary confinement and lockdowns.[52] Facility-wide lockdowns were utilised as a means of collective punishment when one or two persons

regulated by the *Children, Youth and Families Act 2005 (Vic)*. Rather, it falls under the *Corrections Act 1986* (Vic). However, it is beyond the scope of this article to detail the provisions of both Acts, therefore when legislation is discussed, it will focus on the provisions of the *Children, Youth and Families Act 2005 (Vic)*.

[48] Commission for Children and Young People, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in Victorian youth justice system* (Report, 2017) 58, 73 ('*Four walls report*'); *Ombudsman investigation into solitary confinement of children and young people* (n 47) 164 (discussing the *Mandela Rules*); Victorian Ombudsman, *Investigation into children transferred from the youth justice system to the adult prison system* (Report, 2013) 4 ('*Ombudsman investigation into transfer of children from youth justice to adult prisons*').

[49] Ombudsman investigation into solitary confinement of children and young people (n 47) 151 [781].

[50] Four walls report (n 48) 22.

[51] *The Committee inquiry into Youth Justice in Victoria* (n 44) 111; see also *Four walls report* (n 48) 46–47.

[52] The practice of isolating a child or young person 'in the interests of the security of the centre' under s 488(7) of the *Children, Youth and Families Act 2005* (Vic) is referred to as a 'lockdown'.

caused an incident.[53] The use of solitary confinement on a child or young person as a result of another person's misdemeanour is inconsistent with the 'last resort' condition.

A study of the practice in Malmsbury found that within a 12 month period there were 1,214 incidents of placing children in solitary confinement-like conditions.[54] Four of those incidents amounted to solitary confinement.[55] In Malmsbury, the practice was frequently used for behavioural reasons and as a result of lockdowns, which were caused by staff shortages.[56] The Ombudsman reports that 45% of children and young people 'had been isolated for misbehaviour'[57] and 90% 'had been isolated at Malmsbury due to a lockdown at the facility'.[58]

Within 12 months, 265 incidents of solitary confinement of young people were recorded in PPP.[59] Of the young people surveyed by the Ombudsman, 79% reported they had been subjected to solitary confinement at PPP.[60] PPP's records revealed a concerning use of solitary confinement; it is used on young people as a punitive measure.[61] The punitive use of solitary confinement was also evidenced within Parkville and Malmsbury,[62] despite the fact that s 487 of the *Children, Youth and Families Act 2005* (Vic) ('*CYF Act*') explicitly prohibits the use of solitary confinement as a 'punishment'.

The Commission for Children and Young People found that children who were the victims of assault from staff were placed in solitary confinement for the longest average duration in both Parkville and Malmsbury.[63] In this situation solitary confinement averaged 10

[53] *Ombudsman investigation into solitary confinement of children and young people* (n 47) 157 (815). See also the discussion about lockdowns in PPP by the Ombudsman: at 98.
[54] Ibid 20 [49].
[55] Ibid 245 [1213].
[56] Ibid 20 [51].
[57] Ibid 147 [753]
[58] Ibid 155 [798].
[59] Ibid 87 [427].
[60] Ibid 87 [426].
[61] Ibid 21 [64], 89 [443]; Jesuit Social Services, *All Alone: Young Adults in the Victorian Justice System* (Report, 2018) 6 ('*All Alone Report*').
[62] Parliament of Victoria, Human Rights Law Centre, Submission No 38 to Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria*, 10 March 2017, 12. This was referred to in the final report by the Committee, who noted their concern: *The Committee inquiry into Youth Justice in Victoria* (n 44) 111–12; see also *Ombudsman investigation of solitary confinement into children and young people* (n 47) 243 [1202]; *Four walls report* (n 48) (the latter citing the perspectives of children who were interviewed by the Commission).
[63] *Four walls report* (n 48) 49. Young people who are victims of assault are commonly confined in PPP as well: *Ombudsman investigation of solitary confinement into children and young people* (n 47) 89.

hours, with the Commission observing that '[t]his is concerning, as the child or young person was the victim of the assault'.[64]

It is evident that solitary confinement on children and young people in the examined facilities is not used 'as a last resort'. There is an over-reliance on the practice to overcome any issues and challenges faced within the facilities that are outside the control of the children and young people. The Commission concluded that '[e]xtended and repeated use of isolation reflects a failure of the youth justice system's capacity to effectively understand and address children's behaviours'.[65]

B *Use of Prolonged Solitary Confinement*

The international law position is that 'prolonged solitary confinement', as defined by Rule 44 of the *Mandela Rules*, constitutes TCID. This emerges as a particular problem in PPP. In 2013, the Victorian Ombudsman reported on three children who had been transferred to PPP and confined for 23 hours per day for months.[66] At the time the Ombudsman was specific about the *Charter* rights this breached:

> I am particularly concerned by the length of time Corrections Victoria held the three children in isolation and its failure to adequately consider the children's best interests. I consider that, in placing these children in isolation for a number of months, Corrections Victoria acted inconsistently with the children's rights under sections 17(2), 22(1) and 23(3) of the *Charter*.[67]

In 2013, the Ombudsman recommended that the *CYF Act* be amended to remove the possibility of children being transferred to an adult prison and that the Department should ensure this did not occur.[68] This warning was not heeded and a similar situation occurred in late 2016 with the children in the Grevillea unit in Barwon.

The use of prolonged solitary confinement on young people in PPP has also been documented more recently. The Ombudsman's 2019 investigation found that young people were on average separated for 10 days, while 77 persons had been separated for

[64] Four walls report (n 48) 49.
[65] Ibid 64.
[66] *Ombudsman investigation into transfer of children from youth justice to adult prisons* (n 48) 3–4.
[67] Ibid 37. Section 23(3) relates to children's rights in the criminal justice process.
[68] Ibid 39 (Recommendation 1).

more than 15 days.[69] Jesuit Social Services give examples of a 19 year old being confined for a year and a half, an 18 year old for 17 months,[70] and a 25 year old confined for 18 months.[71]

It was also recorded that young people kept in an 'Intermediate Regime' were on average held in this regime for 49 days.[72] The regime in PPP only required those subjected to it to receive a maximum of three hours a day outside of their cell, however, it was noted that in some cases young people were only able to leave their cells for one hour per day.[73] Corrections Victoria does not recognise the use of 'Intermediate Regime' as a practice because it does not fall under legislative regulations.[74] However, this practice constitutes solitary confinement under the *Mandela Rules* which requires that any form of involuntary separation must be appropriately authorised and subject to limitations.

C *Inadequate Record-Keeping*

Poor record-keeping was raised as a critical point of concern over multiple reports.[75] It is a breach of the *CYF Act* because Section 488(6) requires a register to be kept whenever isolation is imposed in juvenile detention centres.[76] It is also inconsistent with Rule 39(2) of the *Mandela Rules* which requires that, for adults, 'a proper record of all disciplinary sanctions imposed' be kept. Failure to record the entire period of solitary confinement has resulted in improper records which significantly impact the ability to have a holistic understanding of the practice.[77]

The Committee expressed frustration with the records they were provided from the Department as follows: '[t]he format of the print outs and the fact that they could not be

[69] Ibid 91.
[70] All Alone Report (n 61) 24.
[71] Ibid 27. See additional details about this person: at 30.
[72] An 'Intermediate Regime' is used in Port Phillip to transition persons held in separation to being back with the general prison population. The regime places restrictions on the person, including their ability to leave the cell and contact other imprisoned people.
[73] Ombudsman investigation of solitary confinement into children and young people (n 47) 94 [457].
[74] Ibid 108 [539].
[75] *The Committee inquiry into Youth Justice in Victoria* (n 45) 112; *All Alone Report* (n 61) 6, 20; *Four walls report* (n 48) 46, 48.
[76] The *Children, Youth and Families Regulations 2017* (Vic) details the information that must be kept in the register: reg 32.
[77] *Four walls report* (n 48) 16.

searched electronically made it extremely difficult for the Committee to verify whether the correct processes had been followed or identify trends is isolation'.[78]

In Parkville and Malmsbury, there were multiple instances of the isolation time being recorded as zero or in negative minutes.[79] The staff at Malmsbury would record the period of solitary confinement as ending when the child or young person was escorted out of their room for fresh air or when regular evening lockdowns commenced.[80] The policy in Malmsbury of not recording time spent 'in a locked room, away from others and separate from the routine of the centre' as isolation, despite this meeting the definition in the *CYF Act,* confirms that the figures for solitary confinement present an under-representation of actual practice.[81]

D Lack of Appropriate Authorisation

The authorisation required by Section 488(1) of the *CYF Act* (by the 'officer in charge' of the facility) arguably does not meet the requirement of Rule 45 of the *Mandela Rules* ('authorization by a competent authority').[82] Of major concern is that in practice, even these lower standards are failing to be met.

The investigatory reports documented a consistent trend of solitary confinement and lockdowns not having the necessary or proper authorisation.[83] The Children's Commissioner reported that 73% of solitary confinement instances were not authorised correctly.[84] The Commission reported that '[t]he requirement for the Director of Secure Services to authorise lockdowns of greater than six hours was routinely not met'.[85]

[78] The Committee inquiry into Youth Justice in Victoria (n 44) 113.
[79] Ibid 47. For example: one instance of solitary confinement was recorded as negative 1,070 minutes.
[80] *Ombudsman investigation of solitary confinement into children and young people* (n 47) 169 [867], 151 [781].
[81] Ibid 151 [781]. See also the discussion in *Four walls report* (n 48) 71.
[82] There are delegations in place: Four walls report (n 48) 52; Ombudsman investigation of solitary confinement into children and young people (n 47) 167.
[83] *Four walls report* (n 48) 16. A separate review by Merlo Consulting found that '91 per cent of isolations of Koori children and young people in July and August 2016 did not record the appropriate authorisation' as reported in the *Four walls report* (n 48) 56.
[84] Four walls report (n 48) 52.
[85] Ibid 85.

It must be noted that inadequate record-keeping has significantly affected this issue, as across the facilities, the records did not have the authorising officer's details noted.[86] Inspection of the records by investigatory agencies has revealed several discrepancies, with authorisation either not recorded or completely missing.[87]

Jesuit Social Services recommended that Corrections Victoria implement an independent body to act as the authorising body for the use of solitary confinement in Victoria.[88] This recommendation would result in greater accountability and transparency, and satisfy the *Mandela Rules*' requirement of an independent body to review the uses of solitary confinement. The implementation of the OPCAT will also increase the scrutiny surrounding solitary confinement.

V A CALL FOR PROHIBITION OF SOLITARY CONFINEMENT OF CHILDREN

As alluded to in Part II, the high risk of solitary confinement of juveniles amounting to TCID has led the United Nations Special Rapporteur on TCID to call for its prohibition. The wording of the Rapporteur's recommendation is as follows: '[w]ith regard to conditions during detention, the Special Rapporteur calls upon all States […] To prohibit solitary confinement of any duration and for any purpose'.[89] The Committee on the Rights of the Child has specifically recommended that Australia 'explicitly' prohibit solitary confinement of children in detention.[90] This article supports these calls for prohibition for the following reasons.

First, the *CYF Act* in Victoria does not incorporate adequate safeguards for the use of solitary confinement on children, and the safeguards that are present are often not complied with. In particular, detailed records are not kept in a register and independent authorisation is not required. This has led the Victorian Ombudsman to recommend that the *CYF Act* be amended to specifically prohibit solitary confinement.[91]

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[86] *Ombudsman investigation of solitary confinement into children and young people* (n 48) 106 [533]; *Four walls report* (n 48) 14, 85.
[87] *Four walls report* (n 48) 52; Merlo Consulting, *Isolations review* (Final Report, 2017) 12–13.
[88] *All Alone Report* (n 61) 39–40.
[89] Juan Ernesto Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015) [86](d).
[90] United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) 14 [48c].
[91] Ombudsman investigation of solitary confinement into children and young people (n 47) 254 (Recommendation 1).

Second, in reliance on the poor data that is available, the investigatory reports have found that solitary confinement is not used 'as a last resort' and prolonged solitary confinement is being imposed on children. It is likely that the poor record-keeping means that this picture is in fact an under-estimate of actual practice.

Third, the Supreme Court found solitary confinement to be a practice central to the finding that the children in the Grevillea unit did not have their best interests or their right to be treated with humanity and respect appropriately protected. The conditions in Grevillea were such that the Court found the establishment of this youth justice precinct unlawful and ordered that children no longer be detained there. This is a serious indictment on the treatment of detained children in Victoria.

Fourth, Australia's new obligations under the OPCAT require the prevention of TCID. While the Supreme Court did not find that the threshold for TCID had been met by practices in the Grevillea unit, international law makes it clear that solitary confinement of children creates a significant risk of TCID. The investigatory reports that have uncovered extensive use of prolonged solitary confinement show this is a very real and imminent risk.[92] Therefore prohibiting its use is entirely consistent with the preventive aim of the OPCAT.

Scholars who have examined the use of solitary confinement in other Australian jurisdictions have also made this recommendation. Following an examination of the use of solitary confinement in the Northern Territory, Grant, Lulham and Naylor have made a cogent argument that segregating children should be prohibited by all jurisdictions in Australia. They highlight that the American Academy of Child and Adolescent Psychiatry has been officially opposed to the practice since 2012 and that as of 2016, 29 states in the United States of America ('USA') 'prohibit the use of punitive solitary confinement in juvenile correctional facilities by law or practice'.[93]

[92] The Ombudsman specifically referred to this as a risk in Malmsbury and PPP: Ibid 19 [41], 20 [53].
[93] Grant, Lulham and Naylor (n 3) 127-28. For an international example of the same recommendation, see Jennifer Lutz, Jason Szanyi and Mark Soler, 'Stop Solitary for Kids: The Path Forward to End Solitary Confinement of Children' in American University Washington College of Law, *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* (Report, 2017).

It is beyond the scope of this article to give a state-by-state overview of the legislation in the USA, given that the criminal law is different in every state.[94] It is illuminating to examine the protections that have been put in place to apply to federal facilities since 2016 when President Obama banned the practice 'because of the potential for "devastating, lasting psychological consequences"'.[95] The *Crimes and Criminal Procedures Code* specifically 'prohibit[s]' confining a child for 'discipline, punishment, retaliation, or any reason other than as a temporary response to a covered juvenile's behaviour that poses a serious and immediate risk of harm to any individual, including the covered juvenile'.[96] There is a requirement to explore 'less restrictive techniques' first and a list of these is included in § 5043(b)(2)(A)(i), which makes it clear that confinement is a last resort. The Code stipulates maximum periods of confinement where there is 'immediate risk of harm'.[97] These periods are three hours where there is a risk to others and 30 minutes where there is a risk posed to the juvenile.[98] There is also a provision indicating that '[t]he use of consecutive periods of room confinement to evade the spirit and purpose of this subsection shall be prohibited'.[99] Therefore, prolonged solitary confinement would be in breach of these provisions.

This discussion is not to suggest that a legislative provision could (or should) be copied from the USA to Victoria or any other state or territory in Australia. What it does provide is an example of a legislative provision that is better aligned with Australia's international human-rights law obligations, which may be helpful to policy makers as a point of reference.

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[94] For an overview, see National Conference of State Legislatures, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement* (Web Page, 29 January2020) <https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx#1>.

[95] Clark (n 12) 45, citing the words of former USA President Barack Obama in Barack Obama, 'Barack Obama: Why we must rethink solitary confinement', *Washington Post* (online, 25 January 2016) <https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html>.

[96] *Crimes and Criminal Procedure*, 18 USC § 5043(b)(1) (2008).

[97] Ibid.

[98] Ibid § 5043(b)(2)(B)(ii)(I).

[99] Ibid § 5043(b)(2)(D).

VI CONCLUSION

Children in detention are the most vulnerable members of the community by virtue of being young and the power imbalance between them and their custodians. Their treatment in the Northern Territory was exposed by the *ABC* and a Royal Commission, and their treatment in Victoria has been extensively documented by investigatory reports over the last decade, as well as by evidence before the Supreme Court that the practices breached the *Charter,* in particular circumstances examined in the *Certain Children* cases.

There can be no doubt that Victoria's extensive over-use of solitary confinement on children violates international human rights law and the *Charter*. The risk of it constituting TCID should be eliminated by heeding the call of the Special Rapporteur on TCID and the Committee on the Rights of the Child regarding banning the practice. This is consistent with Australia's recent obligations under the OPCAT to prevent TCID. The risk of TCID is too great for the children subjected to solitary confinement to allow it to continue.

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CAN SURFERS HAVE TRADITIONAL KNOWLEDGE INTELLECTUAL PROPERTY?

TODD BERRY* AND CHARLES LAWSON**

Various international agreements address traditional knowledge (TK), Indigenous Peoples and local communities. A distinction exists between the traditional knowledge of Indigenous Peoples and the traditional knowledge of local communities. The World Intellectual Property Organisation's (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating a text in anticipation of a Diplomatic Conference to agree on binding obligations about TK distinguishing between the TK of Indigenous Peoples and local communities. This article reports on a pilot study assessing the TK of the surfing community of the Gold Coast, Australia in the context of a local community's TK. Through semi-structured interviews of surfers and non-surfers, the following hypotheses were tested: (1) that surfers exist as a local community; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community that might be characterised as TK. The results of this pilot study show that surfers are a local community and that they do have special forms of knowledge and practices that might be characterised as TK. If this is the intended reach of WIPO's new form of intellectual property, then this will extend well into the economies of developed countries.

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CONTENTS

I INTRODUCTION

The phrase 'local communities' in the context of traditional knowledge (TK) can be traced to the United Nations *Convention on Biological Diversity* ('CBD')[1] that provided for Contracting Parties 'as far as possible and appropriate' and subject to national legislation to 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.[2] Contracting Parties were also obliged to promote, 'with the approval and involvement of the holders of such knowledge, innovations and practices', a 'wider application' and 'encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices'.[3] This language was reiterated in the subsequent *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* ('*Nagoya Protocol*'), although only for the subset of '[TK] associated

[1] *Convention on Biological Diversity,* opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('CBD').
[2] Ibid art 8(j).
[3] Ibid.

with genetic resources'.[4] There the obligations were again subject to national legislation to:

> Take measures, as appropriate, with the aim of ensuring that [TK] associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.[5]

In the context of the CBD and *Nagoya Protocol*, TK refers to the 'knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.[6]

TK is also under discussion at the World Intellectual Property Organisation (WIPO) where the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating a text in anticipation of a Diplomatic Conference to agree on binding obligations.[7] Unlike the narrow scope of the CBD and *Nagoya Protocol* forums addressing TK associated with genetic resources, the IGC is negotiating agreements for the effective protection of TK, traditional cultural expressions and genetic resources. At this stage, the IGC has been unable to finally agree on a definition of TK, although there is text under active consideration and close to consensus agreement:

> [TK] refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and

[4] Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc UNEP/CBD/COP/10/27 (20 January 2011) [103] and annex (Decision X/1, annex 1, 89-109) (Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity) ('Nagoya Protocol').
[5] CBD (n 1) art 7.
[6] Ibid art 8(j).
[7] The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has met on 40 occasions without finally concluding the text for consideration by a Diplomatic Conference, with the latest meeting continuing negotiations: see *Draft Report*, WIPO Doc WIPO/GRTKF/IC/40/20 PROV 2 (30 September 2019). For an overview of developments, see Daniel Robinson, Ahmed Abdel-Latif and Pedro Roffe, *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, 2017).

> environment, including know-how, skills, innovations, practices, teaching, or learning.[8]

The separation of 'indigenous [peoples]' and 'local communities' reflects an important distinction that has been made at the CBD and the *Nagoya Protocol* forums, recognising that Indigenous Peoples and local communities are different conceptions. The debate to separate these concepts traces back to the United Nations Permanent Forum on Indigenous Issues recommendation that the terminology be updated 'as an accurate reflection of the distinct identities developed by those entities since the adoption of the [CBD] almost 20 years ago'.[9] While agreeing to this change in terminology at the CBD and *Nagoya Protocol* forums, and that it would not have any legal effect,[10] the consequence was to create clearly separate entities, so that some groupings that might not meet the definitions of 'indigenous peoples' could meet the broader definition of 'local communities'.[11] The lack of legal effect suggests these were already separate conceptions. This distinction also recognises the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') that specifically addresses the TK of Indigenous Peoples and the specific obligations that apply to Indigenous Peoples' TK.[12] Significantly, the *Nagoya Protocol* expressly notes the UNDRIP and affirms in its Preamble that 'nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of [Indigenous Peoples] and local communities'.[13] This perhaps also clarifies that 'local communities' are not limited to notions that define Indigenous Peoples and might include other groupings with shared interests.[14] Importantly for our purposes, 'local

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[8] *The Protection of Traditional Knowledge: Draft Articles*, WIPO Doc WIPO/GRTKF/IC/40/4 (9 April 2019) annex, 5.

[9] *Report on the Tenth Session of the Permanent Forum on Indigenous Issues*, UN ESCOR, Supp No 23, UN Doc E/2011/43-E/C.19/2011/14 (16-22 May 2011) [26].

[10] See Report of the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc UNEP/CBD/COP/12/29 (17 October 2014) Decision XII/12(F), 91-91, [238]. See also Report of the Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, UN Doc UNEP/CBD/COP/12/5 (11 November 2011) [95], annex 1 (recommendation 8/6, [5(b)]).

[11] Nicole Schabus, 'Article 8(j): Indigenous and Local Community Participation' (2013) 43(6) *Journal of Environmental Planning and Management* 288, 291.

[12] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 6st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 31.

[13] Report of the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity (n 10) Preamble para 28.

[14] See *Guidance for the Discussions Concerning Local Communities Within the Context of the Convention on Biological Diversity*, UN Doc UNEP/CBD/AHEG/LCR/1/2 (7 July 2011) [6]. Notably, Indigenous Peoples and 'local communities' are holders of different bundles of human rights: see Darrell Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local*

communities' are a separate conception and their TK is a separate, while overlapping, concept.

To examine the role and place of TK and 'local communities', this pilot study was conceived and developed to test a particular kind of knowledge among a grouping denoted as 'surfing communities' in the context of the IGC's deliberations about TK. This study set out to test the hypotheses: (1) that surfers exist as a local community; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community that might be characterised as TK. This article reports on that project. The following parts outline the methodology and results respectively, and then a discussion follows placing the results within the context of the CBD, *Nagoya Protocol* and IGC. The article concludes that surfers can be characterised as a local community and they have special forms of knowledge and practices particular to their local community that might be described as TK. This is significant because it demonstrates that TK has, potentially, a very broad scope and one which could possibly empower local communities by giving recognition to their special forms of knowledge and practices.

II METHODOLOGY

Semi-structured interviews were conducted in March and April 2017 with self-identifying members of the surfing local community and other non-community members on the Gold Coast, Australia (see Figure 1). These participants were identified by their participation in surfing activities on beach waves (breaks) (n=10). Non-members were identified by their non-participation in surfing activities (n=2). All participants were given unique identifiers as names (see Table 1).

All participants were asked a range of questions about their knowledge and practices of surfing on the Gold Coast. The purpose of these questions was to elucidate whether surfers were custodians and practitioners of the traditions of surfing that might be characterised as a special form of knowledge and practice particular to an identifiable local community. Each interview addressed three main themes together with questions and sub-questions, including asking for responses to pictures that illustrated surfing

Communities (International Development Research Centre, 1996) 96.

rules and conventions (see Table 2 and Figure 2). The hypotheses being tested were: (1) that surfers exist as a local community on the Gold Coast; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community. The non-surfers were interviewed to test the uniqueness of the specific knowledge and practices held by those within the self-identifying surfing community.

The interviews were conducted according to the *National Statement on Ethical Conduct in Human Research*,[15] with approval from the Griffith University Ethics Committee.[16] As the conduct of this research involved the collection, access and/or use of identifiable personal information, the interviews were completed according to the Griffith University *Privacy Plan*.[17] All audio recordings were erased after transcription. Other research data (interview transcript notes and analysis) will be retained in a locked cabinet and/or a password protected electronic file at Griffith University for a period of five years and then destroyed/erased. Those interviewed were provided with an information sheet about the research, signed a consent form and were provided with an opportunity to ask and continue asking questions about the research and its outcomes.

Interviews were recorded and then analysed by making notes about the responses. These notes were then considered according to themes and their relevance to addressing the research questions. Qualitative methods were preferred, as this pilot study was only intended to determine whether surfers exist as a local community on the Gold Coast and whether the community surfers have special forms of knowledge and practices particular to their local community.

III RESULTS

A *Participation in Surfing*

To test the hypothesis that surfers have special forms of knowledge and practices particular to their local community, two groups were identified: self-identifying members

[15] National Health and Medical Research Council, Australian Research Council and Australian Vice-Chancellors' Committee, 'National Statement on Ethical Conduct in Human Research' (NHMRC, 2007 and updated to 15 May 2015) (Web Page) <https://www.nhmrc.gov.au/about-us/publications/national-statement-ethical-conduct-human-research-2007-updated-2018>.
[16] Griffith University ethics reference number: 2017/170.
[17] Griffith University, 'Privacy Plan' (Griffith University, 2012) (Web Page) <http://www.griffith.edu.au/about-griffith/plans-publications/griffith-university-privacy-plan>.

of the surfing local community participating in surfing activities on beach breaks (n=10) and non-members identified by their non-participation in surfing activities (n=2).

The non-members found almost all of the questions from the interview difficult. For example, when asked to look at the picture scenarios (see Figure 2), the non-members did not understand what was happening. Instead, they tried their best to describe what they could see in front of them. This contrasted with the surfers who, rather than explaining what they saw in the pictures, used their own experiences and knowledge to describe each picture. The comparison of these responses confirmed the hypothesis that those identifying as surfers have special forms of knowledge and practices that are confined to that grouping. While the sample size in this pilot study was small (n=2 for non-surfers and n=10 for surfers), the differences in dealing with this special form of surfing knowledge and practice were very clear.

B *What Makes a Person a Member of a Surfing Local Community?*

Question 1 asked surfers to consider themselves as self-identified members of their surfing local community (Table 2). To do this, surfers were asked to describe what makes them a member of their surfing local community. To gauge the extent of their surfing local community, surfers were then asked to explain what they considered to be the territorial boundaries. Next, surfers were asked how they knew they were a member of their surfing local community. Lastly, surfers were asked how one becomes a member of their surfing local community.

According to Surfing Australia, the peak body representing surfing in Australia, 'Boardriders Clubs' are designed to 'teach the skills required to pursue a competitive career, and introduce surfers to the benefits of the support and friendship offered by club membership'.[18] Moreover, they ensure that 'the sport of surfing continues to go from strength to strength and maintains its status as a truly iconic Australian pastime'.[19] The Gold Coast hosts a number of these clubs.[20] Members of these clubs are considered to be a part of the surfing local community. Generally, participating in surfing itself is enough

[18] Surfing Australia, 'Boardrider Clubs' (Web Page, 2021) <https://surfingaustralia.com/clubs/>.
[19] Ibid.
[20] See, eg, Surfing Australia, 'Mermaid Nobbys Miami Boardriders Club' (Web Page, 2021) (Web Page) <https://surfingqueensland.com.au/clubs>; Surfing Australia, 'Burleigh Heads Boardriders Club Inc' (Web Page, 2021) (Web Page) <https://surfingqueensland.com.au/clubs>.

to make a person a member of the surfing local community. There are, however, nuances based on time, participation in surfing at a particular place, participation in a lifestyle, social interaction and ritual. For example, Surfer D claimed that even though he was a member of his local Boardriders Club, he attributed his membership to his surfing local community based upon time as a surf rider. For him, he had grown up on the Gold Coast and had surfed his local break since he was a child. Therefore, time in the water is what made him feel like a member. Surfer D was not alone in attributing time as one of the factors — almost every other interviewee agreed.

Surfer I believed that being able to identify the regulars, and vice versa, was an aspect of being a member. Moreover, he believed that participating in the lifestyle and the location was all relevant. Surfer F considered that just owning a surfboard and heading to the beach made him a member. Meanwhile, Surfer B thought that it was the social aspect of surfing, for example, the ability to talk to another surfer, stranger or not, about the wind, the swell direction and the tide. Surfer C stated that being a member required a passion for the ocean. Moreover, he described his surfing as a ritual, a routine that he goes through.

C *What is the Extent of the Community?*

Many of the surfers expressed a certain level of comfort connected to surfing within the territorial boundaries of their surfing local communities. Surfer G explained that at some spots the locals would state that only those who live there can surf there. He highlighted Burleigh as being the most notorious for this kind of behaviour on the Gold Coast. Furthermore, he explained that the waves at Burleigh are neither too long, nor is it a big area. Therefore, when a four-wave set comes rolling through, it is a limited resource and there are just not enough waves for everyone. Surfer I explained that the boundaries of his community's territory are within 200 metres of his local break. He uses the carpark from where he begins his surf as the starting point for his radius. The banks — a term that surfers use to describe the build-up of sand on which the waves break —dictate where he surfs within that 200 metres radius. Meanwhile, Surfer A described his local break as the beach at the end of his street in Main Beach. Surfer E felt as though he had spent enough time at Burleigh, Snapper and Currumbin to warrant having some sort of

territorial claim over all three spots. This highlights that the distinctions between being a local or not differed between surfers.

D *How Do You Know You Are a Member of Your Local Surfing Community?*

Generally speaking, a person knew they were a member of their surfing local community once they had knowledge of the local breaks, felt comfortable out in the water and when existing locals who had been surfing there longer started to acknowledge them. Surfer I felt he was a member of his surfing local community when he had knowledge of the breaks and knew how to behave within that community. This, he noted, could differ from break to break, and made him an outsider when he surfed somewhere that was not his surfing local community. Surfers A and G believed that a marker of membership was when they knew the other surfers in the waters of their surfing local community.

E *Surfing Conventions and Rules about Practices*

To assess whether there were any existing conventions and rules about surfing that could be identified as forms of community knowledge and practices, surfers were shown pictures of apparent surfing norms (see Table 2 and Figure 2). Picture 1 asked the interviewees to discuss two different scenarios: (1) to talk about if, when surfing, the person furthest out or waiting the longest had any form of priority over waves; and (2) to discuss whether a surfer who was furthest inside and closest to the peak, gained priority in riding the wave.

Addressing Picture 1, Scenario 1 (furthest out or waiting longest), Surfer D thought that if a surfer was furthest out, they could be out of position, and therefore the surfer would not be in a position to catch the wave. Once the surfer who was furthest out got into position, Surfer D would then allow that person to catch the wave. Surfer B believed that 'furthest out' did apply at his local, while 'waiting the longest' did not. Surfer F thought that 'furthest out' really depended upon the waves as to whether it applied. Surfer J believed that both 'furthest out' and 'waiting the longest' existed at his local, and that he respected that the considerable effort made to get a wave should be rewarded with the wave. However, Surfer J made it clear that he would be waiting under the lip, just in case the priority surfer did not catch the wave. Surfer I thought that it always came down to who was on the waves first, regardless of who was furthest out, or who had been waiting

the longest. All the surfers, however, accepted that Scenario 1 was a best practice, even if they acted in conflict with this best practice.

Addressing Picture 1, Scenario 2 (furthest inside closest to the peak), the general feeling was that this is one of the fundamental rules of surfing — certainly across the Gold Coast and possibly further afield too. In terms of some variation, Surfer D went into great detail about 'closest to the peak'. He explained that 'closest to the peak' is how things work out in the surf. Furthermore, he said that if a surfer had been waiting for a while, then they should paddle to the inside to ensure that they were closest to the peak.

Picture 2 asked the interviewees questions about paddling while they are surfing. Once again, two different scenarios were shown: (1) asked surfers to discuss the rule of paddling wide to avoid the surfer on the wave, and (2) asked about when a surfer is caught on the inside of the white wash and again avoiding the surfer on the wave. All surfers agreed that both scenarios applied at their local breaks. Some interviewees, however, maintained that there is a variation to this rule depending on whether the location is a beach break or a point break.[21]

Picture 3, once again, asked interviewees to discuss two different scenarios: (1) the rule as to whether or not the surfer, first to their feet on the board, had priority on a wave; and (2) communication between surfers when they are paddling to catch a wave to ride. The perspectives about Scenario 1, first-to-feet, varied. Surfer D described this as an old school rule, more suited to those who ride long boards. Surfer H thought that first-to-feet was overridden by the 'closet to the peak' rule. Surfer E also considered that the surfer on the inside, closest to the peak, had right of way over the wave.

For Scenario 2, terms of communication, Surfer D talked about how there should always be communication out on the water, especially when surfing a wave that breaks both left and right. The reason for this, he said, was so that the other side of the wave was not wasted. Moreover, Surfer D discussed how sometimes it came down to talent. For example, Surfer D discussed how most natural footers[22] on the Gold Coast struggle to surf on their backhand. Therefore, most natural footers would not even attempt to go after

[21] A beach break forms when a wave passes over a shallow sea floor (like a sand bar) or by the approaching shallows at a shoreline. A point break forms when a wave passes round (or wraps around) a point or headland.
[22] A natural footer surfer is a surfer that stands on a surfboard with their left foot forward.

left-hand side breaking waves. This usually meant that the left breaking waves were vacant. Surfer D, a goofy footer (opposite of natural footer), would always try to communicate and ensure that the left breaking waves did not go unridden because some natural footers could not surf on their backhand.

Picture 4 asked surfers to discuss the rule of not letting go of their board. The purpose of this rule is to ensure safety to others. There have been incidents where surfers have let go of their board and others have been injured as a result.[23] All interviewees agreed that this was a rule that is followed at their local breaks. There were only two variations to this rule that were expressed. The first was that it was only acceptable to let go of your board if there was a really big wave coming and you did not think you could dive under water to avoid the wave crest. Surfer E, for example, described letting go of one's surfboard as an extremely dangerous thing to do and the only time to do this is if the waves are extremely big. The second variation was that it was only acceptable to let go of your board if there is nobody behind you. The reason for this was to ensure other people's safety on the water. Surfer J, for example, said that he only releases his board if there is no one behind him.

Lastly, Picture 5 asked surfers to discuss the 'drop in' and 'snaking' rules. The 'drop in' rule gives priority to the person closest to the peak, already up and riding a wave. 'Snaking' occurs in the line-up where an individual, 'the snaker', decides to paddle around a person, the victim, who has the inside position. The consequence of this is that the snaker now has the inside spot on the wave, which then, if the victim continues to paddle for the wave, makes the victim look like they are dropping in and therefore violating the 'drop in' rule. All surfers agreed that the 'drop in' rule applied everywhere, although it was not always observed, and that 'snaking' was a troubling part of surfing. Surfer F described the 'drop in' rule as one of the social norms of surfing and one that surfers are very passionate about. Surfer C explained that if someone from outside his community dropped in on him and did not apologise, he would employ an eye-for-an-eye tactic and therefore drop in on their wave. Surfer C was not alone regarding this because Surfer D also talked about how if someone were to drop in or snake him, he would drop in on that person too. Surfer E said that 'snaking' happens everywhere on the Gold Coast. Surfer A

[23] Paul Caprara, 'Surf's Up: The Implications of Tort Liability in the Unregulated Sport of Surfing' (2008) 44(2) *California Western Law Review* 557, 587.

said that snaking happened, and that surfers often let it happen once or twice, but not a third time without some form of comment or retaliation.

F *What Happens if Someone does not Comply with the Local Rules and Conventions?*

The surfers were asked to discuss what happens when someone does not comply with the local rules and conventions. Most agreed that this varies from anywhere between a polite word to verbal abuse and, in extreme cases, violence. Surfer E talked about how it could vary from being beat up to being told never to come back to particular spots. Surfer E said he tried to tell people what they were doing wrong. He said that their response would dictate what would happen next. Surfer E said that things get more extreme when people do not show respect.

G *What are the Boundaries of the Community?*

Surfers were asked to think about when they go surfing outside their surfing local community as a way of establishing a local community and specialist knowledge and practices by contrasting experiences. The first question asked them to think about whether they felt like an outsider when they surfed somewhere that was outside their surfing local community. The response to this question was unanimous in that surfers do feel like outsiders to some extent when they are outside their local because you do not have the same recognition as you do when you surf within your surfing local community.

Next, surfers were asked how they found out about a local community's rules and conventions. Most surfers agreed that the general rules do not change from place to place. Most said, however, that because they felt like an outsider when surfing outside their community, they would spend a lot of time observing the locals of an outside surfing local community in order to see how they do things. Surfer E suggested that if you are surfing at a spot outside your surfing local community but you have a friend who already lives and surfs there, this can really help. Having such a friend can bring you up to speed with the intricacies of the local community and help you engage with the locals.

Then surfers were asked if these rules and conventions were applied differently in surfing local communities other than their own. Most of the surfers agreed that there is little difference in how the rules and conventions are applied at different places. The biggest

variation to such rules and conventions appears to come down to localism and the attitudes of those who are surfing at particular breaks.

Lastly, surfers were asked what happens if someone does not comply with the local rules and conventions of an outside surfing local community. Similar to the responses to the question of what happens if someone does not comply with the local rules and conventions at their surfing local community, it can range anywhere from a polite talk through to violence. This includes shouting, being told to go back to where you came from, death stares, being out-casted, racism, punches being thrown, to having the tyres of your car let down or your car scratched.

IV DISCUSSION

This pilot study set out to test the hypotheses: (1) that surfers exist as a local community on the Gold Coast, Australia; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community that might be characterised as TK. These hypotheses and analyses are important to inform the ongoing debates about TK in the WIPO IGC (and CBD and *Nagoya Protocol*) where 'local communities' are a key component of the definition of TK.[24] This involves an understanding of both a 'local community' and the kinds of knowledges, innovations and practices they have that might be characterised as TK.

The results confirmed the hypothesis that those self-identifying as surfers (n=10) did have special forms of knowledge and practices about surfing that were unique compared to those self-identifying as non-surfers (n=2). The results also demonstrated there was a consensus about the substance of special knowledge about surfing rules and conventions (Figure 2) with some variations in the territorial practices and applications based on localism (place of surfing) and attitudes (applying the rules and conventions).

The surfers considered their local community was bounded by: (1) territory — the places where surfing was carried out; and (2) groupings — membership of surfing organisations or participation in the lifestyle, social interactions or rituals of surfing. Interestingly, the territorial claims appeared to be based variously on the locality to home, distances around a car park, a surfing feature (sand bank) and so on. Meanwhile, the grouping claims appear

[24] *The Protection of Traditional Knowledge: Draft Articles* (n 8) annex, 5.

to be based on how long someone has surfed at a particular place, special knowledge about the surfing place, friendships and other such factors. As a generalisation, these are claims based on localism to a territory and the attitudes of those who are surfing at particular breaks (local surfers).

The special knowledge claims showed that there was a consensus about the form and content of the rules and conventions among self-identifying surfers, suggesting that they are the norms of surfing. There were, however, variations in their application based on individual surfer's compliance that included specific location (place) applications such as not wasting a limited resource and variations in the ways that the rules and conventions were enforced, ranging from talk to physical and property violence.

The following discussion considers the meaning of a 'local community' within the context of TK in the WIPO IGC negotiations and the application of the CBD and *Nagoya Protocol*, and then whether the surfing communities of the Gold Coast are such local communities with specific knowledge and practices that they might be characterised as possessing(?) TK. The article then concludes with consideration of the likely consequences for surfing local communities holding TK.

The phrase 'indigenous and local communities' was agreed at the final negotiations of the CBD in 1992[25]. This was utilised as a compromise, addressing the concern of some developing countries with using the term 'Indigenous Peoples' and its international law implications, because some national constitutions already addressed 'local communities'.[26] The consequence of this, however, is that there is no clear meaning as to what a 'local community' is, or means, in the context of the CBD. The same phrase 'indigenous and local communities' was then adopted in the *Nagoya Protocol*,[27] with no further clarification about its likely meaning or reach.[28] The Food and Agriculture Organisation of the United Nations *International Treaty on Plant Genetic Resources for*

[25] CBD (n 1) art 8(j).
[26] See Schabus (n 11) 288.
[27] Nagoya Protocol (n 4) art 7.
[28] See Thomas Greiber, Sonia Peña Moreno, Mattias Åhrén, Jimena Nieto Carrasco, Evanson Chege Kamau, Jorge Cabrera Medaglia, Maria Julia Oliva and Frederic Perron-Welch in cooperation with Natasha Ali and China Williams, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing*, IUCN Environmental Policy and Law Paper No 83 (International Union for Conservation of Nature, 2012) 91. See also Kabir Bavikatte and Daniel Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' (2011) 7(1) *Law, Environment and Development Journal* 35.

Food and Agriculture ('ITPGRFA') also uses this terminology in the context of promoting '*in situ* conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, *inter alia*, the efforts of indigenous and local communities'[29]. The ITPGRFA extends this ideal to Farmers' Rights recognising 'the enormous contribution that the local and indigenous communities and farmers of all regions of the world'.[30] Interestingly, the term 'local communities' is used by itself in the ITPGRFA in the context of promoting or supporting 'as appropriate, farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and agriculture'.[31] Again, the meaning of 'local communities' was not specifically addressed.

The identification of 'indigenous peoples' and 'local communities' as clearly separate entities at the CBD and *Nagoya Protocol* forums,[32] the ITPGRFA — including distinctive and separate uses — and as separate conceptions in the IGC drafting text,[33] shows there is a need to clarify the meaning of 'local community'. This is important because the bounds of the phrase 'local community' determines who the potential rights holders are in any given case, as they are clearly a distinctive grouping from Indigenous Peoples with rights to TK. As a distinctive group, 'local communities' are also likely to have distinctive TK that is different from Indigenous Peoples' TK, while also perhaps incorporating some of the Indigenous Peoples' TK. Some steps have been taken to understand the meaning of 'local communities' under the aegis of the CBD and *Nagoya Protocol*, although the meaning remains uncertain.

In an effort to address the lack of local community involvement in the CBD discussions, the Conference of the Parties to the CBD established an Expert Meeting of Local Community Representatives (AHEG/LCR) to try and identify common characteristics of local communities.[34] The meeting identified a number of common characteristics, and in

[29] *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, 2400 UNTS 303 (entered into force 29 June 2004) art 5.1(d).
[30] Ibid art 9.
[31] Ibid art 5.1(c).
[32] See Report of the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity (n 10), Decision XII/12(F), 91-91, [238].
[33] The Protection of Traditional Knowledge: Draft Articles (n 8) annex, 5.
[34] *Report of the Seventh Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article* 8(j) and *Related Provisions of the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/11/7 (24 November 2011) [33]-[44], annex 1 (recommendation 7/2, [17]-[20]). See also *Report of the Expert Group*

particular, considered that self-identification was the 'foremost and essential in any list of characteristics'.[35] It also included: territory for the maintenance of social, cultural, and economic aspects of the community; traditions such as history, culture, language, rituals, symbols and customs; a set of social rules and organisational-specific community/traditional/customary laws and institutions; self-regulation of customs and traditional forms of organisation and institutions; and so on.[36] In offering a perspective, the Secretariat of the AHEG/LCR provided, in part:

> 'Local community' remains, to some extent, an ambiguous term. It can refer to a group of people which have a legal personality and collective legal rights and this is considered a community in the strict sense. Alternatively, a 'local community' can refer to a group of individuals with shared interests (but not collective rights) represented by a non-governmental community-based organisation (NGO). For example, many traditional communities act through NGOs, which are social rather than community organisations.[37]

In the context of the CBD, TK appears to mean the 'knowledge, innovations and practices of [Indigenous Peoples] and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.[38] A key element of this definition is the phrase 'embodying traditional lifestyles' and whether this limits local communities according to some conception of traditional organisation, such as communities that have been established over generations (like traditional farming communities).[39] The CBD (and *Nagoya Protocol*) appear to have been conceived more broadly than this, with express recognition that local communities can exist in rural and urban areas. Self-identification as a community is also a key feature, and self-regulation

Meeting of Local Community Representatives Within the Context of Article 8(j) and *Related Provisions of the Convention on Biological Diversity*, UN Doc UNEP/CBD/WG8J/7/8/Add 1 (4 September 2011).

[35] Ibid, 12.

[36] Ibid, annex (Common Characteristics).

[37] *Guidance for the Discussions Concerning Local Communities Within the Context of the Convention on Biological Diversity* (n 14) [6]. See also Expert Group Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, *Identification of Common Characteristics of Local Communities* (2011) UNEP/CBD/AHEG/LCR/INF/1, 4.

[38] CBD (n 1) art 8(j); see also Nagoya Protocol (n 4) art 7 — this is limited to TK 'associated with genetic resources'.

[39] See *Report of the Expert Group Meeting of Local Community Representatives* (n 34) [15]-[37].

of customs and traditional forms of organisation and institutions are relevant considerations.[40]

The IGC has developed glossaries of relevant terms including 'indigenous and local communities', drawn broadly from existing United Nations and other international instruments, national, regional and draft laws, multilateral instruments, other organisations and processes, and dictionaries.[41] The phrase 'indigenous and local communities' is traced to the CBD (and *Nagoya Protocol*) and its use there as the 'recognition of communities that have a long association with the lands and waters that they have traditionally lived on or used', citing the preferred definition of the Permanent Forum on Indigenous Issues.[42] This appears to be a very narrow conception of the CBD and *Nagoya Protocol*'s use of the phrase, and directed to only Indigenous Peoples. Although, at the IGC, clearly Indigenous Peoples and 'local communities' are distinct and separate conceptions, and 'local communities' are not Indigenous Peoples. This leaves some uncertainty about the meaning of 'local communities'.

The results from this pilot study suggest that surfers are a local community and do have special forms of knowledge and practices that might be characterised as TK within the conception of TK for the purposes of the IGC, the CBD, and the *Nagoya Protocol*. The significance of this conclusion is that surfers as a local community with TK are the potential rights holders in any given case where TK is being utilised. Two immediate problems arise from this conclusion: (1) the relationship between surfer local communities' TK and Indigenous Peoples' TK about surfing; and (2) what kind of rights follow a finding that surfer local communities (that are not Indigenous Peoples) have TK?

There is no doubt that surfing involves Indigenous Peoples' TK:

> *He'e nalu* [surfing] has been practiced by Polynesians for centuries and has reached high cultural refinement in Hawai'i … It was discovered by the West in 1778, when Captain Cook and his crew anchored in Waimea, Kaua'i. As a native practice, *he'e nalu* was integrated into the political and religious taboo (*kapu*) system which stratified Hawaiian society. Permissions and bans from the *kapu*

[40] Ibid annex (Common Characteristics).
[41] Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, WIPO Doc WIPO/GRTKF/IC/40/INF/7 (10 April 2019) [4].
[42] Ibid annex, 22.

> system applied to surfing, where commoners (*maka'āinana*) were prohibited from surfing with chiefs (*ali'i*) and from riding some surf breaks, like Kapuni in Waikīkī … Nevertheless, *he'e nalu* was popular and indulged in by children, women and men, commoners and chiefs.[43]

The question is whether surfing local communities' TK is different so that the two forms of TK can be distinguished and dealt with separately, or, whether surfing local communities' TK must give way to Indigenous Peoples' TK about surfing. Our pilot study only contributes to this question by suggesting that the rules and conventions addressed appear to be modern practices and norms. We did not investigate the origins of these practices and norms and they may be directly traceable to Indigenous Peoples' TK about surfing. If they are not, then the remaining question is how to address this specific surfing local community TK in the context of derived TK from Indigenous Peoples. This will require further investigation and consideration in future research.

The other question is if surfing local communities do have special forms of knowledge and practices that might be characterised as TK, what does this mean for TK as intellectual property at the IGC? The scope and conditions of protection, and the form of protection, remain contested at the IGC.[44] If surfers have TK, will this require respect for that TK and the opportunity to practice and express it? An existing limitation on any recognition inherent in the WIPO forums (and similarly for TK in the CBD and *Nagoya Protocol* forums) is that the form of TK will finally be determined in domestic WIPO member laws consistent with their commitments at the WIPO Diplomatic Conference. Further research about the likely scope and conditions of protection of such TK is required and how that might be enforced in domestic courts.

Whether surfers will eventually have rights to protect and enforce their TK as a consequence of these potential binding obligations is presently uncertain. What this pilot study demonstrates is that the IGC's definition of TK incorporates a conception of 'local community' and that a surfing local community on the Gold Coast, Australia, can fall within that conception because of its identifiable special knowledge and practices. The merits of

[43] Jérémy Lemarié, 'Debating on Cultural Performances of Hawaiian Surfing in the 19th Century' (2016) 142-143 Journal de la Société des Océanistes 159. See also Identifying Examples of Traditional Knowledge to Stimulate a Discussion of what should be Protectable Subject Matter and what is Not Intended to be Protected, WIPO Doc WIPO/GRTKF/IC/40/12 (24 May 2019) annex. 2.
[44] The Protection of Traditional Knowledge: Draft Articles (n 8) annex, 10-11.

this conclusion are open to speculation. The consequences of these results, however, are that the IGC (and possibly the CBD, *Nagoya Protocol* and ITPGRFA) need to more carefully consider the outer bounds of their possible application of TK, and whether this broad conception of a 'local community' is intended.

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Table 1: Names of Surfers and their Surfing Local Communities

The self-identified local community for each surfer and non-surfer interviewed. The locations are also identified on the map in Figure 1.

Surfer name	**Surfing local community**
Surfer A	Main Beach
Surfer B	Mermaid
Surfer C	Northcliffe
Surfer D	The Spit
Surfer E	Burleigh, Snapper, Currumbin
Surfer F	Surfers Paradise
Surfer G	Nobby's Beach
Surfer H	Broadbeach
Surfer I	Broadbeach
Surfer J	Miami
Non-surfer A	-
Non-surfer B	-

Table 2: Interview Questions

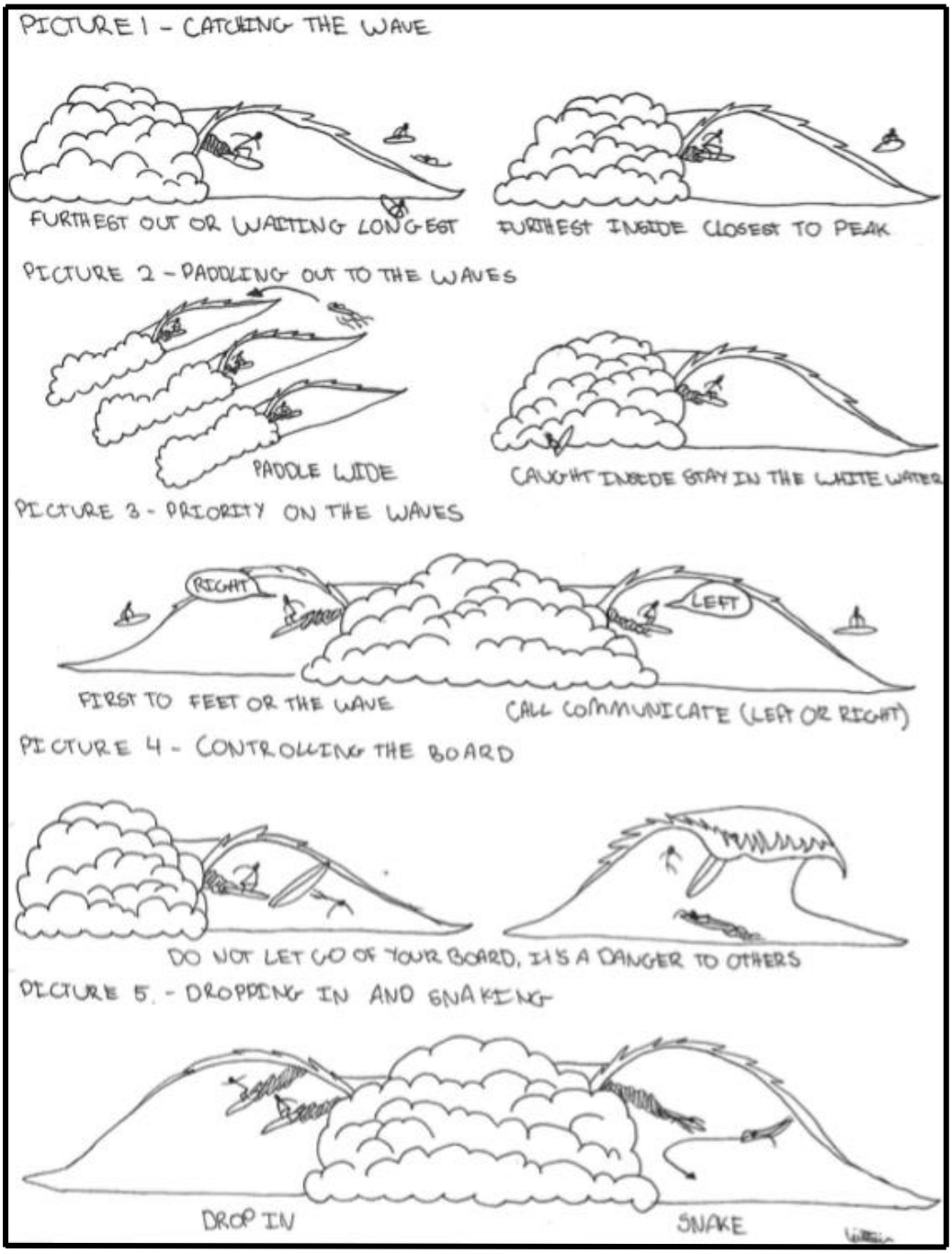
Each interview addressed three main themes together with questions and sub-questions.

Question	**Theme**	**Question**
1.	About you as a self-identified member of a surfing local community.	A. What makes you a member of a surfing local community?
		B. What are the territorial boundaries of your surfing local community?
		C. How do you know you're a member of your surfing local community?
		D. How do you become a member of your surfing local community?
		E. Do you feel like an outsider when you surf somewhere that isn't your home break?
2.	Thinking about going surfing, look at each of these pictures and tell us how the rules and conventions apply at your local surfing place … and tell us about any local variations?	Picture 1 – Catching the wave Picture 2 – Paddling out to the waves Picture 3 – Priority on the waves Picture 4 – Controlling the board Picture 5 – Dropping in and snaking (see Figure 2 for the illustrations of these rules and conventions)
3.	Thinking about when you go surfing outside your surfing local community.	A. Why do (or don't) you feel like an outsider?
		B. How do you find out their rules and conventions?
		C. How are some of these rules and conventions applied differently to your surfing local community?
		D. What happens if someone doesn't comply with the local rules and conventions?

Figure 1: Map of Surfing Local Communities on the Gold Coast, Australia

Figure 2: Surfing Rules and Conventions

To assess whether there were any existing conventions and rules about surfing that could be identified as a form of community knowledge and practices, surfers were shown pictures of apparent surfing norms. The apparent norms were identified from web searches of surfing rules and surfing etiquette.



DEMOCRATIZING INTERNATIONAL AGREEMENTS IN THE CONTEXT OF INTER-STATE HIERARCHIES

PHILIP GIURLANDO*

This paper aims to contribute to the literature on accountability and world politics by bringing to the discussion some of the insights of scholarship on international hierarchy. This literature goes beyond the well-known debate between realists and liberals, and explores status-based models which highlight how both material and normative factors constitute Great Powers. This elite class of states can help to make international agreements more accountable because they have the material means of enforcement, and because their divergent interests and diverse normative orientations help to broaden representation. When the world's Great Powers cooperate to solve global problems, and their proposals include mechanisms for dispute resolution overseen by global governance institutions, agreements are more likely to generate 'legitimacy', a concept which refers to weaker states' willingness to accept the decisions of the powerful because of the sense of fairness and the benefits which accrue to those impacted by the agreement. To illustrate an example, the paper will discuss the Joint Comprehensive Plan of Action (JCPOA), an approach to nuclear non-proliferation overseen by the world's Great Powers and accepted by other members of the international community, strong and weak alike.

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CONTENTS

I INTRODUCTION

Scholars of global governance have examined the question of whether international politics can operate with democratic accountability.[506] There is broad agreement, based on the experience of domestic politics, that accountability comes in two forms: constitutional and representative (or, depending on the author, delegatory and participatory),[507] or vertical and horizontal.[508] At the domestic level, both forms are partly made possible by the legal equality of citizens. But at the international level, there is a pervasive inequality among sovereign states. Thinkers concerned with accountability and world politics recognise this but do not provide a sustained theoretical analysis of the nature of hierarchy (see below). This represents a shortcoming in the existing literature because how international inequalities are characterised has important implications for the question of democratic accountability at the international level.

For example, the realist focus on hard power and coercion would be difficult to reconcile with the possibility of putting in place institutions which make stronger states accountable.

[506] David Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39(2) *Government and Opposition* 364; Michael Zurn, 'Global Governance and Legitimacy Problems' (2004) 39(2) *Government and Opposition* 260; Joseph Nye, 'Globalization's Democratic Deficit: How to Make International Institutions More Accountable' (2001) 81 *Foreign Affairs* 2.
[507] Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *The American Political Science Review* 29.
[508] Ngaire Woods and Amrita Narlikar, 'Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank' (2008) 53(170) *International Social Science Journal* 569.

In contrast, the liberal faith in the power of sovereign equality institutionalised in international law, and the beneficent role of international institutions, insufficiently accounts for how power inequalities may actually *contribute* to making international agreements more accountable.

This paper aims to contribute to the literature on accountability and world politics by bringing to the discussion some of the insights of scholarship on international hierarchy. This literature goes beyond the well-known debate between realists and liberals, and explores status-based models which highlight how both material and normative factors constitute Great Powers. This elite class of states can help to make international agreements more accountable because they have the material means of enforcement, and because their divergent interests and diverse normative orientations help to broaden representation. When the world's Great Powers cooperate to solve global problems, and their proposals include mechanisms for dispute resolution overseen by global governance institutions, agreements are more likely to generate 'legitimacy', a concept which refers to weaker states' willingness to accept the decisions of the powerful because of the sense of fairness and the benefits which accrue to those impacted by the agreement.

To illustrate an example, the paper will discuss the Joint Comprehensive Plan of Action (JCPOA), a successful approach to nuclear non-proliferation overseen by the world's Great Powers and accepted by other members of the international community, strong and weak alike. Former President Donald Trump, of course, withdrew from the JCPOA, but this regrettable outcome illustrates, I will argue, the importance of leadership among powerful states and not the failure of these types of multilateral agreements.

This paper will be structured in the following way. First, there will be a discussion of the nature of global problems which require collective action to solve. Subsequently, the paper will examine the reasons why two key political processes — democratic elections and sovereign equality in the international system — are inadequate for democratic accountability of international agreements. Next, there will be an account of the nature of international hierarchy and how this impinges on the development of international agreements which are necessary to tackle global problems. Insights from the inter-state

status-hierarchy literature will support the argument that a plausible, although imperfect, substitute for the lack of global democracy, in the context of pervasive international hierarchy, is a series of agreements overseen by Great Powers that combine input legitimacy and legal accountability, producing what Rapkin and Braaten call 'output legitimacy'.[509] Lessons from the case study will be distilled to explore the possibility of achieving accountable agreements to solve other global problems in a multipolar world.

II COLLECTIVE ACTION PROBLEMS

All modern societies face similar dilemmas, namely, how to ensure that the costs and benefits of policies which benefit the community are equitably shared. For example, the welfare of the community is enhanced by public healthcare, which ensures that all citizens have access to it independent of socioeconomic status. This requires that everyone contribute to the pot which funds a decent healthcare system. But many citizens may decide that they want the benefits of healthcare without paying for it. If all citizens had absolute freedom to decide whether or not to pay, many would most likely opt not to, even while they continue to consume healthcare services provided by the state. This reduces the necessary funding which compromises the long-term viability of the system, making everyone, *including those who cheat,* worse off.

The coercive apparatus of the state is the main mechanism which ensures that everyone pays their fair share. By passing legislation which obliges everyone to pay via the tax system, and which punishes cheaters, the state helps to ensure the functioning of the collective good of accessible healthcare, and in the process, makes everyone better off. The same logic applies, *mutatis mutandis*, to other public goods, like a clean and secure environment. Both are not cheap, and through the coercive apparatus of the state, leaders can ensure that the costs — and benefits — are equitably shared.

At the domestic level, citizens demand some measure of accountability over these processes, chiefly understood as a 'an actor and a forum, in which the actor has an obligation to explain

[509] David Rapkin and Dan Braaten, 'Conceptualizing Hegemonic Legitimacy' (2009) 35(1) *Review of International Studies* 113, 124.

and to justify his or her conduct … and the actor *may face consequences*' (emphasis mine) for not keeping their end of the bargain.[510] Domestically, the willingness to accept consequences for non-compliance is facilitated by a *demos*, or a sense of belonging to the same political community, which helps ensure that those who inevitably lose legal and political conflicts will accept the decisions of their rivals. It is no coincidence, therefore, that democratic institutions and the nation-state co-evolved together.[511] The characteristics of nationhood — shared language, culture, and equal citizenship — gave legitimacy to policies which were not universally preferred in the political community.[512]

As long as the main arena for political problems and solutions was domestic, this system, although imperfect, permitted some degree of democratic accountability over the coercive processes essential to solving collective action problems. But, particularly since the end of the Cold War, problems which need political solutions more and more transcend national borders, a process Zurn calls 'denationalization'.[513] The elements above which ensure some degree of democratic accountability — a *demos*, elections, and a coercive state with legitimacy — are mostly absent in the international system. Rather, what we have internationally is *de jure* sovereign equality but a *de facto* hierarchy in which some states are much more powerful than others.

III INTERNATIONAL HIERARCHY AND GLOBAL PROBLEMS

Scholars recognise that hierarchies are a pervasive feature of the international system.[514] However, work on accountability and world politics mentions this phenomenon only in a cursory manner. For instance, Woods and Nalikar discuss elite states' determinative

[510] Mark Bovens, 'Analyzing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450.
[511] Held (n 1).
[512] Of course, this observation does not necessarily hold for ethnically divided states. When the state is contested for reasons of ethnicity, minorities are less likely to accept the decisions of authorities, particularly when they impinge on their autonomy or other crucial domains.
[513] Michael Zurn, 'Global Governance and Legitimacy Problems' (2004) 39(2) *Government and Opposition* 260.
[514] Ayşe Zarakol, 'Theorizing Hierarchies: An Introduction' in Ayşe Zarakol (ed), *Hierarchies in World Politics* (Cambridge University Press, 2017) starting page of chapter; Janice Mattern and Ayşe Zarakol, 'Hierarchies in World Politics' (2016) 70(3) *International Organization* 623; David Kang, 'The Theoretical Roots of Hierarchy in International Relations' (2004) 58(3) *Australian Journal of International Affairs* 337.

decisions in the World Trade Organisation (WTO) without interrogating how this hierarchy is constituted or whether secondary states accord legitimacy to them.[515] Keohane and Grant, after a detailed analysis of accountability, commit only one paragraph to the difficulty of its realisation because states are divided among Great Powers, secondary or weak.[516] Bovens,[517] meanwhile, applies his understanding of accountability to the European Union (EU) without considering how it may be impacted by Germany's and France's asymmetrical power over secondary states.[518]

Among scholars of international relations, realists would say that ultimately the powerful will do what they do, and the weak are coerced into accepting the former's decisions.[519] If this assumption is correct, accountability is mostly unachievable in the international system. Liberals, meanwhile, are more optimistic because of their faith in the power of sovereign equality and international institutions in helping to solve collective action problems.[520] Some liberals examine how power inequality, or more specifically US hegemony, can help to promote liberal ideals like free trade and democracy.[521] But it is doubtful that the US alone can ensure the accountability for agreements intended to provide global collective goods. One reason is that its power does not enjoy widespread legitimacy.[522] Equally important is that American hegemony was very brief;[523] in the present multipolar world, the pertinent question is how to reconcile a polycentric global power structure with democratic accountability.

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[515] Woods (n 3) 569.
[516] Grant (n 2) 39.
[517] Bovens (n 5) 447.
[518] On the unequal inter-state power structure of the European currency union, see Ulrich Krotz and Joachim Schild, *Shaping Europe: France, Germany, and Embedded Bilateralism from the Elysée Treaty to Twenty-first Century Politics* (Oxford University Press, 2013); Philip Giurlando, *Eurozone Politics: Perception and Reality in Italy, the UK, and Germany* (Routledge, 2015).
[519] Tim Dunne, 'Liberal Internationalism' in John Baylis, Steve Smith, and Patricia Owens (eds), *The Globalization of World Politics* (Oxford University Press, 2020) 130-44.
[520] Ibid 103-14.
[521] John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, 2011); David Lake, *Hierarchy in International Relations* (Cornell University Press, 2009).
[522] Rapkin (n 4) 126.
[523] Fareed Zakaria, 'The Self-destruction of American Power: Washington Squandered the Unipolar Moment' (2019) 98(4) *Foreign Affairs* 10.

The inter-state status-hierarchy literature is more helpful for the present purposes in part because it emphasises *both* material and ideational aspects in the constitution of rank of the Great Powers, not only the US.[524] Since the 19th century, Great Powers have been the select few who are expected to have managerial responsibilities for the entire international system.[525] By definition, they have interests which exceed their borders, in part because they have sufficient political and economic resources to make the investments and commitments necessary, say, to resolve disputes between other members of the system, and in part because they are perceived by others as possessing special responsibilities.[526] And — crucially for the discussion of accountability — among secondary states, specific Great Powers enjoy greater or lesser degrees of legitimacy. For example, the US, France and the UK are viewed with suspicion by Venezuela, Iran and Cuba; these weaker states are more likely to look towards China and Russia for leadership.[527]

Up until the mid-20th century, Great Powers were mostly concerned with international security. Since then, their responsibilities include helping to find solutions to other global problems like economic stability to climate change to nuclear proliferation. The G7, for example, allows the world's most powerful states to coordinate fiscal responses to global recessions. Having the two largest emitters of carbon dioxide, the US and China, sign the Paris agreement was essential for this attempt to fight climate change; and ensuring the world's Great Powers, including Germany, signed the JCPOA (more on this below), helped to strengthen this agreement to stem Iran's nuclear weapons program. The next section will show how having multiple Great Powers sponsor and sign agreements enhances their legitimacy.

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[524] Deborah Larson, Thazha Paul and William Wohlforth, 'Status and World Order' in Deborah Larson, Thazha Paul and William Wohlforth (eds), *Status in World Politics* (Cambridge University Press, 2014) 3-29; Gadi Heimman, 'What Does It Take To Be a Great Power? The Story of France Joining the Big Five' (2015) 41(1) *Review of International Studies* 185.

[525] Mlada Bukovansky et al., *Special Responsibilities: Global Problems and American Power* (Cambridge University Press, 2012); Hedley Bull, *The Anarchical Society: A Study of World Politics* Palgrave Macmillan, 1977).

[526] Ibid.

[527] Harold Trinkunas, 'What is Really New about Venezuela's Foreign Policy?' (2006) 5(2) *Strategic Insights* 2; Michael Dodson and Maocheir Dorraj, 'Populism and Foreign Policy in Venezuela and Iran' (2008) 9(1) *The Whitehead Journal of Diplomacy and International Relations* 71.

IV LEGITIMACY AND INTERNATIONAL HIERARCHY

In the context of international politics, Rapkin and Braaten define legitimacy as 'rightful rule' or the existence of 'oughtness'.[528] Constructivist scholars like Wendt and Friedheim have recognised that it is inter-subjective, existing in the realm of ideas and beliefs, and hence more difficult to grasp and measure, but no less important than other attributes of power.[529] Powerful states have an interest in promoting legitimacy because it makes their rule less costly.[530] Agreements with a high degree of legitimacy are easier to enforce, and increase the cooperation necessary to produce collective goods, the pursuit of which motivated the international negotiation in the first place. Moreover, international institutions have a central role in legitimacy.[531] They are not only perceived as more impartial; international organisations provide leading states with opportunities to socialise weaker states to view their rule as the best possible outcome.[532]

Rapkin and Braaten make the useful distinction between input and output legitimacy.[533] The former refers to the representativeness of an institution. For example, at the level of the nation-state, parliaments and executives have input legitimacy because all citizens have the right to vote; this helps to make their decisions broadly acceptable to the political community. Applied internationally, a one-person-one-vote global system would mean that citizens in the most populous countries, India and China, would have the final say on major decisions, and it strains credulity to imagine that citizens in other countries would accept the majority's will under these circumstances.[534] Giving each state one vote, consistent with the norm of sovereign equality, would also lack legitimacy: few would accept that, say, tiny Luxemburg and a behemoth like China should have an equal say in a major international

[528] Rapkin (n 4) 120-22.
[529] Alexander Wendt and Daniel Friedheim, 'Hierarchy under Anarchy: Informal Empire and the East German State' (1995) 49(4) *International Organization* 689.
[530] Lisa Martin, 'Interests, Power, and Multilateralism' (1992) 46(4) *International Organization* 765.
[531] Miles Kahler, 'Defining Accountability Up: The Global Economic Multilaterals' (2004) 39(2) *Government and Opposition* 132.
[532] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of International Order' (2005) *The European Journal of International Law* 369.
[533] Rapkin (n 4) 124.
[534] Nye (n 1).

policy. However, as Stiglitz mentions, *representativeness* can be achieved by increasing the diversity of interests and normative orientations of those who are parties to the bargain.[535] He illustrates this with the World Bank (WB), and how it successfully enhanced representativeness because it institutionalised the participation of a more diverse range of stakeholders — ministries of labour and health rather than only ministries of finance. Below will demonstrate how the divergent interests and normative orientations of the Great Powers' enhanced representativeness and hence input legitimacy of the JCPOA.

Legal accountability entails the setting up of relatively impartial procedures, like courts, tribunals, or mediation, which allow weaker states to defend their interests and resolve disputes.[536] This is one of the essential purposes of global governance institutions which were put in place after the Second World War, and which continue to be important arenas of international action. There is a relatively large literature which examines these processes in the WTO, International Monetary Fund (IMF), and WB.[537] In all three, elite states dominate decision making, and yet each, with varying degrees of success, has attempted to implement mechanisms to enhance legitimacy via access to dispute resolution mechanisms.

When input legitimacy and legal accountability are combined, weaker states are more willing to accept the hierarchical structure and to cooperate in the production of public goods which make most better off. Under these circumstances, "'output legitimacy' is generated, which Rapkin and Braaten define as international governance with systemic properties which produces beneficial outcomes.[538] Promoting this, however, is not cheap. It requires leading states to recognise that they are the primary beneficiaries of international agreements, and that it is incumbent upon them to bear the asymmetrical costs involved, including time-consuming and work-intensive diplomacy, making side payments to nudge reluctant states, sharing information, and funding the agencies necessary for monitoring and enforcement.

[535] Joseph Stiglitz, 'Democratizing the IMF and World Bank: Governance and Accountability' (2003) 16(1) *Governance: An International Journal of Policy, Administration, and Institutions* 111.
[536] Grant (n 2) 35-37.
[537] Stiglitz (n 30); Woods (n 3).
[538] Rapkin (n 4) 124.

V POWER AND RESPONSIBILITY

A brief history and summary of the JCPOA will help to provide a concrete example of an agreement which combines input legitimacy, legal accountability, and output legitimacy. Iran signed and ratified the Non-Proliferation Treaty (NPT) in 1970,[539] when the country was led by the Western-allied Shah Reza Pahlavi. After the Iranian Revolution, there was a falling out between Iran and its international partners, but some cooperation continued. By 2003, the International Atomic Energy Agency (IAEA), an agency which reports to the Security Council, confirmed that Iran was violating its commitments under the NPT and thus raising the spectre of economic sanctions, and potentially war, for non-compliance. A diplomatic solution was reached between Iran, France, Germany, and the UK, but the election of the conservative Mahmoud Ahmadinejad in 2005 prompted a withdrawal, leading to the imposition of sanctions by the Security Council. This put pressure on Iran to return to the negotiating table, and the election of the moderate Hassan Rouhani in 2013 led to the resumption of negotiations between the five members of the Security Council and Germany (or, as diplomats call it, P5+1).

The Obama administration invested heavily in the diplomatic process, and after 20 months of intense negotiations, a deal was finally reached in 2015 which prohibited Iran from developing weapons-grade uranium and which obliged the country to permit intrusive monitoring by the IAEA. In exchange, it would enjoy the benefits which would accrue from the gradual relaxing of sanctions. The deal would last 10 years, and the hope was that by then, Iran would become an integrated and responsible member of the international system, rendering the agreement moot. If not, the US and other Great Powers could demand an extension of the original agreement, or an adjustment to adapt to new circumstances.

It was in force for three years, and during that time IAEA confirmed that Iran was meeting its commitments. Meanwhile, Iran enjoyed access to the global economic system. Standards of living did not takeoff across the board as many had hoped, but nonetheless the easing of sanctions provided opportunities for Iran to integrate into, and develop a stake in, the

[539] *Treaty on the Non-Proliferation of Nuclear Weapons,* opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

functioning of the global economy. This lasted until Donald Trump's administration withdrew in 2018 (more on that below).

We can now interpret the JCPOA through the framework discussed in the previous section of the paper. The collective good being produced, which all countries have an interest in, is international peace and security, as the non-proliferation of nuclear weapons reduces the possibility that these weapons will be used or fall into the wrong hands. International hierarchy was instrumental in achieving the agreement: the countries with the special status of 'Great Power' — the US, China, Russia, France, the UK, and Germany — led the process, mainly because they have the economic, military, and political weight to reward compliance and punish non-compliance. But equally important is that they represent divergent interests and a diversity of normative orientations. The US, UK, and France are not trusted by Iran, while Russia and China (and perhaps Germany) are.[540] The participation of the last three enhanced the *representativeness* of the agreement and helped to satisfy an important criteria of input legitimacy.

An element which helped promote output legitimacy was the governance or institutions with the role of monitoring, enforcement, and dispute resolution. First, the IAEA had the primary responsibility to ensure that Iran was keeping its end of the bargain. This organisation, as an agency of the UN, was and is seen by Iran as more impartial than, say, the State Department or the Pentagon, both of which primarily serve America's interests. Second, in the event of evidence of non-compliance, the Security Council and Germany could reimpose sanctions. A majority of members' consent was needed, meaning that the US, by itself, could not have the final say on whether Iran was meeting its obligations. Rather, France, the UK, Germany, and the EU had to agree with the US, and if they did, neither China nor Russia could exercise their veto.

The deal enjoyed widespread legitimacy (although it was not universally accepted — Republicans in the US, Israeli Prime Minister Benjamin Netanyahu, and Saudi Prince Mohamed bin Salman were opposed). In Iran, there were joyful gatherings and celebrations

[540] Dodson (n 22).

on the streets of Tehran,[541] and Iranian president Hassan Rouhani's support subsequently increased dramatically.[542] Surveys show that public opinion was broadly favourable: 60% of American Jews and a majority of Iranians supported it, as did 63% of Germans, one of the key sponsors of the deal. There was a unanimous acceptance on the Security Council: all 15 states, permanent and rotating members, voted in favour of the JCPOA. In addition, foreign ministers of the EU member states — all of whom are democratically legitimate — gave the green light to the deal. American scholars from across the political spectrum, like Noam Chomsky on the left, and John Mearsheimer on the right, signed an open letter endorsing the agreement. Donald Trump's withdrawal in 2018 was not very popular, even in his own country; less than one third of Americans agreed with the decision.[543]

VI ABDICATING RESPONSIBILITY

The secret to the JCPOA's success included the enlightened leadership of the Obama administration; the willingness of the world's Great Powers to make the necessary political and economic commitments; and the global governance institutions, namely the UN and the IAEA, which put in place procedures which allowed the weaker state, Iran, to defend its interests and resolve disputes with some degree of impartiality.

This example illustrates how other global problems, like climate change, can be successfully tackled in the context of a multipolar and hierarchical international system. For example, a future agreement sponsored by the greatest emitters and most powerful capitals, particularly Beijing, Washington and Brussels, could include sanctions for non-compliance (such as tariffs on traded goods which are carbon-intensive) and rewards for compliance, perhaps in the form of economic supports for transitioning to the green economy. Inevitable

[541] Saeed Dehghan, 'Iranians Celebrate Nuclear Deal: 'This Will Bring Hope To Our Life'', *The Guardian* (online, 3 April 2015) <https://www.theguardian.com/world/2015/apr/02/iranians-celebrate-nuclear-deal-tehran>.
[542] Amir Farmanesh and Ebrahim Mohseni, 'Survey Finds President Rouhani's Popularity Soaring Among Iranians', *The Guardian* (online, 1 October 2015) <https://www.theguardian.com/world/iran-blog/2015/oct/01/iran-rouhani-popularity-misperceptions-nuclear-deal>.
[543] Grace Sparks, 'Majority Say US Should Not Withdraw from Iran Nuclear Agreement', *CNN* (online, 9 May 2018) <https://www.cnn.com/2018/05/08/politics/poll-iran-agreement/index.html>.

disputes on whether agreements are being adhered to can be delegated to specialised international agencies overseen by the UN's International Panel on Climate Change.

A similar model can be applied to prevent or better manage future pandemics. The world's Great Powers could craft an agreement that obliges others to quickly report local outbreaks while providing more funding and conferring more powers to the World Health Organisation (WHO) to independently investigate them. The WHO could also be an arena for an agreement on the production and distribution of vaccines. In both cases, having a diverse array of powerful states sponsor the agreement may help ensure that secondary states will see the leadership structure as fair and impartial, increasing the odds that they will accord it legitimacy. And if one Great Power temporarily withdraws, the others' commitment will increase the odds that the agreement will remain applicable.

Donald Trump's withdrawal from the JCPOA illustrates the fragility of these processes. This paper will not interrogate his expressed reasons for this decision; suffice to say that it reflected the political preferences of some hardline members of his party, who opposed the deal. Washington's reimposition of sanctions against Iran, against the will of its international partners — France, Germany, the UK and the EU — as well as the other signatories, China and Russia, was a regrettable abdication of leadership, especially as Iran was fulfilling its obligations. But it also reveals the importance of diverse Great Power participation. France, the UK, and Germany put in place a funding mechanism, the Instrument in Support of Trade Exchanges (INSTEX), to circumvent American sanctions. Meanwhile, Russia and China made an effort to continue their cooperation with Iran. Their commitment to preserve the deal even while the US abdicated global responsibility created the sense that, on this subject at least, Washington made a serious mistake (or what Grant and Keohane call 'peer and reputational accountability').[544]

Countries have noticed that America cannot be trusted; even if, in the future, an enlightened leader commits to producing mutually beneficial outcomes, he or she can be replaced by someone in the next election who will renege on the country's commitments. And other

[544] Grant (n 2).

countries have taken actions to lessen their dependence on American leadership. For example, one of the key levers of American influence is the dollar-based global trading system. In the past three years, there has been a reduction in the use of the dollar as a means of exchange. China is increasingly signing agreements with other countries which price goods in their own currencies rather than the dollar. And central banks around the world have invested in other asset classes, like gold, in order to reduce their dependence on the greenback. One consequence of this is that in the future America will have less leverage, while other Great Powers will correspondingly have more, making the latter increasingly indispensable in sponsoring international agreements which help to provide global collective public goods with some degree of accountability.

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THE CORONAVIRUS: OLD VS YOUNG

JAMES ALLAN*

This paper makes a sceptical case against the way Australia's government (and most other governments) invoked lockdowns to handle the coronavirus outbreak. This governmental response amounted to one of the biggest inroads into civil liberties in this country ever. It was based on modelling that has not stood the test of time. It significantly hurt those in the small business private sector but not those in public service or the politicians themselves. And most particularly, it was a response that differentially affected those who are young considerably more than those who are old. The author considers the morality of that and argues that this has been one of the worst public policy misfires of the last century.

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I was surprised to receive an invitation from the editors of this law journal to write a short article on the implications of the coronavirus. I was surprised because as a sceptic of bills of rights and of over-powerful judges,[1] this is not my natural home. I also happen to believe that any journal that puts human dignity front and centre – in its very title no less – will either struggle to avoid dealing in the anodyne, trite and unobjectionable (since, in one sense, who can be against it?) or it will be plunged into deep philosophical waters where it is far from clear what 'dignity' might mean,[2] indeed whether it can even escape the charge of being an empty concept.[3]

Still, the invitation was a pleasant surprise and I accepted – though not before warning the editors that my views often strike many in the lawyerly caste as heretical.[4] I, overwhelmingly, am on the side of free speech,[5] and the J.S. Mill notion that blunt speaking

[1] For a small sample of this see James Allan, 'Bills of Rights and Judicial Power – A Liberal's Quandary' (1996) 16(2) *Oxford Journal of Legal Studies* 337; James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts' (2006) 43(1) *San Diego Law Review* 1; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17(1) *King's College Law Journal* 1; James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Honourable Michael Kirby' (2009) 33(3) *Melbourne University Law Review* 1032; James Allan 'Against Written Constitutionalism' (2015) 14(1) *Otago Law Review* 191; James Allan, 'Why Politics Matters: A Review of Why Law Matters' (2018) 9(1) *Jurisprudence* 132; James Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky', in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 108-126; James Allan, *Democracy in Decline: Steps in the Wrong Direction* (McGill-Queen's University Press, 2014).

[2] The Supreme Court of Canada dabbled with the concept of dignity as a means to understand equality rights, but then abandoned this avenue. The initial dignity case was *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497. The Court there ascribed the protection of essential human dignity as the purpose of the equality right in the Canadian Charter of Rights and Freedoms, and required a demonstration that dignity was demeaned in order to succeed in establishing a Charter violation. This proved too difficult. It was abandoned about ten years later after being much criticized by academics.

[3] Just such a charge having been brought, convincingly to my mind, against the concept of 'equality'. See Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537. Westen's core point is that for the principle of equality to have meaning, it must incorporate some external substantive values that determine which persons and treatments are alike. But, once these external values are found, the principle of equality is superfluous. Put differently, equality requires some earlier substantive value to be put in play and valued before the demand for equality, for treating X the same as Y, can make sense. On its own, not in the service of some other set of values, the demand for sameness or for equality is vacuous. It is empty. Worse, equality tends to cause confusion and logical errors. Consequently, Professor Westen concludes, the rhetoric of equality should be abandoned.

[4] For instance, as other past pandemics were named (accurately or inaccurately) in geographic terms, I saw (and still see) no reason to end that practice here. Were it up to me, I would not have abandoned the original label of 'Wuhan virus' even if that amounts to little more than an idiosyncratic protest against some of the more tangential idiocies of political correctness with their willingness to stop speaking the truth if such talk might, just might, offend others.

[5] See, for example, academic pieces of mine such as James Allan, 'Hate Speech Law and Disagreement' (2013) 29(1) *Constitutional Commentary* 59; James Allan, 'Free Speech is Far Too Important to be Left to

in the back-and-forth cauldron of competing views is the least-bad and most effective method of discovering truth – feelings of offence or psychic harm be damned.

Moving on to the assigned topic, I am also something of a sceptic of the worth and merits of how the vast preponderance of governments around the world have responded to this coronavirus. Put to one side the governments of Sweden and Taiwan and one or two others and I think that governments have done a very poor job. I include Australia's response to the virus in that assessment. I predict that this will go down as one of the worst public policy misfires of the century. My initial take on the efficacy of lockdowns was very sceptical,[6] and the accumulation of evidence since then has only reinforced my view that they do not work, certainly not in any cost-benefit sense.[7] Then there is the modelling that came out of Imperial College in London (the ICL model). Now clearly it is true that there is very little about this virus, not least its lethality and prevalence, that is uncontested. There is and was much uncertainty. That said, this Imperial College modelling has proven to be woefully wrong - abysmal in fact:[8]

> The modelling by Ferguson *et al* [the Imperial College modellers] was influential in the UK and the US … Clearly, it was also influential in Australia. It has been the subject of extensive criticisms by other scientists, including a team at Oxford. As many have pointed out, the results of the Imperial College modelling were not

Unelected Judges' (2013) 4 *The Western Australian Jurist* 5; James Allan, 'The Administration of Australian Universities: A National Scandal? or Amiss in Funderland?' in William O. Coleman (ed), *Campus Meltdown: The Deepening Crisis in Australian Universities* (Connor Court, 2019) 23; together with many of my weekly columns in the *Spectator Australia*.

[6] See, eg, my contributions to the *Spectator Australia*: James Allan, 'Corona Notes', *Spectator Australia* (online, 18 April 2020) <https://www.spectator.com.au/2020/04/corona-notes/>; James Allan, 'Churchill in Reverse', *Spectator Australia* (online, 9 May 2020) <https://www.spectator.com.au/2020/05/churchill-in-reverse/>; James Allan, 'Fear Porn Panic', *Spectator Australia* (online, 23 May 2020) <https://www.spectator.com.au/2020/05/fear-porn-panic/>.

[7] See, eg, Ramesh Thakur, 'Responding to COVID-19: Are Lockdowns Doing More Harm Than Good?, *The Strategist* (online, 6 May 2020) <https://www.aspistrategist.org.au/responding-to-covid-19-are-lockdowns-doing-more-harm-than-good/>; Ramesh Thakur, 'Six Deadly Lockdown Sins', *The Japan Times* (online, 29 May 2020) <https://www.japantimes.co.jp/opinion/2020/05/29/commentary/world-commentary/six-deadly-lockdown-sins/>; Carlo Caduff, 'What Went Wrong: Corona and the World After the Full Stop' (2020) *Medical Anthropology Quarterly* (forthcoming); David Miles, Mike Stedman and Adrian Heald, 'Living with COVID 19: Balancing Costs Against Benefits in the Face of the Virus' (2020) *International Journal of Clinical Practice* (forthcoming).

[8] See, for just one critique of this modelling, Aynsley Kellow, 'COVID-19 and the Problem with Official Science' *Quadrant* (online, 15 June 2020) 12 <https://quadrant.org.au/magazine/2020/06/covid-19-and-the-problem-with-official-science/>; As for the modelling in Australia that bandied about potential coronavirus deaths of between 50,000 and 150,000 – woefully wrongheaded it turns out – see Dana McCauley, Eryk Bagshaw, and Rob Harris, 'Australia Prepares For 50,000 to 150,000 Coronavirus Deaths', *Sydney Morning Herald* (online, 16 March 2020) <https://www.smh.com.au/politics/federal/australia-prepares-for-50-000-to-150-000-coronavirus-deaths-20200316-p54amn.html>.

> subjected to peer review, and nor was the code used in the model made available, so they would not have met the [US Supreme Court's] *Daubert* standard if the coronavirus was [*sic*] the subject of litigation, rather than public policy-making.[9]

For those who find it hard to distinguish correlation and causation – who believe that the far lower than predicted death rates were *caused by* the lockdowns – there is Sweden to prove you wrong. Sweden's government, bravely, did not lockdown. It did not intrude on civil liberties in the way almost all other Western liberal democracies did. Other than banning gatherings of more than 100, and offering its citizens advice, it left them be. The deaths per million in Sweden have come in, thus far, below the tallies in Belgium, the United Kingdom, Spain and Italy, not much above France, and within sight of the United States.[10] The total number of deaths so far in Sweden have been 5,420.[11] Or put differently, 99.95 per cent of the Swedish population has *not* died of the coronavirus.[12] Remember, this is in a country that did not lockdown; did not order businesses to shut; did not indulge in extraordinary inroads into people's civil liberties; but merely gave advice and banned gatherings of triple figures or more. To show the ineptitude of the above-mentioned Imperial College modelling, Sweden without lockdowns was predicted to suffer between 70,000 and 90,000 deaths, later revised somewhat down, but in reality, has not hit 6,000.[13] As I said, these predictions have been stupendously wrong. It was these models that played some role in the responses of many governments. Yet some studies have now put the lethality of the coronavirus, in world terms, at not all that much worse than that of a bad flu season.[14]

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[9] Kellow (n 8) 14.

[10] On July 6th, 2020 at 2pm the numbers of deaths per million of population were: Belgium 843; the UK 651; Spain 607; Italy 577; Sweden 537; France 458 and the US 400. See 'COVID-19 Coronavirus Pandemic', Worldometer (Web Page, 6 July 2020) <https://www.worldometers.info/coronavirus/#countries>.

[11] Ibid.

[12] And for those Swedes under 60 years of age, 99.998 per cent have not died, making this a negligible cause of death for them. See Ramesh Thakur, 'The Rise and Fall of Coronavirus Modelling', *Pearls and Irritations* (Web Page, 27 May 2020) <https://johnmenadue.com/ramesh-thakur-the-rise-and-fall-of-the-coronavirus-models/>: "The best-known example of a country bucking the model is Sweden. Without compulsory lockdowns and with much of activity as normal, 99.998% of Swedes under 60 have survived."

[13] See Ibid. "Applied to Sweden, the ICL-like model projected that, without a lockdown instituted by 10 April, between 70,000-90,000 people would die by mid-May. The actual total on 22 May was 3,925 – significantly higher than its Nordic neighbours but far lower than most of Europe." The predicted deaths for the US were 2.2 million and for the UK half a million. For other pieces on the ineptitude of this sort of epidemiological modelling, see (n 8); see John Ioannidis, Sally Cripps and Martin Tanner, 'Forecasting for COVID-19 has Failed' (Blog Post, 11 June 2020) <https://forecasters.org/blog/2020/06/14/forecasting-for-covid-19-has-failed/>.

[14] See United States Government, *Centers for Disease Control and Prevention* <https://www.cdc.gov/>. Which now estimates the rate at about 0.26 % of contracted cases; Aynsley Kellow, 'COVID-19 and the Problem with Official Science' *Quadrant* (online, 15 June 2020)

If that is the factual side of things, there is also the moral or normative side of things. When government decides whose livelihood is, and is not, 'essential', consequences will flow from that determination. Those deemed to be 'inessential' and forced to close may well see the owners lose their business. If, as is usually the case with small businesses in the private sector, there is also a personal guarantee to finance that business then the owner may well lose the family home as well. Meanwhile, all the politicians carry on with their same pay. So do those in the public service, perhaps at worst having to put off for a few months a foreshadowed raise but possibly not, perhaps even receiving a raise. So do those whose business was able to continue trading. Likewise, many of us (not all) in the universities. On any understanding other than one couched in terms of sloganeering, or politicking, it is simply a lie to say 'we are all in this together'.[15] The response to this virus by governments around the world, and by Australia's too, has been one that affects some people, some citizens, some businesses, far more than it does others.

Or perhaps, one could consider this virus through the prism of how the media and press have in general behaved, given that from my point of view they have been woefully lacking in scepticism about many aspects of this pandemic, and at times have come close to becoming purveyors of 'fear porn'.[16]

Or, again, one might look at how this lockdown response has devastated the developing world, where far more deaths are likely to be due to the governmental responses to the virus than from the virus itself. The mooted figures here are staggering. Professor Ramesh Thakur quotes Oxfam as warning that an extra half billion could be pushed into poverty due to the virus and governments' responses to it, while also citing the UN as estimating

<https://quadrant.org.au/magazine/2020/06/covid-19-and-the-problem-with-official-science/>. 'There are at the time of writing fifty-one studies based upon the polymerase chain reaction or seriological studies that give a mean IFR [Infection Fatality Rate] of 0.27 per cent'. Death rates from the flu in developed Western countries range between 0.1 and 0.2 per cent.

[15] One might even point out that as the private sector implodes, and has to sell off assets, those with a guaranteed public sector pay will actually improve their comparative positions. Their purchasing power will grow as so many in the private sector lose their jobs.

[16] As it happens, this is one of the topics I consider more fully in another article of mine that was solicited (at about the same time this one was) by a different law review – *the Western Australian Jurist* – also for a special issue on the theme of the coronavirus. It should appear more or less when this issue appears. See too Allan (n 6), 'Fear Porn Panic', *Spectator Australia* (online, 23 May 2020) <https://www.spectator.com.au/2020/05/fear-porn-panic/>; For a critique of the press that extends to the actions of the government regulator, Toby Young, 'Who Watches the Broadcast Watchdog?' *Spectator Australia* (online, 27 June 2020) <https://www.spectator.com.au/2020/06/who-watches-the-watchdog/>.

that the resultant economic downturn could cause hundreds of thousands of additional child deaths, in 2020 alone.[17] Professor Jayanta Bhattacharya (Stanford Medical School) and Professor Mikko Packalen (University of Waterloo in Canada) note that a) the governmental responses to the virus sees the UN forecasting an economic downturn that will increase the world's numbers in extreme poverty from 84 million to 132 million; b) the lockdown may cost two years' economic growth, which 'would end up taking nearly six million young lives in the coming decade'; and c) the 'World Bank has calculated [the] countries [that] will be hit hardest, and how many more are about to end up in poverty. In Congo, 2 million. In Nigeria, 5 million. In India, 12 million'.[18]

Any or all of those issues touching on the implications of the coronavirus would have made fitting themes to fill out the remainder of this short article. In the end though, I opted for another topic to consider in slightly more depth. This is the topic of how these governmental responses (ours and other non-Swedish democracies) have differentially affected those who are old and those who are not. You see, it is plain that the young – those in university, those just out of university, those in the first few years of their careers, those still in high school, those missing early years in school, even chunks of those in their 30s and 40s – are paying a much heftier price for the heavy-handed governmental lockdown response than are the old (by which I mean not just the elderly, but those at the tail end of their careers). I want to look at the morality of that. I want to consider the trade-offs involved, whether governments actually took the time to consider them or not. I want to argue that the young have been very hard done by indeed.

To start though, readers must remember that this coronavirus does not kill the young at anywhere near the percentage levels at which it kills the old. In fact, those under 65 years of age who catch the coronavirus have pretty much the same chance of dying as they do from the flu or from driving to work.[19] In this sense, the coronavirus is nothing like the

[17] See Ramesh Thakur, 'Responding to COVID-19: Can We Save Lives and Preserve our Quality of Life at the Same Time?', *The Strategist* (online, 5 May 2020) <https://www.aspistrategist.org.au/author/ramesh-thakur>; Emeritus Professor Ramesh Thakur was Director of the Centre for Nuclear Non-Proliferation and Disarmament (CNND) in the Crawford School, The Australian National University and Vice Rector and Senior Vice Rector of the United Nations University (and Assistant Secretary-General of the United Nations) from 1998–2007.

[18] Jayanta Bhattacharya and Mikko Packalen, 'Lives vs Lives – The Global Cost of Lockdown', *The Spectator* (online, 16 May 2020) <https://www.spectator.co.uk/article/lives-vs-lives-the-global-cost-of-lockdown>.

[19] See The Editorial Board, 'The Covid Age Penalty', *The Wall Street Journal* (online, 12 June 2020) <https://www.wsj.com/articles/the-covid-age-penalty-11592003287> – 'For most people under the age

Spanish Flu of a century ago that was a good deal more lethal to the young.[20] As time goes on, even fewer young are dying of coronavirus – and I mean fewer in comparative terms, in terms of the percentage of overall deaths.[21] Or, to take just one representative US State of Pennsylvania, more people over the age of 100 have died of the coronavirus than under 45; more over 95 years of age than under 65, and more over 85 than under 80.[22] For those under 15 in Britain, there is a greater chance of dying from being hit by lightning.[23] The evidence on this is clear. It follows that government lockdowns are for the benefit of the old, not the young – since the risks the coronavirus poses for young people are ones, as I noted, even lower than those posed by the flu.

Put more bluntly, the steps taken to combat the effects of the virus have been taken to benefit the old, the ones who face out-of-the-ordinary and real risks from it. Yet, the costs of these steps taken by governments around the world (leaving aside Sweden and Taiwan and possibly Japan) have been borne overwhelmingly by the young. They do not face much risks, if any, and yet they pay the costs of the measures imposed.[24]

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of 65, the [Stanford Ioannidis] study found, the risk of dying from COVID-19 isn't much higher than from getting in a car accident driving to work'. Many people seem to have forgotten that Australians die of the flu. The yearly death rate from the flu is between 0.1 and 0.2 per cent.

[20] Even the regular flu is more lethal to the young. See Ibid. 'Fatality rate comparisons between COVID-19 and the flu are inapt because they affect populations differently. Children under age 14 are between 6.8 and 17 times less likely to die of COVID-19 than the seasonal flu or pneumonia, assuming 150,000 coronavirus deaths this year'.

[21] 'The Covid Age Penalty' (n 19) – 'In late March, Americans over age 75 made up about half of all weekly deaths [accompanying chart omitted] while those under 45 made up between four and five percent. Now those over 75 make up about two-thirds of deaths while those younger than 45 make up less than 2%'.

[22] See Pennsylvania Department of Heath Bureau of Health Statistics and Registries *Weekly Report for Deaths Attributed to COVID-19* (Report, 17 May 2020).

[23] Or so says Professor David Spiegelhalter of the University of Cambridge's Winton Centre for Risk. This was widely reported, including in Sarah Knapton and Christopher Hope 'School Age Children More Likely to be Hit by Lightning than Die of The Coronavirus', *The Telegraph* (online, 9 June 2020) <https://www.telegraph.co.uk/politics/2020/06/09/school-age-children-likely-hit-lightning-die-coronavirus-oxbridge/>.

[24] This general claim, that how governments are fighting the virus has been with an eye to benefitting the old, not the young, is not meant to rule out the plausible and real possibility that older people are on net also being hurt by lockdowns (as opposed to a policymaking 'best case scenario' of targeted protection for the vulnerable). It is just that they are being less hurt by them than are younger people. Essentially, the possibility here is that while the lockdowns have been taken in the name of the older and more vulnerable, in fact this group, just like the young, may be better off without them. This can be argued in myriad ways. For example, the old are more likely than the young to live alone and hence to have suffered damage from the social isolation produced by lockdown restrictions; the old are more likely to suffer from non-COVID-related illnesses and disabilities for which care and attention have been crowded out in this COVID fanaticism; and, in the longer run, countries that have attempted to slow the spread of the virus have delayed the building up of immunity amongst the healthy population, which in the long run is most protective of the old and otherwise vulnerable. There is no evidence that wholesale lockdowns save lives on net, but also no evidence that they save lives on net even of those vulnerable to the virus, relative to a best-case alternative policy. I thank one of the anonymous referees for this insight.

What costs are those one might ask? Well, there are quite a few. Schools have closed. For all but the brightest children or those from the wealthiest backgrounds (who can afford top private schools) this affects their life prospects. Australia's schools already do badly in international comparisons.[25] Children who in substance miss out on a year or even half-year of proper schooling suffer greatly. Classes delivered by Zoom or other technology are no substitute for face-to-face teaching, as many students and most teachers know. Much the same goes for those in university. A year with ersatz classes delivered electronically is a substandard year. Some students will drop out who otherwise would not. More than a few first-year students, isolated at home, will fail to make the new friends they otherwise would have made and will miss out on one of the great years of their life. There is even this claim from author Lionel Shriver that:

> … isolating schoolchildren within chalk circles may have a negligible epidemiological effect, but a profound psychological one. We are inculcating chronic fearfulness in our kids, who will skip from the helplessness of infancy to the neurotic hyper-caution of old age with no moon landings in between.[26]

Then there are the economic costs. It seems clear that these too, will be overwhelmingly borne by the young. If, because of the lockdowns and other governmental restrictions, the economy contracts as much as many predict, then we can expect it to be much harder for newly graduated university students to get jobs. We can expect young people in work to be laid off first, on seniority grounds. We can expect those young people who took chances – who did what any believer in a thriving, productive free-market economy would hope many would do – and shunned safe jobs in the public sector in favour of working for start-ups, or starting their own businesses, or taking on a risky job, or even just choosing the private sector will lose those jobs at a far higher rate than those who opted for a public sector job. We can expect those in their 30's with a business of their own that had taken

[25] For one example, we score below Kazakhstan in the Trends in International Mathematics and Science Study. See Dan Conifer, 'Australia Crashing Down International Leaderboard for Education, Falling Behind Kazakhstan', *ABC News* (online, 30 November 2016) <https://www.abc.net.au/news/2016-11-30/australia-declines-in-global-education-report/8077474>.

[26] Lionel Shriver, 'Is Living Without Risk Really Living At All?', *The Spectator* (online, 30 May 2020) <https://www.spectator.com.au/2020/05/is-living-without-risk-really-living-at-all/>. Shriver's point is that the 'group most inclined to elevate safety to the highest virtue is the elderly' and that this obsession with safety at all costs is not a self-evidently good thing. No country shut down its economy for the Spanish Flu, which was far more lethal. But this pandemic around 'the whole western world has clung to safety above all else. We've willingly traded prosperity, functionality, joy, good company and the productive futures of upcoming generations for short-term security'.

off but now has collapsed to suffer, maybe even losing the family home. Maybe even seeing that family break up. In the meantime, we can expect the old, with seniority, with a comparatively healthy superannuation account, and with a paid-off home to suffer less – a lot less.

There is also this. The Australian government, like those of other Western democracies, has spent huge amounts of money propping up – or trying to prop up – businesses so that fewer will go bust and fewer will lay off workers.[27] The costs of this spending has basically doubled the Commonwealth government's debt. It will have to be repaid. In the short term, there are three options for the government: 1) raise taxes; 2) borrow money; or 3) monetise the debt. The latter of those, under which governments in effect print money, is the easiest one politically. Yet, it will almost certainly be accompanied by asset inflation; those with assets will find them rising in value, possibly significantly, while those without will miss out. Or put in the terms of this discussion and generalising, the old will win and the young will lose.

Early on in this pandemic, there was much criticism of sceptics, like me, on the basis that we were characterised as comparing lives with the economy – the critics suggesting that no monetary value ought ever to be placed on a life. Yet, this is just a sophomoric response, even if 200-odd Australian economists signed a letter to that effect.[28] Society puts an implicit price on life when it sets speed limits (at a maximum of 5 km/h there would be many lives saved in terms of foregone traffic accidents, but at a huge cost to the economy

[27] Here is just one example, the government announcement of the hundreds of billions to be spent on Jobkeeper: Prime Minister of Australia, '$130 Billion Jobkeeper Payment to Keep Australians in a Job' (Media Release, 30 March 2020) <https://www.pm.gov.au/media/130-billion-jobkeeper-payment-keep-australians-job>.

[28] A link to that open letter can be found at Ramesh Thakur, 'Responding to COVID-19: Can We Save Lives and Preserve our Quality of Life at the Same Time?', *The Strategist* (online, 5 May 2020) <https://www.aspistrategist.org.au/author/ramesh-thakur>. Thakur, there, disagrees with those economists. And, of course, by no means all Australian economists agreed with these 200-odd signatories (though sceptical economists did face some severe public criticism). Gigi Foster, Peter Swan, Paul Frijters and others signed a counter open letter; See Graham Young, 'Open Up Our Country – Sign The Open Letter', *Australian Institute of Progress* (online, 8 June 2020) <https://aip.asn.au/2020/06/open-up-our-country-sign-the-open-letter/>; and Gigi Foster made her sceptical views clear on the ABC. See Economist Gigi Foster Questions Lockdown Decision on Q+A *ABC News* (online, 21 April 2020) <https://www.abc.net.au/news/2020-04-21/economist-gigi-foster-questions-lockdown-decision/12168436?nw=0>. What the 200-odd signatories overlook, or ignore, is that there is always an opportunity cost, and in the case of coronavirus that includes the medical interventions foregone, diagnostic and surgical, that will produce a reduction in life-years. The 200 simply ignored these costs, measured even in deaths. I thank a second anonymous referee for this insight which could be translated into one about the misallocation of resources.

and to lives otherwise saved by having such a flourishing economy). Likewise, not all life-saving drugs are listed on the Pharmaceutical Benefits Scheme, meaning those left off will cost the lives of some people, and will do so because of the cost of such drugs.[29] In courtrooms, an implicit price is put on life all the time.

It gets worse. Thus far, I have been treating the life of a 90-year-old as equivalent to that of the 20-year-old. In some moral senses, that is a correct assumption. However, in others, it is not. Epidemiologists talk, somewhat bizarrely, of 'quality-adjusted life years'. A 20-year-old might be expected, today, to have 60 or more years in front of him (more for a her). A 90-year-old's expectations would be massively less than that. Concomitantly, the ruined life of a 20-year-old will strike many – not just utilitarian consequentialists like me[30] – as a far worse prospect than a ruined 90-year-old's future prospects moving forward. On this (though I am three years younger than she), I am with Lionel Shriver who, in relation to the British government's response to the coronavirus, wrote 'that protecting the lives and livelihoods of young people is socially, economically and morally more important than protecting lives of people like me'.[31] It is a morally noteworthy factor, or so I say, that the old have already lived long-ish lives and hence, that policies related to dealing with the coronavirus ought to have taken that difference into account. Instead, those policies did pretty much the opposite. They favoured the old at the expense of the young.

The morality of that sort of 'safety at all costs, even if it is only really needed for that subset of society that is old' is not self-evident – especially as it is the case that when, as in Sweden, people are left to make calls on their own, and governments limit themselves to giving regular advice and urging the vulnerable and old to take special care, the death

[29] For a discussion of the cost of new hepatitis treatments, and justifying costly drugs for rare diseases more generally, see Charles Denaro and Jennifer Martin, 'The Challenge of Costly Drugs' (2016) 39(3) *Australian Prescriber* 72.

[30] See James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (Ashgate, 2002), And note that philosopher Peter Singer is reported to worry about the generational dimension to all this too; See Adam Creighton, 'Lockdowns Could Eventually Be Seen As An Over-Reaction', *The Australian* (online, 13 August 2020) <https://www.theaustralian.com.au/nation/lockdowns-could-eventually-be-seen-as-an-overreaction-says-philosopher-peter-singer/news-story/f5e9ede7faca62182f4ebbdf1aee0e68>.

[31] Lionel Shriver, 'If This is a War, Let's Fight it Like One', *The Spectator* (online, 9 June 2020) <https://www.spectator.co.uk/article/if-this-is-a-war-let-s-fight-it-like-one>.

rate is simply not high. Indeed, it is about 0.026 percent or lower – not much worse than that of a very bad flu season.[32]

I finish by quoting Lionel Shriver again because her views on this strike me as spot on:

> We've prioritised the preservation of life in a literal, short-term sense – possibly losing more lives than we've saved, once the collateral damage totals are in – while giving no priority to everything that makes life worth living, like the experience of bravery that young man leaping a gap in the wall relished last week. Worse, we've thrown the future of a generation under the bus. Safety is fine as far as it goes, but it's not the driver of a vibrant culture. Safety is about stasis. If all you care about is safety, you never leave the house, lockdown or no lockdown. Obsession with safety is the very opposite of ambition.[33]

Everything Shriver said in that quote is wholly compatible with a whole-hearted commitment to human dignity. That is why I believe the Australian government's response to this coronavirus, in time, will come to be seen as having been a public policy disaster (or fiasco, you pick).

[32] See (n 14).
[33] Shriver, 'Is Living Without Risk Really Living at all?' (n 26).

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GOOD FENCES MAKE GOOD (SPACE) NEIGHBOURS

DALE STEPHENS AND LACHLAN BLAKE*

Humanity has reached a critical point in its history. Technological advancements herald a great renaissance for humanity's reach to the stars. States and private companies plan commercial and other activities in space and upon celestial bodies, demonstrating that humankind can become an inter-planetary species. Such planning occurs in accordance with the prevailing space law regime and, notwithstanding the undeniable ambition of the planners, it is evident this space law regime does have gaps and ambiguities that must be addressed before these endeavours can be meaningfully fulfilled. This article examines the legal regime encapsulated by the 1967 Outer Space Treaty ('OST') (ratified by all major space-faring nations) and explores ways in which specific OST provisions can give rise to temporary proprietary and jurisdictional rights, which can be used to avoid future conflict in space. The authors contend that these provisions provide rights of control to States so as to manage 'facilities', to exercise jurisdiction and to observe rights of 'due regard' that in turn establish basic legal boundaries. Such boundaries, it is argued, permit confidence and certainty in the conduct of commercial and other activities upon celestial bodies, enabling competing States and companies to delimit areas in which they conduct their operations. Additionally, the article examines the capacity of military forces to operate on these celestial bodies so as to undertake a peacekeeping type role consistently with the provisions of the OST. Such a function is argued to be necessary, given the unique attribution mechanism of the OST that can give public legal significance to the acts of private companies. It is an underlying theme of this article that respecting legal boundaries on the Moon and other celestial bodies while engaging in commercial activity can create good neighbours which in turn can underpin a peaceful, stable and cooperative space environment.

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CONTENTS

I INTRODUCTION

The 1960s saw intense competition between the two major space powers, namely the United States ('US') and the former Soviet Union ('USSR.'), in their struggle to be triumphant in the space race. Despite the strong rivalry, both the US and USSR. were able to negotiate a key multilateral treaty that sets out the fundamental legal principles that would guide humanity's reach for the stars. The resulting effort, the 1967 *Outer Space Treaty* ('OST'),[1] establishes the basic framework for the conduct of all space activity and enjoys a high number of subsequent State party ratifications, including all of the major space powers today.[2] The OST provides, inter alia, that there shall be no national appropriation of space or any celestial body.[3] It also proscribes the establishment of military bases, and other particular military activities, on the Moon and other celestial bodies.[4] Such a framework is commendable in seeking to avoid the egregious mistakes that came from the colonialisation projects of European powers in former centuries, and is specifically committed to the goal of ensuring the cooperative and peaceful exploration and use of outer space.[5]

While setting out the fundamental principles for guiding space activities, the OST was very much a product of its time. Drafted when only a limited number of States had the

[1] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('OST').
[2] In particular, ratifications made by the US (10 October 1967), the Union of Soviet Socialist Republics (10 October 1967), China (12 January 1984) (by accession) and India (18 January 1982).
[3] OST (n 1) art II.
[4] Ibid art IV.
[5] Ibid Preamble, art I.

economic, technological and industrial capacity to voyage into space and the goals for human habitation of celestial bodies were very uncertain, the basic framework adequately reflected the realities of 1967. However, in the current century, it is self-evident that many more States, as well as private companies, now have the same capacities to explore and use space. Moreover, it is also becoming very clear that human settlement and exploitation of resources within space are on the cusp of being fully realised. Such exploitation of space resources is envisioned to allow humanity to travel further into the solar system and become an interplanetary species.[6] Given these imminent developments, it may be fairly asked whether the OST is optimally suited to meet the emerging challenges that have already manifested as States and private entities start and increase their activities in space. A case is made in this article that the OST framework is not ideally suited to meet current, and inevitably increasing, pressures in this area. However, it will be argued that the OST does contain provisions that provide a reasonable starting point. While it is laudable that States cannot claim space and celestial bodies as national territory, the absence of any kind of proprietary entitlement to undertake activities on the Moon or other celestial bodies, however temporary, sows the seeds for uncertainty and potential conflict. Similarly, it is desirable that the blanket prohibition on military bases and other stated military activities on the Moon and other celestial bodies serves the goal of lessening military competition and conflict. However, security concerns remain, especially under the unique attribution framework established by the OST. Article VI of that treaty links the actions of private actors in space much more directly with the State than what general international law rules otherwise provide for attribution. Such direct attribution for private actors in space thus allows for the possibility of unwitting violation of international law in circumstances where States would not otherwise be implicated. Such violation has the real chance of heightening

[6] Dylan Love, 'The Next Frontier: Space Miners are the Universe's Future Tycoons', *CNBC* (Web Page, 26 December 2016) <https://www.cnbc.com/2016/12/26/the-next-frontier-space-miners-are-the-universes-future-tycoons.html>; Adrian Turner, 'Mars and Our Path to Being an Interplanetary Species', *Financial Review* (Web Page, 18 July 2019) <https://www.afr.com/work-and-careers/leaders/mars-and-our-path-to-being-an-interplanetary-species-20190718-p528ky>; Rob Liddell, 'Could We Become an Interplanetary Species? What's Next for Space Travel', *BBC Two Stargazing* (Web Page, 2019) <https://www.bbc.co.uk/programmes/articles/27jMG32HjQmf0JGDxCNy6Nj/could-we-become-an-interplanetary-species-what-s-next-for-space-travel>.

tensions and risking conflict. Accordingly, security mechanisms that maintain control over such private actors and otherwise 'keep the peace' are necessary.

Given that humanity is about to enter a new era of space use, and the likelihood of any major new multilateral treaty is unlikely, this article will examine how the existing provisions of the OST may be interpreted and applied to achieve humanity's current goals while minimising the risk of potential conflict. A case will be made that there is some capacity to use pre-existing, though as yet untested, provisions of the OST. It will be argued that these may provide for both a sense of relative confidence in undertaking commercial activities in space as well as allowing for a sense of security and ensuring de-escalation of conflict in undertaking those very same activities. The article will comprise three parts: first, a brief survey of currently planned activities in space will be undertaken to provide context; then, an analysis of Articles VIII and XII of the OST will be undertaken to assess whether they can provide a basis for ensuring confidence in undertaking planned activity; finally, an assessment of Article IV and the prohibition on a number of military activities will be undertaken. Paradoxically, a case will be made that the restrictions outlined in Article IV need to be read narrowly in order to ensure that military forces can be deployed on 'peacekeeping' type missions to exercise control over private actors and broker disagreements in a manner that reduces the risk of escalating tension and potential conflict.

II CONTEXT OF CURRENT AND NEAR FUTURE SPACE ACTIVITIES

The new space race for the 21st century has already begun. Unlike its 1960s counterpart, the field today is comprised of numerous States, as well as many capable private actors. New technology has quite literally propelled the world into an era in which commercial uses of space are driving an economic paradigm shift. Mining on celestial bodies is an inevitability and traditional ways of thinking about international space law must shift accordingly. In April 2020, the Trump administration signed an executive order encouraging an American return to the Moon,[7] led by the US' commercial companies and precipitating an exponential increase in exploration and exploitation of mineral and

[7] United States Government Executive Order No 13914, 'Encouraging International Support for the Recovery and Use of Space Resources', Federal Register, vol 85, no 70 <https://www.govinfo.gov/content/pkg/FR-2020-04-10/pdf/2020-07800.pdf>.

chemical resources from the Moon, Mars, and other celestial bodies. The order complements the Obama administration's US *Commercial Space Launch Competitiveness Act 2015* ('*Commercial Space Act*')[8] through which the U.S. Government provided its citizens the right to claim commercial ownership of celestial resources and established the theme of a commercially led race to claim space resources. US Government officials have sought interest from China and other space faring States to engage in cooperative commercial operations in space.[9] The significance of these declarations in light of the value and the scale of commercial space industry will be demonstrated further in this paper. Other States are also planning their own commercial space initiatives: China has already announced its own long-term plans for the extraction of space resources, with the current chief scientist of the Chinese Lunar Exploration Program remarking on the feasibility of removing large quantities of Helium-3 from the Moon as long ago as 2006;[10] Russia and Europe are collaboratively assessing resource deposits on the Moon through the aptly named Prospect project.[11]

Private actors are equally important drivers of this paradigm shift. The so-called 'billionaire space race'[12] lists Jeff Bezos' Blue Origin, Elon Musk's SpaceX and Richard Branson's Virgin Galactic as its main competitors. These companies are some of the most well-known of thousands of companies interested in the commercial exploitation of space. These private actors are engaged for good reason. Predictions of the potential profits of space mining ventures are, in a word, astronomical. Goldman Sachs' conservative estimate of the value of minerals extracted from a single small asteroid at between US $25-50 billion is indeed difficult for a more terrestrially minded audience to

[8] US Commercial Space Launch Competitiveness Act, HR Res 2262, 114th Congress (2015). See Executive Order No. 13914 (n 8) for an explicit reference to the *U.S Commercial Space Launch Competitiveness Act*.
[9] Theresa Hitchens, 'WH Woos Potential Allies, Including China for Space Mining', *Breaking Defense* (Web Page, 6 April 2020) <https://breakingdefense.com/2020/04/wh-woos-potential-allies-including-china-for-space-mining/>.
[10] Jia Hepeng, 'He Asked for The Moon and He Got It', *China Daily* (Web Page, 26 July 2006) <http://www.chinadaily.com.cn/cndy/2006-07/26/content_649325.htm>; Jack H Burke, 'China's New Wealth-Creation Scheme: Mining the Moon', *National Review* (Web Page, 13 June 2019) <https://www.nationalreview.com/2019/06/china-moon-mining-ambitious-space-plans/>.
[11] European Space Agency, 'One Step Closer to Prospecting the Moon', *Science & Exploration* (Web Page, 30 January 2020) <https://www.esa.int/Science_Exploration/Human_and_Robotic_Exploration/Exploration/One_step_closer_to_prospecting_the_Moon>.
[12] David Dawkins, 'Billionaire Space Race: Elon Musk Shows Sympathy as Branson's Virgin Orbit Fails to Lift Off', *Forbes* (Web Page, 26 May 2020).

comprehend.[13] Companies like Deep Space Industries and Planetary Resources have already aimed to extract celestial resources, and their goals contributed to the creation of the US *Commercial Space Act* mentioned above.[14] The failure of these two companies in 2018 shows that the industry is volatile.[15] As will be demonstrated in this article, the law surrounding such operations poses a number of challenges for commercial operations which must be addressed. Nonetheless, the creativity of these commercial actors is boundless, and they are accomplishing significant technological feats. Blue Origin recently revealed its lunar lander and announced its plan to harvest water resources from the Moon to convert into hydrogen-based fuel.[16] Blue Origin, Dynetics and SpaceX have realised significant advancements in lunar landing technology and each received major contracts from NASA to help land humans on the Moon as early as 2024.[17] SpaceX and NASA also recently collaborated in a historic launch of a crewed mission to the International Space Station (ISS) this year, the first such mission from American soil in nearly a decade.[18] Outside the US, nearly 150 Chinese companies have entered the commercial space arena. One of these companies, Origin Space, has developed a method of telescopic prospecting, allowing China to map celestial resources through a satellite in Low Earth Orbit.[19] Interestingly, one of the billionaire participants in the new space race, Elon Musk, explicitly espouses an intention to apply this technology to the eventual human settlement of Mars, musing on the possibility of humankind becoming an interplanetary species by 2050.[20]

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[13] Jack Heise, 'Space, the Final Frontier of Enterprise: Incentivizing Asteroid Mining Under a Revised International Framework' (2018) 40(1) *Michigan Journal of International Law* 191.
[14] Jeff Foust, 'Lunar Exploration Providing New Impetus for Space Resources Legal Debate', *SpaceNews* (Web Page, 7 September 2019) <https://spacenews.com/lunar-exploration-providing-new-impetus-for-space-resources-legal-debate/>.
[15] See Atossa Araxia Abrahamian, 'How the Asteroid-Mining Bubble Burst', *MIT Technology Review* (Web Page, 26 June 2019) <https://www.technologyreview.com/2019/06/26/134510/asteroid-mining-bubble-burst-history/>.
[16] Jeff Foust, 'Blue Origin Unveils Lunar Lander', *SpaceNews* (Web Page, 9 May 2019) <https://spacenews.com/blue-origin-unveils-lunar-lander/>.
[17] Michael Sheetz, 'NASA Awards Contracts to Jeff Bezos and Elon Musk to Land Astronauts on the Moon', *CNBC* (Web Page, 30 April 2020) <https://www.cnbc.com/2020/04/30/nasa-selects-hls-lunar-lander-teams-blue-origin-spacex-dynetics.html>.
[18] Jeff Foust, 'Crew Dragon in Orbit after Historic Launch', *SpaceNews* (Web Page, 30 May 2020) <https://spacenews.com/crew-dragon-in-orbit-after-historic-launch/>.
[19] Andrew Jones, 'Chinese Space Resource Utilization Firm Origin Space Signs Deal for Space Telescope', *SpaceNews* (Web Page, 23 April 2020) <https://spacenews.com/chinese-space-resource-utilization-firm-origin-space-signs-deal-for-space-telescope/>.
[20] Mike Wall, 'Elon Musk Is Still Thinking Big with SpaceX's Starship Mars-Colonizing Rocket. Really Big', *Space.com* (Web Page, 18 January 2020) <https://www.space.com/elon-musk-starship-spacex-flights-mars-colony.html>.

Regarding the lawfulness of the mining and use of space resources, the International Institute of Space Law (IISL) has concluded that the extraction of such material from celestial bodies (for non-State parties to the Moon Agreement) is not expressly prohibited under current international space law.[21] In its 2015 position paper, the IISL notes the express prohibition on national appropriation in the OST, but acknowledges that the US legislation does not assert this and the US view of their legal rights regarding use of resources may be shared by other States.[22] Indeed, this US legislation, alongside that of the United Arab Emirates ('UAE')[23] and Luxembourg,[24] is shaping our understanding of the legality of mining operations, with each of the three countries taking collaborative steps to assert the legality of, and become global leaders in, space resource extraction.[25] This municipal legislation can be taken as state practice and *opinio juris,* and will usefully inform the interpretation of customary international law in this area.[26] Moreover, it has the capacity to inform the meaning of treaty terms in accordance with Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*.[27] As such, while such activities remain potentially legally ambiguous at present, there is an ongoing push towards their classification as lawful activity.[28]

As more State and corporate interests explicitly announce their intentions and prepare to commence space operations, debates over the manner in which space resources will be exploited become crucial to resolve before the rapidly approaching rush for resources. New issues surrounding the prospecting of resources; the building of infrastructure on

[21] International Institute of Space Law, 'Position Paper on Space Resource Mining' (adopted 20 December 2015) <http://iislwebo.wwwnlss1.a2hosted.com/wp-content/uploads/2015/12/SpaceResourceMining.pdf> (para 2: 'Therefore, in view of the absence of a clear prohibition of the taking of resources in the Outer Space Treaty one can conclude that the use of space resources is permitted').
[22] Ibid [2], [3].
[23] See Government of the United Arab Emirates, 'The UAE Space Law', Space Science and Technology (Web Page, 20 July 2020) <https://u.ae/en/about-the-uae/science-and-technology/key-sectors-in-science-and-technology/space-science-and-technology> ('*UAE Space Law*'); Federal Law No 12 of 2019 On the Regulation of the Space Sector (UAE) (2019).
[24] See Le Gouvernement Du Grand-Duché de Luxembourg, *Luxembourg Space Agency,* 'Law of July 20th 2017 on the Exploration and Use of Space Resources' (Web Page, 18 November 2018) <https://space-agency.public.lu/en/agency/legal-framework/law_space_resources_english_translation.html> ('*Law of July 20th*').
[25] See generally Scot W Anderson, Korey Christensen and Julia LaManna, 'The Development of Natural Resources in Outer Space' (2018) 37(2) *Journal of Energy & Natural Resources Law* 227.
[26] See Statute of the International Court of Justice art 38(1)(c).
[27] *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').
[28] See John G Wrench, 'Non-Appropriation, No Problem: The Outer Space Treaty is Ready for Asteroid Mining' (2019) 51(1) *Case Western Reserve Journal of International Law* 437.

celestial bodies; conflicts over resources; State jurisdiction and control over claimed resources, and resource extracting operations; and many, so far unimaginable scenarios will manifest in challenging and fascinating ways.

III THE OUTER SPACE TREATY

The range, scope and pace of thinking, investment and capability in this burgeoning field of space activity is impressive. However, the capacity of the OST to address these developments is less certain. The OST's ban on national appropriation ensures that no State can outright claim national territory in space; however, it does not set up any accompanying regime to govern temporary rights as to the use of space or celestial bodies. For example, it is easy to anticipate a potential conflict where the mining company of one country finds resources in a particular location on an asteroid or the Moon, and another company from another country moves into this very same area to extract the same resources, possibly right on top of the original area claimed by the first company. At present, the absence of any proprietary right that can be asserted by either company does not prevent such an outcome. Inevitably, such an action will lead to a dispute that may escalate into actual conflict. On earth, a State's national territory, airspace and territorial seas, have particular legal status and national military forces monitor and provide continuing security over such areas. Moreover, the rights and obligations of States and private parties are well understood, and foreign companies and other entities are provided with permission (or not) to undertake commercial activities within such areas.

The OST provides only two Articles that deal to a greater or lesser extent with proprietary rights. These are Articles VIII and XII. It will be these two Articles that will, initially at least, likely provide the foundation for seeking to set jurisdictional and legal boundaries and hence certainty for planned activities. Even so, their ambit and scope are unlikely to fully provide what is necessary. The following section will address the content and potential application of Articles VIII and XII of the OST. It will then assess the nature of the military prohibitions contained within Article IV and identify where the implied permissions in this Article may, in fact, enhance a sense of security for future planned activities.

A *Article VIII*

Article VIII of the OST provides:

> [a] State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.

Registration is normally undertaken pursuant to the terms of the 1975 *Registration Convention*.[29] Von der Dunk notes that Article VIII provides jurisdiction 'on a quasi-territorial basis' and ought to be construed as providing States 'maximum leeway' as regards jurisdiction.[30] Accordingly, a State which is the State of registry of a space object has exclusive enforcement (the right to investigate, arrest, prosecute or otherwise enforce laws), and comprehensive prescriptive (the right to make laws that can apply to nationals) and adjudicative (the right to exercise judicial control over the resolution of a dispute) jurisdiction with respect to that space object. There can only be one State of registry and thus if there are multiple States involved in the one space object, then an agreement will be necessary to nominate which State shall be the relevant State of registry.

Importantly, Article VIII does not prohibit other States from seeking to exercise prescriptive or adjudicative jurisdiction. It does mean, however, that a State that is not the State of registry cannot exercise enforcement jurisdiction within the physical area of a space object. While several States may have concurrent prescriptive and adjudicative jurisdiction, only the State of registry has the primary right of enforcement jurisdiction based upon its exclusive enforcement powers over a space object. This can be assessed with reference to state practice under the *International Space Station Agreement* ('ISS Agreement').[31] The ISS Agreement invokes Article VIII of the OST in setting out principles of jurisdiction and ownership, and illustrates how States interpret the limits of

[29] *Convention on Registration of Objects Launched into Outer Space*, opened for signature 6 June 1975, 1023 UNTS 15 (entered into force 15 September 1976) ('the Registration Convention').
[30] Frans G Von Der Dunk, 'Effective Exercise of "In Space Jurisdiction": The US Approach and the Problems It Is Facing' (2015) 40(1) *Journal of Space Law* 147, 157.
[31] Agreement Among the Government of Canada, Governments of Members States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, opened for signature 29 January 1998 (entered into force 27 March 2001) TIAS No 12927 art 5 ('ISS Agreement').

jurisdiction provided by Article VIII.[32] The ISS Agreement states that 'each Partner shall retain jurisdiction and control over the elements it registers… and over personnel in or on the Space Station who are its nationals'.[33] Accordingly, jurisdiction applies both 'in' and 'on' the component parts of the space object, thus granting the State of registration wide jurisdiction over the entire physical area of the object, including its outside surfaces and the areas within it. Each State retains jurisdiction only over those areas and is thus unable to exert enforcement jurisdiction in or on an 'element' that another State has registered.[34] This acknowledged limitation on jurisdiction supports the contention of this article as regards the boundaries of jurisdiction over space objects more generally.

This differentiation of jurisdiction between prescriptive, adjudicative and enforcement can only partially address the issue of control and certainty over commercial activity on a celestial body. It represents a very indirect mechanism for actually governing activity though the mechanism of applicable laws, and an actual capacity to enforce such laws to space objects themselves. More importantly however, it does not apply to the actual ground activity that may be occurring outside that space object. Hence, it does not stop a State asserting enforcement jurisdiction if a relevant national should leave a space object that another State has registered. Moreover, it can only apply to a space object that has a temporary presence on the celestial body. Hence, space objects such as lunar landers or spacecraft that are intended to depart from the celestial body, would be subject to Article VIII but they would not be subject to the more comprehensive rights that Article XII of the OST provides. This distinction between objects temporarily on the surface of celestial bodies and facilities that are established on the same surface is demonstrated by the negotiating history of Article XII, which evinces an intent that visitation provisions will apply only to facilities permanently stationed on a celestial body. This is clear in the treaty's listing of stations constructed and operating permanently on celestial bodies, as against the rejection of the insertion of 'platforms' in orbit into the list of visitable items

[32] Zhao Yun, 'Revisiting the 1975 Registration Convention: Time for Revision?' (2004) 11(1) *Australian Journal of International Law* 106, 117.
[33] ISS Agreement (n 32) art 5.
[34] See discussion of these principles under a previous ISS Agreement in Stacy J Ratner, 'Establishing the Extraterrestrial: Criminal Jurisdiction and the International Space Station' (1999) 22(2) *Boston College International and Comparative Law Review* 330-332.

including 'stations, installations, equipment and space vehicles'.[35] Thus, if a space object is intended to operate permanently on the surface of a celestial body, then it will be a 'facility' subject to Article XII rights and obligations. There is yet to be any definitive agreement or judicial assessment for when a 'space object' (Article VIII) can become a 'facility' (Article XII), although indicia regarding the permanence of placement such as being fixed in location, would likely be relevant to any such conclusion.

While Article VIII does provide for the exercise of primary enforcement jurisdiction over a space object, albeit even one that is temporarily located on a celestial body, it is unlikely to provide for the required level of operational and legal certainty for the ambitious commercial off world activities that are currently planned.

B *Article XII*

Article XII of the OST relevantly provides:

> All stations, installations, equipment and space vehicles on the Moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.[36]

The term 'facility' used in the last sentence of this Article at least applies to all 'stations, installations, equipment and space vehicles' on the Moon and other celestial bodies. This Article only applies to facilities on the Moon and other celestial bodies — it does not apply to facilities in outer space itself.

The negotiating history of this Article reveals that an attempt was made by the US to replicate a similar provision contained within the Antarctic Treaty.[37] Such a provision gives liberal rights of 'visit' and 'inspection' to all State parties to that treaty, to facilities

[35] Summary Record of the 64th Meeting, UN GAOR, 4th Comm, 5th sess, 64th mtg UN Doc A/AC.105/C.2/SR.64 (24 October 1966) 7 ('UN COPUOS 64th Meeting'). See, also, UN COPUOS 64th Meeting 5, 8, 9.
[36] OST (n 1) art VII.
[37] *The Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force June 23 1962); *Summary Record of the 63rd Meeting*, UN GAOR, 4th Comm, 5th sess, 63rd mtg UN Doc A/AC.105/c.2/SR/63 (20 October 1966) ('UNCOPUOS 63rd Meeting') at 6.

established in Antarctica. This very liberal access proposal was rejected, in particular by the USSR, during the OST negotiations. This rejection was manifested in the concept of reciprocity that was discussed at relative length during the negotiation of Article XII. Proposals were discussed regarding the need to have actual facilities on the Moon or a celestial body before this right could be exercised.[38] Similarly, the issue of whether there needed to be parity in the number of facilities, as to whether the right could be exercised, was also raised.[39] Both of these issues were resolved in favour of expanding the capacity to visit other facilities.

The issue of reciprocity, however, ignited considerable debate during the negotiating process as to the exercise of the substantive right in the first place. Not without a level of ambiguity, a general consensus emerged that dealt with the question of reciprocity in terms of acknowledging an indirect veto States had in restricting access to their facilities. Hence it was acknowledged that 'any State which was affected by the refusal of another State to grant access could, on the basis of the principle of reciprocity, suspend its obligations to allow access'.[40] Critically, the Soviet amendment that introduced the concept of reciprocity to Article XII 'suggested to several delegations that if a particular nation, which controls a station on a celestial body, has no desire to inspect the stations … of other nations, it is under no obligation to permit visitors from other stations to enter its own stations'.[41] Such an agreed result means that a refusal to allow a visit would be lawful and the consequence of that action would be the lawful denial of a corresponding right to visit the facilities of the requesting State party.[42] This is not a result of the operation of international law and remedies against unlawful conduct,[43] but rather an exercise of lawful discretion under the wording and meaning of Article XII.

Where a State party was willing to agree to a visit, then it needed to receive 'reasonable advance notice' of a projected visit to then undertake 'appropriate consultations'. Such consultations are predicated upon the need to ensure 'that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to

[38] UN COPUOS 64th Meeting, (n 35) 5.
[39] Ibid 5.
[40] Ibid 6.
[41] Paul Dembling and Daniel Arons, 'The Evolution of the Outer Space Treaty' (1967) 33 *Journal of Air Law and Commerce* 419, 448.
[42] UN COPUOS 64th Meeting (n 35) 6-7 (Canada), 8-9.
[43] Ibid (Italy) 8.

be visited'. This directly reflects the treaty negotiation consensus that access is not absolute and that the right of visit is subject to serious considerations of safety and non-interference with normal operations.[44] This would allow for restricted access and controlled conduct within specified areas in a facility to ensure that safety concerns and avoidance of interference with normal operations could continue.

The term 'visit' as used in Article XII is not defined in the OST. It is nonetheless notable that the term used in the Antarctic Treaty, which was initially in contemplation during the negotiations of Article XII,[45] allows for an unlimited right of open access to all 'stations, installations and equipment' anywhere within Antarctica and a corresponding right of 'inspection' of those same facilities at 'all times'. Similar absolute access rights as proposed by the US during the OST negotiations were not accepted. More particularly, rights of 'inspection' as opposed to reciprocal 'visit' are not included within the wording of Article XII as a result of the Soviet resistance to the verbatim inclusion of terms as found in the Antarctic Treaty. In fact, the Soviet delegate rejected that such an automatic comparison could be made between the legal and physical similarities of Antarctica and outer space.[46]

Article XII represents the only provision in the OST that gives (indirectly) a right of control over access to a facility. It does not actually define what a 'station' or 'installation' is, but presumably there is scope to cover the physical limits of such a facility including its ground area. The power to deny entry, with the necessary consequence that such reciprocal rights are also denied, would give a State (and a company of that State) a right to control access to a physical area where such a facility was located. In addition, as discussed below, there is a suggestion with the so called 'Artemis Accords' that an associated safety zone around a facility could also expand beyond the physical limits of the facility itself, thus providing a broader range of control.

The US 'Artemis Accords' are a consensus-seeking attempt to develop this concept of safety zone and bring it into the accepted canon of lawful activities on celestial bodies under international space law. These Accords, presently not fully announced, will attempt to gather a number of countries and private actors in a shared recognition of, among other

[44] Ibid 8-10 where comments from Soviet, Japanese and Italian delegates reinforced this point.
[45] UNCOPUOS 63rd Meeting (n 37) 6.
[46] Ibid 10.

things, the lawfulness of safety zones surrounding celestial installations. NASA cites principles found under Article IX of the OST, that States should have 'due regard' to the interests of other space-faring States, and that they should avoid 'harmful interference' with the activities of other States, as a legal basis for the establishment of these zones.[47] State practice in adopting the Accords and implementing such zones will help to inform the standard and scope of the requirement to show 'due regard' under Article IX, as well as the threshold for triggering this responsibility. The Accords also seem to invoke principles under Article XI of the OST as regards safety zones, suggesting that public information about the 'location and general nature of operations' will affect their establishment and scope.[48] Further, they aim to achieve international consensus on the extraction of space resources, with NASA citing Articles II, VI and XI of the OST as supporting the lawfulness of such activities.[49] It is clear that this signals a more *laissez faire* interpretation of the OST's prohibition on national appropriation, reflecting the positions already taken by the US, UAE and Luxembourg.[50] However, NASA also suggests the Accords will facilitate 'exploration, science and commercial activities for all of humanity to enjoy', seemingly echoing the sentiments of Article I of the OST.[51] Overall, the Accords are an encouraging step toward the establishment of accepted, practical measures to implement obligations and rights under Article XII of the OST.

It ought to be noted that the Accords explicitly repudiate principles of the *Moon Agreement,* which will pose challenges for those few States that have ratified that treaty (such as Australia). The Accords most notably clash with the *Moon Agreement*'s proscriptions on unilateral extraction and ownership of space resources.[52] This is in line with the aforementioned US declarations that the *Moon Agreement* does not reflect customary international law.[53] Thus, States that accept principles of the Accords would

[47] NASA, 'Principles for a Safe, Peaceful and Prosperous Future', *The Artemis Accords* (Web Page, May 2020) <https://www.nasa.gov/specials/artemis-accords/index.html>.
[48] Ibid. See also OST (n 1) art XI.
[49] NASA (n 47) 6.
[50] See U.S. Commercial Space Launch Competitiveness Act (n 8); The UAE Space Law (n 23); Law of July 20th (n 24).
[51] NASA (n 47) 6; OST (n 1) art I.
[52] Ibid. See also *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) art 11 ('Moon Agreement'). See also commentary by Dennis O'Brien, 'The Artemis Accords: Repeating the Mistakes of the Age of Exploration', *The Space Review* (Web Page, 29 June 2020) <https://www.thespacereview.com/article/3975/1>.
[53] See Executive Order No 13914 (n 8).

seemingly signal a rejection of the framework underpinning the *Moon Agreement.* Accordingly, the relatively few parties to the *Moon Agreement* have a separate regime to navigate in adopting the Accords.

At present, there are no facilities on the Moon or any other celestial body and hence no exercise of Article XII rights and obligations. It is likely, however, that when commercial activities are commenced on such bodies, that Article XII will quickly acquire great significance. It remains the only provision in the OST that recognises a sense of physical legal boundaries on a celestial body. As such, the actions of States and private companies when invoking the terms of this Article will establish relevant 'subsequent State practice'[54] for the purposes of informing meaning of Article XII that will thus provide a critical foundation for understanding in decades to come.

IV MILITARY ACTIVITIES AND THE PROVISION OF SECURITY IN SPACE

Article IV of the OST provides that 'The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes' and proceeds to identify three specific military prohibitions on the Moon and other celestial bodies: namely, (1) the establishment of military bases, installations and fortifications, (2) the testing of any type of weapons, and (3) the conduct of military manoeuvres. In addition, Article IV also specifically prohibits the installation of weapons of mass destruction on the Moon or other celestial bodies. Article IV then provides that military personnel undertaking scientific research or 'for any other peaceful purpose shall not be prohibited'. Similarly, Article IV makes clear that the use of 'any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited'.

The term 'peaceful purposes' has been accepted to broadly mean 'non-aggressive' purposes as read consistently with the United Nations (UN) Charter.[55] In respect of this view, a Canadian Government working paper presented at the Conference on Disarmament in 1986, specifically examined this issue of 'peaceful purposes'.[56] The

[54] *VCLT* (n 28) art 31(3)(c).
[55] See, eg, US Department of Defense, *Law of War Manual* 2015 (General Counsel of the Department of Defense, December 2016) 944, n 168.
[56] Working paper submitted by the Canada Delegation to the Conference on Disarmament, 'Terminology Relevant to Arms Control and Outer Space', CD/716, CD/OS/WP.15, 16 July 1986 ('Canadian Working Paper').

Canadian Government evaluated the views of States on this term, paid regard to the negotiating history and subsequent State practice, and looked at analogous treaties. It concluded that this term 'peaceful purposes' was to be read narrowly and that military restrictions needed to be expressly stated in a treaty such as the OST.[57] Such a view is also reflected by academic commentary. Hobe, for example, notes that:

> The text of the Outer Space Treaty hence remains silent on the precise meaning of the notion "peaceful purposes". At the very least, the travaux of the Outer Space Treaty do not support a reading that would interpret "peaceful uses" as outlawing all military uses of outer space. Though the United States had urgently favoured this approach at the beginning of the space era, it soon turned to the non-aggressive doctrine. Likewise, the USSR, while publicly supporting the "non-military view", used satellites to carry out military activities in the guise of scientific research during the Outer Space Treaty negotiations.[58]

Hobe goes on to observe that '[t]he practice of the US and Russia may lead one to conclude that the two original space powers do not favour an interpretation of peaceful as "non-military"'.[59]

The wording of the OST is unlike similar terminology used in the 1959 Antarctic Treaty that prohibits all military activity in that region, including 'any measures of a military nature'.[60] While the wording is subtly different, the significance is considerable. Article IV of the OST does not use that same unqualified language as the Antarctic Treaty in its prohibition of military activity. As the Canadian working paper on this issue concluded, the correct Treaty analogy would be Article 88 of the Law of the Sea Convention, which similarly 'reserves' the high seas for 'peaceful purposes' but outside of restricting acts of aggression imposes no further limitation on military activity.[61] Hence, it is open to conclude that outside of the specific prohibitions enumerated in Article IV (which unlike

[57] Ibid 15.
[58] Stephan Hobe, 'The Meaning of Peaceful Purposes in Article IV of the Outer Space Treaty' (2015) 40 *Annals Air and Space Law* 9, 14.
[59] Ibid 16.
[60] Article I of the Antarctic Treaty (n 37) provides: 'Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.'
[61] Canadian Working Paper (n 56) 15.

the *Antarctic Treaty* are not given as illustrative examples of what is prohibited, but rather is an exhaustive list), these provisions do permit the conduct of some military activity on the Moon and other celestial bodies. Hence, there is no explicit prohibition of military personnel occupying facilities, provided that such facilities are not established as a military base, installation and/or fortification. Similarly, while conventional weapon testing upon the Moon or other celestial bodies is prohibited, as is the installation of weapons of mass destruction, the general presence and carriage of personal weapons is not expressly prohibited. Finally, military activities that do not constitute 'manoeuvres' are not prohibited. This term contemplates the mass movement of troops in formation, not the presence of a small security force. However, military activities outside of the specific prohibitions contained in Article IV are still subject to the 'peaceful purposes' obligation and must therefore be consistent with the UN Charter which is directly applied to outer space by virtue of Article III of the OST. While efforts to minimise the overt militarisation of the Moon and other celestial bodies with the listing of specific prohibitions is a desirable goal, it should also not be forgotten that military forces can also act to enhance stability and security. This is especially the case with respect to controlling private actors engaging in activities in space. The OST creates a unique status of private actors in space that implicates deeper issues of international law, in particular the regime of State responsibility. Hence, Article VI of the OST provides as follows:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.[62]

[62] OST (n 1) art VI.

The wording of Article VI resolved an early potential conflict between the USSR and the US. Originally, the view taken by the USSR. was that only States could undertake space activities, whereas the US took the view that private companies, as non-governmental entities, should also be able to undertake space activities. Article VI represents a compromise where private companies are permitted to undertake space activity, however, 'the State concerned' with a non-governmental entity is to bear international responsibility for the activities of that non-governmental entity. As Von Der Dunk notes, this means there would be 'private activity but public responsibility'.[63] There has not been any great elaboration of what the term 'national activities' means within international legal discourse.[64] Academic commentary (coupled with perspectives reflected in national legislation) has largely resulted in a consensus view that 'jurisdiction' over a nation or company satisfies this requirement.[65] What is striking about Article VI is its very unique application of attribution for the actions of private companies in undertaking activities in outer space. Extending way beyond what the normal rules of State responsibility require for attribution,[66] Article VI imposes a strict requirement of attribution upon States. Accordingly, should a private company undertake malevolent or unlawful behaviour in space, the relevant State concerned would bear international responsibility for that activity. As Von der Dunk poignantly notes, 'Contrary to the version of the concept applicable under general international law … Article VI [makes] no difference as to whether the activities at issue were the State's own … or those of private actors'.[67] This consequence has very significant implications with respect to unpredictable and impulsive actions undertaken by a private company that constitute a use of force contrary to Article 2(4) of the UN Charter or even an 'armed attack', thus allowing a targeted State to respond in self-defence under Article 51 of the UN Charter.[68] Accordingly, this unique attribution regime requires that effective security control be exercised over the activities of such a company, especially where there is competition and uncertainty as to proprietary rights concerning extraction activity on a celestial body.

[63] Frans Von Der Dunk, 'The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law' in Frans Von Der Dunk (ed), *Studies in Space Law* (Martinus Nijhoff, vol 6, 2011) 1, 3.
[64] Ibid 4.
[65] Ibid 4-7.
[66] Ibid 4.
[67] See ibid.
[68] Charter of the United Nations.

Paradoxically, therefore, ensuring military security and oversight of a State's private entities on a celestial body enhances the necessary control to avoid escalation and potential conflict. This type of military deployment is well accepted in military doctrine and also well practiced in the context of international peacekeeping, which has been successfully undertaken over the past 70 years within the terrestrial environment,[69] and can have obvious application in outer space.

In addition to the issue of attribution and ensuring control, there is ample evidence of military to military connections within the terrestrial environment encouraging stability and understanding. Military diplomacy itself has an enviable record of averting conflict and preserving equilibrium in otherwise tense contexts.[70] The OST does permit military members to operate on the Moon and other celestial bodies, subject to specifically stated prohibitions. Hence, any effort to further 'read down' the permissions contained within the OST for military forces to provide security, may deliver unanticipated consequences, regarding escalatory conduct by private entities and potential conflict.

V CONCLUSION

Humanity is at a key moment in its ambitions for space use and settlement. We are poised to undertake a truly momentous leap in our history by exploring, using and settling in space. We are about to become an inter-planetary species. The capacity for human ingenuity has allowed private industry in conjunction with State support to realistically plan on the manner in which this can be undertaken. The existing central treaty for space — the OST — that was negotiated over 50 years ago, does provide a basic framework of principles that will guide this endeavour. However, that treaty was negotiated before humanity had even walked on the Moon, and while some of its provisions can be made to work, it is not optimal. While it is timely to consider negotiating a new space treaty that deals with emerging issues in a comprehensive fashion, the chances of this occurring are not good. The last major Space Treaty negotiated was in 1979 with the Moon Agreement and to date has a mere 18 ratifications (with no major space faring nations as party). Given this record, there seems little likelihood that a new treaty will provide necessary

[69] United Nations, 'What Peacekeeping Does', *United Nations Peacekeeping* (Web Page) <https://peacekeeping.un.org/en>.
[70] See Amy Ebitz, The Use of Military Diplomacy in Great Power Competition (Brookings, 2019).

solutions. However, as argued in this article, there are provisions in the existing OST that do provide a level of legal foundation for developing a framework that can underpin future planned human activity in space.

Indeed, future space use and human settlement on celestial bodies must be undertaken with a sense of confidence in the legal rights and obligations that will accompany planned activity. Outer space cannot become a 'wild west' free for all, where the strongest prevail and armed conflict becomes an optional means for success. The current OST regime, even with its current limitations, must be applied creatively to ensure that the interests of all are protected and that States remain responsible and accountable for their actions. In this context, the proverb that 'good fences make good neighbours' rings true. Humanity's development of resources on celestial bodies to expand our ambitions in space needs to be undertaken in a context of certainty. One where security is maintained by those who are directly responsible under international law to their State and have the capacity to control otherwise wayward behaviour. We need to be realistic in ensuring the tendencies of human nature which can bring out our worst are properly contained, so as to allow the best of humanity to flourish as we enter this new golden era of space exploration and use.

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