SHORTER ARTICLES, COMMENTS AND NOTES

FROM NUREMBERG TO ROME: RESTORING THE DEFENCE OF SUPERIOR ORDERS

A plea of superior orders in response to charges founded upon violations of the international laws of armed conflict has since 1945 been treated as a plea in mitigation of sentence rather than as a defence, a position founded upon article 8 of the 1945 Charter of the International Military Tribunal at Nuremberg. In 1998 the draft Statute of the proposed permanent International Criminal Court appeared, by article 33, to "restore" superior orders as a defence, a move deprecated by some as an apparent softening of the international legal approach to war crimes in an age in which such violations are all too prominently before the world's scrutiny. In fact both the formerly received "Nuremberg" doctrine and the appearance of a radical change, or reversion, in the 1998 Statute can be argued to be erroneous. It is the contention of this paper that far from advancing a new and stricter doctrine, the Charter of the IMT at Nuremberg correctly applied pre-existing doctrine in extreme and unusual circumstances but was mistakenly taken to have developed a new approach which was then applied with potentially distorting effect for the generality of circumstances. In this view the 1998 Statute has merely recognised the essential doctrine of superior orders as it existed prior to 1945 and which, properly understood, should not have been thought essentially to have been changed even in 1945.

I. SUPERIOR ORDERS BEFORE NUREMBERG

Before 1945 the generally accepted analysis of the defence of superior orders was founded upon what might fairly be considered an "ought to know" doctrine. The position was broadly that a soldier who obeyed an order issued by a superior to perform an act which later proved to have been unlawful would have a defence in any consequent legal proceedings if, and only if, the order was one which could credibly have appeared lawful at the time when it was received. If the order was such that the illegality must have appeared manifest *ab initio*, then there would be no defence although there might still be a plea in mitigation founded upon *respondeat superior*. The nature and implication of this doctrine may readily be traced through a series of municipal and international cases going back to the early 19th century.

An early example may be seen in *R* v. *Thomas* in 1816[1] in which a Marine sentry serving on board HMS *Achilles*, then at anchor at a home port, had been ordered by the officer of the watch to keep small boats and harbour craft from approaching. After repeatedly warning off one persistently approaching boat he finally fired upon it. killing one of the occupants. At his subsequent trial for murder, apparently before a civilian court, Thomas was convicted but the jury added a strongly worded recommendation that he be pardoned. This was not

1. (1816) 4 M&S, 41.

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strictly a case of an unlawful superior order as one of an ambiguous order disastrously, but not wholly unreasonably, misinterpreted. When the potentially drastic consequences of questioning an order in the early 19th century Royal Navy are taken into account, the jury's sympathy for Thomas seems by no means misplaced.

The most important British case in this area occurred just under a century after *R* v. *Thomas* with the decision in *R* v. *Smith* in 1900.[2] Smith whilst serving as a private soldier in the second Boer War was a member of a patrol sent to Jackalfontein to detain men believed to be about to join the enemy. One man having been detained the Commanding officer, Captain Cox, ordered one of the farm servants, Dolley, to bring a saddle for the horse upon which the prisoner was to be conveyed to Naauwport. Dolley repeatedly refused and, upon Cox's orders, Smith then shot him. Smith was tried for murder before a special Tribunal convened under the Indemnity and Special Tribunals Act 1900 in Capetown. He pleaded superior orders and was acquitted. The essentials of the "ought to know" doctrine were concisely stated by Solomon J., in judgment as follows,

> If a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they are unlawful, the private soldier would be protected by the orders of his superior officer.[3]

The essence of the judgment, and the doctrine, is found in the central portion of the cited passage, in the reference to "orders . . . not so manifestly illegal that he must or ought to have known that they are unlawful". The historic "ought to know" doctrine can be found in other jurisdictions, e.g. in the USA in *Riggs* v. *State* (1866) and *Commonwealth ex rel. Wadsworth* v. *Shortall*,[4] but the most significant cases after *R* v. *Smith* for the present purpose were those taken after the First World War by the German *Reichsgericht* at Leipzig in the *Dover Castle* and *Llandovery Castle* cases.

In the *Dover Castle* case[5] the British hospital ship HMHS *Dover Castle* was torpedoed and sunk by UC-67 in the Tyrrhenian Sea on 26 May 1917. At his post-War trial, conducted upon Allied insistence, the commander of the U-Boat, Kapitanleutnant Neumann, in essence pleaded superior orders upon the basis that he had been instructed that British hospital ships were being unlawfully used as troop transports and had therefore lost their protected status under 1907 Hague Convention VIII.[6] This assertion was in fact erroneous and appears to have been founded upon a mistaken identification of personnel from the Canadian Military Medical Corps, then newly arrived, whose uniform resembled at a distance that of British infantry officers. Neumann was acquitted, the Court having accepted that he had no reason to question the information given to him by German naval command and that his action, had that information been accurate, would have been entirely lawful. The Court concluded that,

2. (1990) 17 S.C.R., 561.
3. Ibid.
4. For discussion of the general case jurisprudence see L. C. Green, *Superior Orders in National and International Law* (A. W. Sijthoff, 1976, especially at pp.122 ff.).
5. (1922) 16 *American Journal of International Law*, p.704).
6. The modern equivalent is 1949 Geneva Convention II, specifically article 34.

> . . . a subordinate who acts in conformity with orders is . . . liable to punishment . . . *when he knows* [compliance would] . . . involve a civil or military crime or misdemeanour.[7]

The emphasis is added. The decision caused predictable outrage in Allied countries but was in fact surely correct. The dilemma of false or erroneous intelligence is a common one in armed conflict and has arisen many times since the sinking of the *Dover Castle*. Recent instances include the bombing of the Amirayah Bunker in the 1990–91 Gulf Conflict and the attack upon a Serbian military convoy which also included a column of refugees during 1999 NATO air strikes in the Kosovo crisis.[8] As in these more recent instances the sinking of HMHS *Dover Castle* is at the level of the U-Boat's action to be seen as a tragic accident of war rather than a war crime. Legal liability, if any, would lie with those who issued the false direction to Neumann, but this matter appears not to have been investigated further.

The *Llandovery Castle* case[9] involved quite different facts. Another former Union-Castle liner in use as a hospital ship was torpedoed and sunk by U-86 on 27 June 1917. The submarine then surfaced and machine-gunned the survivors—apparently in an attempt to conceal the fact of the sinking. At the subsequent trial in Leipzig the Commander of the U-Boat, Kapitanleutnant Patzig, had disappeared but his responsible subordinates submitted a plea of superior orders. The plea failed because the Court held that an order to massacre shipwrecked survivors was so manifestly unlawful that it could not afford a defence. It was stated in judgment that,

> . . . military subordinates . . . are under no obligation to question [superior orders] . . . but no such confidence can be held to exist if such an order is universally known . . . to be . . . against the law.[10]

The defendants were convicted and received varying sentences of imprisonment—from which incarceration it must be added they almost immediately "escaped". These two contrasting cases set out the broad parameters of the "ought to know" doctrine as it existed up to 1939. At the end of the Second World War with its appalling and sanguinary catalogue of military, and civilian, crimes a situation was faced in the application of international criminal law which had not in practice been dealt with before. It is the common view that the trials which followed in 1945 radically altered the understanding of *respondeat superior*, but whether that was truly the case may be questioned.

B. The Nuremberg Doctrine

At the end of the Second World War the Allies were faced with a hitherto unprecedented situation both in the scale of the atrocities uncovered and the totality of the defeat of the Axis Powers. The decision to conduct international war crimes trials of the major war criminals before International Military Tribunals at Nuremberg and Tokyo, and of lesser offenders before Allied

7. (1922) 16 *American Journal of International Law*, at pp.707–708.
8. See *The Times* (London), 20 April 1999.
9. (1922) 16 *American Journal of International Law*, 708.
10. *Ibid*., at p.722.

Tribunals in the various occupied zones,[11] was of great importance in the development of international criminal law but falls outside the scope of the present discussion. The significant point for the present purpose is the character of the defendants before both the Nuremberg and Tokyo Tribunals. They were for the most part political leaders of cabinet rank and military officers at very senior levels of command, in most cases at the level of general staff leadership. Both the German Third Reich and the Japanese Empire were through most of the 1930s and in the war years authoritarian States to an extreme degree in which orders and instructions from above were not, in theory, open to question. In the Third Reich in particular this idea was given formal expression in the *Fuhrerprinzip*, or Leadership Principle, according to which every level of the State apparatus was governed by and answerable to the next level in the hierarchy with the whole system culminating in direction by the Fuhrer. In this situation there was an understandable concern that the defendants might attempt to plead "superior orders" in a system of infinite regression in which all responsibility would be placed upon Hitler, who was by then conveniently dead. The situation in Japan was significantly different in that both the Allies and the major defendants were supremely anxious to avoid holding the Emperor responsible for the wartime policies of Japan, albeit in this case more from the viewpoint of sustaining constitutional stability and continuity.[12] It is in these contexts that the relevant provisions of the respective Charters of the Nuremberg and Tokyo Tribunals must be seen.

Article 8 of the Charter of the International Military Tribunal at Nuremberg provided that,

> The fact that the Defendant acted pursuant to orders of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

The same principle was enunciated by article 6 of the Charter of the International Military Tribunal (Far East) at Tokyo, which provided that,

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

In the present context the key questions are whether these provisions represented a shift in international legal doctrine and whether they were in fact necessary. It is contended that the answers must in both cases be in the negative. Under the pre-1945 "ought to know" doctrine as it has been outlined above it is clear that no defence was afforded in circumstances in which the illegality of an order which was sought to be relied upon was so manifest that the recipient knew, or ought to have known, that the instruction was unlawful. Where politicians of cabinet rank and officers at the most senior levels of command are on trial it is difficult to see

11. For discussion of the British Tribunals see A. V. P. Rogers "War Crimes Trials under the Royal Warrant: British Practice 1945–1949" (1990) 39 I.C.L.Q. pp.780–800.

12. For an illuminating discussion see T. Crump, *The Death of an Emperor* (Oxford University Press, 1991).

how, upon the face of this doctrine, a "defence" of superior orders could have been available to them. These were very far from being "simple soldiers", or even "simple officers", receiving military orders which they were enjoined by discipline and training to obey. On the contrary, these were the very authorities which were participating in the formulation and issuing of the guiding orders and directions in question. It was also unequivocally clear that the upper echelons of the Third Reich were all too well aware that many of their decisions and actions were made and undertaken in violation of international law. A stark example may be found in Hitler's Commissar Order in relation to the Russian front, in which he stated that,

> The war against Russia cannot be fought in knightly fashion. The struggle is one of ideologies and racial differences, and will have to be waged with unprecedented, unmerciful and unrelenting hardness. … Any German soldier who breaks international law will be pardoned.[13]

Viewed in this light it may be questioned whether the Nuremberg and Tokyo Charters necessarily altered the legal status of a plea of superior orders at all. It may rather be argued to be the case that they simply stated the natural application of the established "ought to know" doctrine in the very particular context of the cases with which they were called upon to deal.

Indirect support for this proposition may be found in the *Peleus* case[14] tried at the same time as the Nuremberg hearings by a British Military Tribunal in Hamburg. The facts closely paralleled those of the *Llandovery Castle* case. The Greek freighter *Peleus* was torpedoed and sunk by U-852 on 13 March 1944, an act lawful in itself. The U-Boat then surfaced and machine-gunned the survivors. The reason for this action never really emerged—it was suggested that the Commander, Kapitanleutnant Eck, had recently lost relatives in an Allied air raid and that the massacre was an act of personal vengeance—this, however, seems a far fetched explanation. Eck himself resolutely refused to plead "superior orders", apparently because this would inevitably have referred to the notorious *Laconia* order[15] and proved a grave embarrassment to Grand Admiral Doenitz, then on trial at Nuremberg. Eck's subordinates did, however, advance pleas of superior orders. They failed because, again, the orders were too manifestly unlawful to afford a defence. In his analysis the Judge Advocate—later a noted

13. Cited by Martin Gilbert, *Second World War* (Weidenfeld and Nicholson, 1989; Phoenix, 1995), at p.160.

14. *War Crimes Trials*, Vol. I, (William Hocky & Co., 1948).

15. On 12 Sept. 1942 the British liner *Laconia* was torpedoed by a U-boat whose captain and crew, and the crews of two other U-boats summoned to assist, rescued some 1500 people. Towing lifeboats, the U-boats headed towards the shore but were fired upon by an American B-24 bomber, forcing the U-boats to cut the lines, thereby abandoning the survivors to the sea. Following this incident, Grand Admiral Doenitz made the following order:

> 1. Every attempt to save survivors of sunken ships, also the rescuing of swimming men and putting them on board lifeboats, the setup of overturned lifeboats, the handing over of food and water, have to be discontinued. These rescues contradict the primary demands of warfare especially the destruction of enemy ships and their crews.
> 2. The orders concerning the bringing in of skippers and chief engineers stay in effect.
> 3. Survivors are only to be rescued if their statements are important for the boat.
> 4. Stay hard. Don't forget that the enemy didn't take any regard for women and children when bombarding German towns.

and far from lenient Judge—closely followed the *Llandovery Castle* case and the "ought to know" doctrine thus stated. All the defendants were convicted, Eck was executed and the remainder served long terms of imprisonment.

Unfortunately the impact of Nuremberg and Tokyo was not understood in this way and the defence of superior orders was perceived to have been abolished rather than, as it is argued was truly the case, merely excluded in very particular and unusual circumstances. The consequences can be seen in the relevant provisions of successive editions of the British Manual of Military Law. The 1944 Manual provided by paragraph 13 that,

> If the command was obviously illegal, the inferior would be justified in questioning, or even refusing to execute it … . But so long as orders … are not obviously [unlawful] … the duty of the soldier is to obey and (if he thinks fit) to make a formal complaint afterwards.

The 1956 edition in contrast provided by article 24 that,

> The better view appears to be … that an order … whether manifestly illegal or not, can never of itself excuse the recipient if he carries out the order, although it may give rise to a defence on other grounds.

It is difficult to imagine quite what "other defence" might arise in such circumstances, although a plea in mitigation might well be possible. This transmutation of the highly specific "Nuremberg" application of the "ought to know" doctrine into a "new" and much harsher doctrine for general application thus had a severely distorting effect which, arguably, contravened the Kantian Categorical Imperative in its impact. Kant taught that specific actions should be founded upon maxims capable also of being the foundation for general action: the post-1945 development of the superior orders doctrine was a precise reversal of such a process. The consequences were potentially damaging in the extreme.

Military forces are, by definition and functional necessity, disciplined organisations and in the real exigencies of the battlefield mutual reliance and rapid response to authorised direction are, in every sense of the term, vital. The presumption that orders are to be obeyed and not debated is thus both an inherent and a necessary part of military organisation. When a soldier obeys a credibly lawful order he or she not only does that which is demanded by elementary training and discipline but also what is professionally essential. To penalise a member of the armed forces for compliance with such an order if it later proves in fact to have been unpredictably unlawful, as post-1945 doctrine seemed to demand, must appear intolerably harsh. It may be pointed out that superior orders did continue to afford to defendants a substantial potential plea in mitigation: to whatever degree this might reduce or even eliminate the penal sanction applied, the convicted defendant would still emerge from the process tainted as a war criminal. The possible context is adequately indicated by the facts of the *Dover Castle* case,[16] although the *Reichsgericht* was fortunately at that time able to apply a more rational doctrine.

This is not, of course, to advance a counsel of mindless obedience or an absolute defence; soldiers are not and have never realistically been argued to be in the position of Pavlov's dogs responding automatically to an unquestioned stimulus

16. See above.

of command. Both under the classical "ought to know" doctrine and the claimed Nuremberg doctrine it is clear that a soldier may and should query a *prima facie* unlawful order. The point was made clear by the 1944 British Manual of Military Law referred to above. At the same time the extent of both knowledge and capacity to question may vary considerably and this too is a factor to be taken into account. Although in this as in other contexts the maxim *ignorantia non excusat lex* carried very considerable weight, it may also be remarked that failure of dissemination of the laws of armed conflict, or worse, deliberate concealment or distortion, may in themselves be violations of the 1949 Geneva Conventions.[17] Failures in this regard are not characterised as "grave breaches" but could still conceivably generate culpability in those responsible and this may be seen as a dimension of the basic question of the correct placement of liability which essentially underpines this whole issue.

C. The Rome Statute: The Defence Restored

The supposed Nuremberg doctrine of superior orders is, in appearance, set aside by the provisions of the Rome Statute of the intended International Criminal Court (ICC). The relevant provisions are, in order of immediate significance, articles 33 and 28. Article 33 provides that,

> (1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
> (a) The person was under a legal obligation to obey the orders of the Government or the superior in question;
> (b) The person did not know that the order was unlawful; and
> (c) The order was not manifestly unlawful.
> (2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

It will be noted that this is a carefully phrased and even rather strict formulation of an "ought to know" doctrine. There is in the first place a strong presumption *against* the availability of a defence of superior orders, which is appropriate granted the fact that, subject to the possibility of political malice, cases reaching the ICC are likely to have involved such serious violations that the illegality of the orders concerned would in most instances have been such as to be considered manifest. The tripartite requirements of obligation, non-knowledge and non-apparent unlawfulness go on, however, to meet precisely the objections to the perceived Nuremberg doctrine which have been outlined above. The provision of article 33 is very far from being a carte-blanche for the commission of war crimes under the shelter of "orders"; it is on the contrary a protection for personnel who have been led unwittingly into unlawful conduct which they neither comprehended nor intended. The further caveat set out in paragraph (2) might be argued to be unnecessary but is nonetheless worth stating and it may be suggested that the position of bodies such as the genocidal murder squads which operated in Kosovo and in Rwanda is thus much better dealt with than was the case in the Statutes of

17. See 1949 Geneva Convention I, article 47; Convention II, article 48; Convention III, article 127; Convention IV, article 144; see also 1977 Additional Protocol I, article 83 and 1977 Additional Protocol II, article 19.

the International Criminal Tribunals for former Yugoslavia and Rwanda which simply followed the Nuremberg precedent in regard to superior orders.

Where it is accepted that superior orders may function as an effective defence, there still remains the question of culpability, and the possible objection that where questions of criminal liability arise, potentially culpable superiors may prove difficult to bring to trial, as indeed the International Tribunal for former Yugoslavia has found even in the absence of a "superior orders" defence. This is not in fact an unreasonable impediment to the restoration of the "ought to know" doctrine or, as it is argued, more correctly a proper understanding of it. Where an unlawful order is innocently obeyed the liability must clearly lie with the superior who issued the order. Article 28 of the Rome Statute deals effectively with the question of command responsibility by providing that military commanders for this purpose are persons who functionally exercise such command and will commonly be held liable for violations committed within their areas of jurisdiction. If the culpable superior is not available for trial there is no case in either law or justice for making a scapegoat out of an innocent subordinate. It may be added that even if the subordinate is culpable, by reason of the manifest illegality of the order with which he or she complies, the superior who issued the order will, of course, still be liable.

Ultimately article 33 of the Rome Statute may be suggested to have restored a reasonable balance in the treatment of superior orders as a defence, taking into account both the paramount claims of international law and the nature of military discipline and obligation. J. Blackett remarks pertinently in this context that,

> . . . the law can recognise the military dilemma and grant the subordinate a defence in criminal proceedings in all cases where he acted in obedience to superior orders except those where the actions required of him were objectively manifestly illegal. In these cases the subordinate's training and background should be taken into account at least to mitigate his sentence . . ..[18]

This in essence is what article 33 has done, although the suggested jurisprudence of mitigation is not made explicit. This latter element will no doubt emerge if and when the ICC comes into being and is presented with any relevant cases, but the approach suggested in the above cited passage would seem an eminently reasonable basis for the treatment of this question.

Has the ICC Statute then "reverted" to an older doctrine of superior orders, overthrowing that established at Nuremberg? This is certainly its *prima facie* appearance in the light of the interpretation subsequently placed upon the Nuremberg, and Tokyo, Statutes, and this appearance has been greeted with dismay in some quarters, not least some Human Rights NGOs, as weakening the provisions against war criminality. This, it is suggested, is hardly the case. As it has been argued above there was no practical possibility of the defendants before the IMT at Nuremberg or the IMT(FE) at Tokyo succesfully advancing a plea of superior orders, in either defence or mitigation, and the same, thus far, may be argued to be true of the 1990s Tribunals for former Yugoslavia and Rwanda as well, potentially, of the ICC itself. The perceived Nuremberg doctrine, far from

18. J. Blackett, "Superior Orders: The Military Dilemma" Feb. 1994, *Royal United Services Institution Journal*, p.12 at p.17.

being a radical change in approach, was merely a statement of the established "ought to know" doctrine which was entirely correct in its given context but both misleading and distorting when taken as a specific principle for general application. Far from "reverting" to an outdated and excessively militaristic doctrine of superior orders, the 1998 Rome Statute has restored, and carefully reformulated, the interpretation of that doctrine which existed before 1945 and, if only it had been correctly understood, was also the foundation of the Nuremberg/Tokyo provisions—albeit for application in unusual and extreme circumstances. Article 33 of the Rome ICC Statute thus rectifies a 50 year distortion of the understanding of the legal effect of superior orders without in any way compromising what was actually held at Nuremberg and Tokyo or might be held in any parallel present or future circumstances. As such it is therefore to be welcomed, not as a radical change but as a correction of a potentially, and in some cases actually, serious half century misapprehension.

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THE 2000 REVIEW OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

ON 27 June 2000, the updated Guidelines for Multinational Enterprises (the Guidelines) were adopted by the 29 Member States of the Organisation for Economic Co-operation and Development (OECD) together with the observer governments of Argentina, Brazil, Chile and the Slovak Republic. The Ministerial Conference Chairman, Mr Peter Costello, described the 2000 Review as heralding the most "far reaching changes" to the Guidelines since their introduction in 1976.[1] This note proposes to consider only the most noteworthy among them.[2] Accordingly, it will not examine those elements that have merely been reaffirmed by the 2000 Review. However, the conclusions will be made that the Chairman's sentiments are only observable in the ongoing textual development of the Guidelines and that the all-important implementation mechanism has only been improved by half-measure.

Background to the 2000 Review and Negotiating Positions

The Guidelines were previously reviewed in 1979, 1984 and 1991 with a mid-term report during 1982. On each occasion, business has argued that acceptance of the Guidelines necessitated as few textual changes as possible and the OECD

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1. Statement by the Conference Chair, Ministerial Special Session on the Revision of the OECD Guidelines for Multinational Enterprises, 27 June 2000.

2. The following citations together with the new OECD Guidelines appear at http://www.oecd.org/daf and http://www.biac.org. For a previous version of the Guidelines, see *The OECD Declaration and Decisions on International Investment and Multinational Enterprises : Basic Texts*, OECD Doc OECD/GD(97)36.

Member States have concurred that their effective application derived from continued stability. Consequently, in 1979 only one amendment was made in respect of the transfer of employees during collective bargaining. More recently, greater textual change became contemplated provided they resulted from consensus. In 1984 a modification concerning the protection of consumer interests was added together with minor alterations in relation to collective bargaining and disclosure. A Chapter on Environmental Protection was introduced during the 1991 Review. Prior to the 2000 Review, therefore, the Guidelines had experienced very limited development. However, they remain the most prominent intergovernmental "code of conduct" that seeks to encapsulate self-regulation with a universally mandated solution. Particularly in light of well-publicised difficulties for the OECD in the investment field, reasserting national credibility for the 2000 Review was a greater imperative than any previous commitments to stability. Moreover, the present Review reflected contemporary interest in the globalisation debate and thus the Working Party on the Guidelines received a mandate to ensure their continued relevance and effectiveness within this context.

The Review formally commenced with a Conference in Budapest during November 1998 attended by delegates from 25 States (including 3 OECD non-Members), 21 corporate and 12 labour representatives, 10 intergovernmental organisations such as the International Labour Organisation (ILO) and six non-governmental organisations (NGOs). Concerned that the Guidelines no longer represented the "state of the art", the Conference concluded that all Chapters were subject to revision and that the National Contact Points (NCPs) needed to be "reinvigorated" with a "more precisely defined mandate'.[3] Informal consultations with the two OECD Advisory Bodies—the Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC)—together with NGOs took place on three separate occasions.[4] Thematic conferences were also held on foreign direct investment and the environment, the role of international investment and corporate responsibility for development and contemporary employment and labour practices. Finally, public comments were solicited through the OECD website.[5]

The longstanding concerns of the principal participants predictably re-emerged for the 2000 Review. From the business perspective this included the primacy of national law, the non-judicial nature of the clarification process and strong resistance to public disclosure for non-complying enterprises. In support of the market method for improving corporate standards, BIAC argued that the 2000 Review be guided by the criteria of usefulness, simplicity and visibility.[6] Business

3. OECD, Conference on the OECD Guidelines for Multinational Enterprises : Summary of Proceedings, Budapest, Hungary, 16–18 Nov. 1998, OECD Doc DAFFE/IME (98)18, p.8.

4. For contributions, see e.g. OECD Doc DAFFE/IME/WPG/RD(99)8 (TUAC), OECD Doc DAFFE/IME/WPG/RD(99)11 and OECD Doc DAFFE/IME/WPG/RD (2000)6 (BIAC) and OECD Doc DAFFE/IME/WPG/RD(99)13 (NGOs).

5. OECD, Review of the OECD Guidelines for Multinational Enterprises: Public Comments, 17 Feb. 2000, OECD Doc DAFFE/IME/WPG/RD(2000)4/REV1.

6. BIAC, Comments on the Review of the OECD Guidelines for Multinational Enterprises, 2nd Ed, 8 Dec. 1999, p.4.

therefore favoured a "very prudent approach to an in-depth review".[7] The initial trade union position, believing corporate standards to have deteriorated, was to strengthen the implementation mechanism with textual revisions a "secondary" consideration.[8] However, by February 2000 it had reassessed its campaign and determined that "greater emphasis should be given to securing textual revisions more positive to labour, while maintaining the emphasis on implementation procedures".[9] Its renewed call for reasonable notice of major changes to corporate operations prevailed, with dicta from a clarification issued by the OECD's Committee on International Investment and Multinational Enterprises (CIME) added to the reformulated Employment and Industrial Relations Chapter.

Notably, opinions continued to differ on the desirability of enhancing the legal quality of the instrument with France proposing mandatory standards and the UK preferring an essentially moderate approach.[10] BIAC responded to NGO efforts to render the Guidelines compulsory through the backdoor of a sanctions regime by arguing that the proper focus should be upon promoting business awareness of its self-interest.[11] In response to initial interest by 17 non-OECD Member States in the mechanism for enforcement, CIME suggested that market discipline and host government expectation were sufficient.[12] In the event, the voluntary nature of the instrument is reaffirmed prominently throughout the revised version of the Guidelines.

The Principal Textual Amendments

Once again, the 2000 Review sought to balance competing objectives such as that between exhortatory principles and prescriptive standards, respect for national legal diversity as against international standardisation, the respective responsibilities of trade unions, States and Multinational Enterprises ('MNEs') with the legitimate interests of civil society and State-MNE co-operation in particularly contentious areas such as transfer pricing. However, as an evolutionary document the Guidelines are no longer directed towards investor regulation characteristic of the 1970s or intergovernmental efforts to attract foreign direct investment of the following decade. Although OECD productivity had achieved its fastest rate since 1988, Member States remained conscious that greater trade liberalisation was critically dependent upon continued consumer confidence.[13] Consequently,

7. OECD, Labour and Employment Practices in Today's Global Economy: Implications for the OECD Guidelines on Multinational Enterprises, Paris, 10 March 1999, OECD Doc PAC/AFF/LMP(99)5, p.12.

8. TUAC Initial Submission on the 1999 Review of the OECD Guidelines for Multinational Enterprises, undated, p.2.

9. TUAC Summary Report, Consultations with the CIME on the Review of the OECD Guidelines for Multinational Enterprises, 17–18 Feb. 2000, Paris, p.2.

10. See e.g. OECD Doc DAFFE/IME(98)12 (France) and OECD Doc DAFFE/IME (97)16 (U.K.).

11. Letter dated 28 April 1999 from Lamborghini B., BIAC MNEs Committee Chairman to H.E. Baldi M., OECD CIME Chairman, OECD Doc DAFFE/IME(99)13.

12. OECD, Review of the OECD Guidelines for Multinational Enterprises: Aide-Memoire of the Informal Consultation between Non-Members and the Extended CIME Bureau, 23 Feb. 2000, para.11.

13. OECD Press Release, "Shaping Globalisation", Paris, 27 June 2000, paras.14, 20.

the Guidelines are now addressed to a much wider constituency and are more akin to that of a promotional tool to address such concerns.

Consequently, the 2000 Review necessitated more then a mere rewriting of existing Chapters. The Competition and Taxation Chapters have been reshuffled to the back of the Guidelines with Employment and Industrial Relations and the Environment to the front. The former Financing Chapter has been dropped altogether. By way of recompense, the Chapter on Consumer Interests incorporates contemporary developments in product labelling, the transparency of complaints procedures, informed consumer decision-making and privacy. The Review also introduced a wholly new Chapter on Combating Bribery. Also to be noted are several references to voluntary codes of conduct—defined as "expressions of commitments to ethical values"—but omits mention of any applicable verification mechanisms. The Concepts and Principles Chapter acknowledges that market participants are now typically small and medium-sized enterprises (SMEs) who are included under the Guidelines to "reflect good practice for all'.

It was also initially considered desirable that the Guidelines remain a user-friendly stand-alone document not requiring familiarity with other international instruments.[14] In one inventory of some 233 codes of conduct, international standards were explicitly cited in only 20 per cent.[15] However, updating the Guidelines was useful where concepts already endorsed by business were not yet reflected within the text.[16] The market for the 2000 Review included the 1948 Universal Declaration on Human Rights, the 1992 Rio Declaration on the Environment and Development, a 1994 European Works Council Directive and the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. In addition were specific OECD instruments with respect to transborder flows of personal data, transfer pricing, corporate governance, environmental information and consumer protection in the context of electronic commerce. Business initiatives included the International Chamber of Commerce's Business Charter for Sustainable Development and the American chemical industry's much-touted Responsible Care Programme. Through a process of incorporation by reference the Guidelines exemplify the OECD's agenda of formulating a "rules-and values-based world economy" with non-Member States.[17]

On the other hand, the merits of such a cross-pollination are not self-evident. The prospective intermeshing of instruments complicates the interpretative function, particularly where the MNE may be a conduit for standards against which a host State is not formally bound. CIME has become less inclined to issue clarifications on the application of the Guidelines and were it not for the prospective inclusion of outside expertise it would be in an unenviable position of applying international instruments for which distinct interpretative arrangements

14. OECD, Review of the OECD Guidelines for Multinational Enterprises: Framework for the Review, 21 May 1999, p.7.

15. OECD, Codes of Corporate Conduct—An Inventory, OECD Doc TD/TC/WP(98)74.

16. OECD, Review of the OECD Guidelines for Multinational Enterprises: Environmental Content of the Guidelines, March 1999, para.12.

17. OECD Press Release *supra* n.13 para.41.

are already available. For example, the deletion from an earlier draft which proposed that reviews of ILO standards may be useful for interpreting the Employment and Industrial Relations Chapter was intended to maintain a degree of institutional separation.[18] Moreover, interpretations that privilege one instrument over another accord little deference to the specificity of the instrument under consideration. For example, the OECD Principles of Corporate Governance are directed towards enhanced investor decision-making. Similarly, the prohibition on the use of the Guidelines for protectionist purposes and the affirmation of national comparative advantage—extracted from the ILO Declaration—have in mind the trade interests of non-OECD States. As such instruments are addressed exclusively to States, there is credence to the business view that the Guidelines express a shifting accountability. Finally, in view of the extent of national discretion during dispute resolution (considered further below), such factors contribute to a fragmented application of the Guidelines.

Turning to particular Chapters, TUAC's opinion that the Preface overemphasises the positive aspects of corporate behaviour and dilutes concern for their negative activities appears vindicated.[19] This is disconcerting where enterprises are welcomed as partners with government in the development of the legal and political environment. Although enterprises should refrain from seeking or accepting "exemptions not contemplated in the statutory or regulatory framework" as recommended by the General Policies Chapter, this does not imperil any purported right to lobby. Notwithstanding that the Commentary adopts the definition of bribery from the OECD Convention, the Bribery Chapter itself suffers from several noteworthy omissions.[20]

With respect to the Employment and Industrial Relations Chapter, CIME clarifications have hitherto produced important normative prescriptions in an effort to guide multinational behaviour in this field. Presumably its explanations of collective bargaining, labour management relations and bona fide negotiations remain unaffected.[21] In addition, recognition of the core labour standards of the ILO Declaration—freedom of association and the right of collective bargaining, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in employment—was considered beneficial. Although accepting that fundamental human rights should be respected, BIAC suggested that many corporations lacked direct business involvement with child labour.[22] Moreover, the Guidelines were an inappropriate mechanism for eliminating such practices given the potential to duplicate ILO efforts. TUAC responded that child

18. OECD, Draft Guidelines for Multinational Enterprises, 16 May 2000, OECD Doc DAFFE/IME/WPG(99)18/REV6.

19. TUAC Secretariat, Comments on the Draft Integrated Text—Chapters and Commentary, 17 Dec. 1999.

20. Cf. 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (entry into force 15 Feb. 1999) *reproduced* 37 I.L.M. 1 (1998).

21. Note also "geographic area" as defined by the previous version of the Disclosure Chapter.

22. BIAC's ELSA Committee Submission, Contribution on the Employment and Industrial Relations Chapter of the OECD Guidelines for Multinational Enterprises, circa 9–10 March 1999, p.2.

labourers often produced goods and services through the subsidiaries and suppliers of MNEs. The final text imposes the less specifically onerous requirement of contributing to their elimination, notwithstanding draft versions emphatically stating that MNEs were not to "engage" in the use of forced labour nor the "worst forms" of child labour. Such a compromise reflects the General Policies Chapter whereby corporate respect for human rights is to be consistent with a host government's commitments. The Commentary further obfuscates the business role to those unspecified circumstances "where corporate conduct and human rights intersect".

Notwithstanding the removal of the term "protection" from its title, the Environment Chapter is satisfyingly more detailed in its expectations for corporate conduct than its predecessor. The OECD predicted concessions between its environmental ambitions as against the degree of enforceability and compliance with national law as contrasted with promoting a "race to the top" of corporate practice. The Chapter refers to institutionalised environmental management systems, monitored energy consumption, consumer awareness of the full product life-cycle and research into improved environmental performance. These business suggestions reflect corporate opportunities and indeed many of their proposals were eventually adopted, although in certain respects the initial propositions enjoyed greater specificity.[23] On the other hand, BIAC resisted the precautionary and polluter pays principles in the absence of international consensus on their precise ambit and the variety of national specific obligations. The eventual watered-down formulation of the former avoids elucidating how MNEs are to satisfy this principle and is content to delimit responsibility between implicit enterprise contributions and pre-existing government commitments.

The Disclosure Chapter abandons a previous concern for financial and highly specific information in favour of material information on business fundamentals. Material information is defined by the OECD Principles of Corporate Governance as information whose omission or misstatement could influence the economic decisions taken by users of that information. However, corporations are not expected to disclose information that endangers their competitive position or misleads the investor. The twin track approach as formulated only encourages the reporting of information unavailable through national legal compulsion. As the rights of "stakeholders" are confined to those established under municipal law or through individual corporate practice, the beneficiaries will be generally limited to creditors, contractors and employees. Moreover, the value of any corporate self-assessment against a code of conduct will be left to the initiative of the particular enterprise concerned. As social reporting is very much in its infancy, recourse could be had to the Global Reporting Initiative of the Coalition for Environmentally Responsive Economies (CERES) which has already been tested by over 20 companies.

23. BIAC Submission on Environmental Management, Attachment to Letter dated 17 June 1999 from Lamborghini B., Chairman of BIAC's MNEs Committee to Sikkel M. W., Chair of the Working Party on the OECD Guidelines for Multinational Enterprises.

Finally, BIAC questioned the utility of a Commentary that went beyond understanding to add content or create confusion.[24] It supported a "short practical text announcing high standards on essential and widely supported points".[25] Although the Commentary is not intended to be part of the Declaration or the Council Decision, its degree of influence remains to be seen. This is problematic where, for example, the Commentary on Competition is more authoritative and exhaustive than the Chapter itself. Overall, the tone of the Commentary moderates many of the recommendations, thus leaving the true scope of the expectation unclear. By way of example, the particulars which extend corporate responsibility to third parties within the supply chain or the explicit concessions within the Disclosure Commentary render such obligations by no means onerous.

Notwithstanding novel phraseology, the Guidelines clearly benefit from greater drafting precision. Given ongoing disparities between States, such changes amount to a distinct supplement to municipal regulations. The Commentary acknowledges as much where prevailing industry norms prompt an MNE to adopt standards even where not formally required by national law. As was the previous arrangement, any conflicting legal requirements that result are to be resolved by the follow-up procedures at the intergovernmental level. In the interim, the corporate conduct prescribed by the Guidelines may overreach what is practicably feasible. For example, the Competition Chapter expects enterprises to consider the application of the competition laws of jurisdictions whose economies would be harmed by anti-competitive activity. Similarly, the Disclosure Chapter anticipates corporations relinquishing legitimate legal protection in the interests of volunteering information.

The "New" Implementation Procedures

The 2000 Review devoted considerable attention to the role of NCPs for ensuring prospective corporate compliance.[26] The Guidelines are not enforced *per se*: States are responsible for promoting their implementation, principally through NCPs, and in the event of a dispute, business, trade unions and other interested parties may question their application to the particular circumstances. The procedure is not intended to explicitly assess the propriety of business conduct against the Guidelines. To date implementation has produced contrasting results between States, prompting TUAC to describe them as "empty shells". During the current Review it therefore sought to institute a neutral tripartite structure with elements of contestability should procedures become stalled.[27] However, as only Belgium, Sweden and Norway functioned on a tripartite basis, there was also a

24. OECD, Aide-Memoire of the Informal Consultations between BIAC, TUAC, NGOs and the CIME on Investment Issues and the Review of the OECD Guidelines for Multinational Enterprises, 8 Dec. 1999, para.8.

25. BIAC Statement on the Preparation of the 1998 Review of the OECD Guidelines for Multinational Enterprises, Sept. 1998, p.3.

26. See e.g. OECD, Implementation of the Guidelines for Multinational Enterprises and National Contact Points, OECD Doc DAFFE/IME/WPG(2000)2; OECD, Verification, Voluntary Codes and the Guidelines: Background and Issues for Discussion, OECD Doc DAFFE/IME/WPG(2000)3.

27. TUAC Submission, CIME Working Party on the Review of the OECD Guidelines for Multinational Enterprises, Dec. 1999.

reluctance to standardise the NCP role for States. In contrast, BIAC argued that as governmental bodies NCPs should possess ultimate political accountability for their decision-making. However, it also acknowledged that there remained scope for an enhanced NCP role in accordance with the original intent of the Guidelines. In the event, the notion of functional equivalence prevailed such that adhering States retain flexibility to organise NCPs in light of national preferences and priorities.[28]

Having been promoted within the Concepts and Principles Chapter, the envisaged role for the NCP is effectively downgraded by the revised Council Decision of 27 June 2000 to good offices and facilitating access to non-adversarial means. The NCP is instructed to issue a statement and make recommendations as appropriate on the implementation of the Guidelines. However, as a recalcitrant MNE may resist a change of corporate behaviour, the content and effectiveness of the final NCP report may prove somewhat ephemeral. In addition to being prohibited from naming the enterprise and responsibility for clarifications being reserved to CIME, the outcome may be excluded from the public domain where it would be in the "best interests of effective implementation". Although making the implementation of the Guidelines more explicit undoubtedly renders NCPs more transparent, this need not improve performance. Transparency is clearly limited to providing greater guidance to States and to unify the inconsistent efforts of government departments.

Consequently, confidentiality clearly has the potential to override the transparency objective with resulting detriment to NCP credibility. Significantly, the ultimate deal-breaker for BIAC was any threat to the corporate reputation through non-confidential and non-consensual dispute resolution. In its view, the character of the Guidelines would be changed unacceptably were the Guidelines to move towards formal legal censure.[29] Notwithstanding contrary NGO proposals, the Decision provides for a presumption of procedural confidentiality in the absence of waiver. The Commentary also states that sensitive business information and the identity of individuals are to be protected with "proceedings" construed broadly to include both facts and arguments. However, Mexico's experience with the NAFTA Labour Side Agreement suggests that confidences may not always be respected and which may account for its reticence at the final Ministerial Conference.[30]

A further deficiency derives from the territorial extension of the Guidelines to non-OECD States. Enterprises from the territories of adhering States are encouraged to observe the Guidelines wherever they operate. BIAC, concerned by a possible subversion of the national treatment principle, stressed that the

28. OECD, Aide-Memoire of the Informal Consultations between BIAC, TUAC, NGOs and the CIME on the Review of the OECD Guidelines for Multinational Enterprises, 17–18 Feb. 2000, p.2.

29. OECD, Aide-Memoire on the Consultations on the OECD Guidelines for Multinational Enterprises, Paris, 19 April 1999, para.35.

30. "OECD agrees global company code", *Financial Times*, 28 June 2000.

Guidelines are part of an interrelated package.[31] Admittedly, any geographical extension requires the appropriate substantive and procedural provisions to progress in tandem. To date, only Argentina, Brazil and Chile as non-OECD Members have formally adhered to the 1976 Declaration and its associated follow-up procedures. Although only adhering countries are required to establish NCPs, the revised Decision provides that CIME may hold an exchange of views with non-adhering States. The ambiguous extension of the Guidelines is most stark given the absence of NCPs within the latter group. Under the new procedures an NCP is limited to taking steps to develop an understanding of the issues arising within non-adhering States. As one prominent NGO has already experienced first-hand the inadequacies of that approach, such a procedural shortcoming has yet to be satisfactorily remedied.

The Commentary to the revised Decision concedes that much of the procedural guidance lacks novelty. For example, the Decision continues to limit the right to initiate an exchange of views with CIME to the OECD Advisory bodies. Of particular note, the 2000 Review purportedly introduced NGOs into the mechanism. In truth, since 1991 CIME possessed the ability to periodically invite NGOs as "other interested parties".[32] It is difficult to predict if NGOs will take up the reins hitherto left slack by the trade unions or whether TUAC will follow through with its stated intention to utilise these implementation procedures.[33] In balancing independent participant with uninhibited critic, NGOs are likely to resist any formal involvement that circumscribes their freedom of action or forgoes resort to public denunciation. One may also caution against sacrificing the essential like-mindedness of the OECD forum with MNEs continuing to look to States for assurances of impartiality. To date CIME has issued around 30 clarifications largely at the instigation of TUAC but several prominent matters have also arisen from States. In contrast, there have only been two interpretations of the analogous 1977 ILO Tripartite Declaration on Multinational Enterprises and Social Policy where employers are more inclined to block matters. As illustrated by the *Badger* example, the first proceedings under the revised Guidelines will set the all-important precedent.

Conclusions and Future Reviews

As expected, the initial reactions by States to the revised Guidelines were favourable.[34] By contrast, TUAC, disillusioned by the historical lack of govern-

31. In addition to the Guidelines which were annexed to the 1976 OECD Declaration on International Investment and Multinational Enterprises were three legally binding Council Decisions relating to National Treatment, International Investment Incentives and Disincentives and Conflicting Requirements.

32. OECD, Second Revised Decision of the OECD Council on the Guidelines for MNEs amended June 1991 in *Basic Texts supra* n.2.

33. TUAC Press Release, "Action Required Now to Implement the Revised OECD Guidelines for Multinational Enterprises', 27 June 2000.

34. See U.S. Department of State Press Statement, "OECD Guidelines for Multinational Enterprises', 27 June 2000; U.K. Department of Trade and Industry, Press Release P/2000/444, "Caborn Champions International Code of Conduct for Multinational Enterprises", 27 June 2000 ; OECD, Statements made on the adoption of the Review 2000, 27 June 2000.

ment commitment, described them as a compromise framework.[35] Whilst appreciating their inclusion in the formative process, NGOs were also disappointed by "the worst of both worlds": "a combination of voluntary low level standards with a weak implementation mechanism".[36] Indeed, notwithstanding improvements to the Environment Chapter, the 2000 Review has introduced weaker obligations under the successor text of the Guidelines. Greater specificity has produced numerous qualifying clauses and conditions that give the impression of favoured gradations of observance. For example, although the Environment Chapter calls for disclosure to the wider community and not merely to the competent authorities, the chapeau also lists several exceptions. Possible dilution of existing recommendations is also evident by terms such as "encourage" and "contribute" rather than more definite language. Revolutionary textual change aside, one may fairly conclude that more stipulations have been taken away than effectively added. The Competition Chapter, for example, presents a closed category of four anti-competitive agreements whereas the previous version employed the broader approach of an open definition with examples.

However, as the Guidelines are notionally addressed to MNEs, it is from their perspective that the Review should be evaluated. Seeking instructive directives of sufficient clarity and flexibility, BIAC perceived the revisions to be "far from ideal".[37] The Guidelines endeavour to achieve an atmosphere of confidence and predictability between business, labour, governments and society.[38] Such objectives are ill-satisfied by jargon such as "local capacity building", "individual human development" and "good corporate governance" which are evidently directed at non-participating addressees. Business also objected to subjective standards such as "safety" and "fair" that may depart from national law or accepted commercial practices. It is also anomalous to identify, at the opposite end of the spectrum, potentially over-reaching public interest concerns for whistleblowers and employees that give short shrift to the legitimate business interest in such matters. Although BIAC indicated that these concerns may entail a reconsideration by individual businesses of their public endorsements of the previous version, it is very unlikely that industry will be able to do anything other than accept the amendments. From any perspective, the terminology employed is too vague to be operational and provides few measurable benchmarks for accurately assessing compliance. References to the "applicable" regulation are unhelpful without indicating which has priority among competing national, sub-national and supra-national regimes. Disturbing for all parties must be the habitual conclusion that non-adherence will not render an MNE in strict technical breach of the Guidelines.

35. Statement by Evans J., TUAC General Secretary, "OECD Ministerial Council Conference on the Adoption of the OECD Guidelines for Multinational Enterprises", 27 June 2000.

36. Statement to Governments adhering to the OECD Multinational Enterprise Guidelines from interested NGOs, 6 June 2000, para.5.

37. BIAC Statement at the Ministerial Special Session on the Revision of the OECD Guidelines for Multinational Enterprises, 27 June 2000.

38. OECD, OECD Guidelines for Multinational Enterprises: Frequently Asked Questions, 27 June 2000.

Future Reviews of the Guidelines will rely upon empirical data as circumstances become clearer. The Guidelines were updated notwithstanding uncertain evidence of the reputed chilling effect upon national labour and environmental regulation. Competitive pressures between States reflected through discretionary investment incentives are suspected to push foreign direct investment away from those having high standards to ones with comparatively lower levels. Although environmental standards may fail to accommodate local conditions, it is nonetheless worthwhile to establish internationally-agreed minimum baselines of performance.[39] The current OECD policy response to this dynamic is relatively embryonic. Prospective revisions are also likely to reconsider the numerous proposals which fell by the wayside, such as NGO calls for a living wage and the French suggestion for corporate certification in exchange for the OECD imprimatur. Business proposals also remain alive in such contested areas as double taxation, bribery and technology transfer.

It was TUAC which first suggested that textual amendments however worthy of merit would have little impact where the focal point is to improve the existing implementation mechanism.[40] The 2000 Review of the Guidelines has assembled substantial textual change—not wholly beneficial—but more importantly only marginal profile enhancement to the NCP mechanism. Although the longevity of the most recent draft will be determined principally by MNEs, its success as indicated by resort to the enforcement mechanism falls upon NGOs, trade unions and more critically States. Prior to the next Review in six years time, it is to be hoped that each of these tailors exercise due restraint when disentangling this spectacle of the emperor's new clothes.

STEPHEN TULLY*

THE CRIME OF GENOCIDE: *NULYARIMMA* v. *THOMPSON*[1]

I. INTRODUCTION

ON 31 May 1999 two matters came before the Full Federal Court of Australia, constituted by Justices Whitlam, Wilcox and Merkel. The two cases heard together were different in nature and origin, but their common feature was a claim of genocide. The primary issue was whether the international crime of genocide forms part of the law of Australia. The majority view was that, before an international crime could be prosecuted in an Australian court, specific domestic legislation needed to be enacted. The dissenting opinion was that genocide had become an offence at common law and could be prosecuted. In this case note I will

39. OECD, Conference on Foreign Direct Investment and the Environment: Summary of the Discussion, OECD Doc CCNM/EMEF/EPOC/CIME(98)7.

40. TUAC Briefing Note for Affiliates, The Review of the OECD Guidelines for Multinational Enterprises, Dec. 1999, p.7.

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1. [1999] FCA 1192 ("*Nulyarimma*"). Full case names: *Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie and Robbie Thorpe* v. *Phillip R Thompson* heard together with *Kevin Buzzacott* v. *Robert Murray Hill, Minister for the Environment, Alexander Joh Gosse Downer, Minister for Foreign Affairs and Trade and Commonwealth of Australia.*

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analyse the opinions both in the terms of their impact on the relationship between international law and domestic law in Australia, and in light of recent trends in Australia and other common law countries.

II. FACTS

The first matter, *Nulyarimma* v. *Thompson*, was an appeal against a decision of Crispin J in the Australian Capital Territory ("ACT") Supreme Court. Crispin J upheld a refusal by the Registrar of the ACT Magistrates Court, Phillip Thompson, to issue warrants for the arrest of Prime Minister John Howard, Deputy Prime Minister Tim Fischer, Senator Brian Harradine and Member of House of Representatives Pauline Hanson. The warrants were sought on the basis that these politicians, in formulating or supporting the "Ten Point Plan" and the Native Title Amendment Act 1998, had committed genocide.

The second matter, *Buzzacott* v. *Hill*, was an application to strike out a proceeding instituted by Kevin Buzzacott in the South Australian Registry of the Federal Court of Australia against the Minister for the Environment, Robert Hill, and the Minister for Foreign Affairs and Trade, Alexander Downer. Mr Buzzacott claimed, on behalf of the Arabunna People, that the failure of these Commonwealth Ministers to apply for world heritage listing for his peoples' lands in the Lake Eyre region constituted an act of genocide.

III. ISSUE

The primary legal issue in dispute was whether the customary norm of genocide[2] can become part of Australian law without a legislative act creating genocide as an offence. While it is well established that treaties to which Australia has acceded do not form part of the domestic law until they have been specifically implemented by legislation,[3] the status of international custom in Australia is less certain.

There are two approaches to the way in which a customary rule of international law may become part of domestic law. One approach is known as the doctrine of incorporation. It holds that international custom is part of municipal law without the need for the enactment of specific legislation or judicial adoption, providing it does not conflict with statute law.[4] In contrast, the transformation or adoption theory does not treat international customary law as automatically part of domestic law, but requires a positive act of adoption by legislation, or, on a wider interpretation, by judicial decision or long established custom, for it to become part of municipal law.[5]

The appellants contended that the customary norm of genocide had been incorporated into the common law of Australia either by incorporation or

2. It was agreed by both the appellants and the respondents that although Australia had ratified the Genocide Convention and enacted the Genocide Convention Act 1949 (Cth), neither act had the effect of incorporating the Convention as part of Australia's domestic law. It was also agreed that the crime of genocide as set out in the Convention had reached the status of a peremptory norm of customary international law with universal jurisdiction and that there was a duty to prosecute. *Supra* n.1, p.81.

3. *Minister for Immigration and Ethnic Affairs* v. *Teoh* (1995) 183 C.L.R. 273, p.287.

4. Lord Denning MR in *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] 1 QB 529, pp.553–554.

5. *Supra* n.4.

adoption by judicial discretion without the need for legislation.[6] The respondents claimed that international custom can only form part of the law of Australia if Parliament enacts legislation to that effect.[7]

IV. JUDGMENT

The majority judgment of Justices Wilcox and Whitlam agreed with the respondents and held that the international customary norm of genocide was not recognised in Australian law, and could not be prosecuted in an Australian court, unless specific domestic legislation was first enacted.[8]

Justice Wilcox relied essentially on Brennan J in *Polyukhovitch* v. *The Commonwealth*[9] to find that while Australia may have an international legal obligation to prosecute a genocide suspect, it was for the Commonwealth Parliament to legislate to ensure that that obligation was fulfilled before it could be recognised in Australian law.[10] He said it would be a "curious result" if customary law was to have greater domestic consequences than a treaty voluntarily entered into by Australia.[11] He also considered that international criminal law was best left to the domain of Parliament; municipal courts face a policy issue in determining whether or not to recognise a customary rule of international law, and in the realm of international criminal law there is a strong presumption in favour of the notion that there is no crime unless expressly created by law.[12]

Justice Whitlam likewise held that Australia would need to legislate to incorporate international custom into its municipal law. He considered Lord Millett's judgment in *Reg* v. *Bow Street Magistrate, Ex p. Pinochet (No. 3)*[13] but disagreed with his conclusion that universal jurisdiction provides, by itself, a source of jurisdiction for municipal courts to try international crimes.[14] Like Justice Wilcox, he relied on Brennan J's judgment in *Polyukhovich* to say a statutory vesting of the universal jurisdiction would be essential to its exercise by an Australian court.[15] He also noted that courts are no longer able to create new criminal offences,[16] and that there was a formidable statutory obstacle to the adoption by judicial decision approach in Australia, as section 1.1 of the Criminal Code 1995 (Cth) abolished common law offences under Commonwealth law.[17]

6. *Supra* n.1, para.75.
7. *Ibid.*, para.77.
8. *Ibid.*, paras.17 and 49.
9. (1991) 172 C.L.R. 501 ("*Polyukhovich*"). This case concerned the question of whether an amendment to the War Crimes Act was beyond the Commonwealth's legislative power under the Australian Constitution, and in this context Brennan J considered the position concerning the adoption of universal crimes into municipal law, pp.565 and 567.
10. *Supra* n.1, para.20.
11. *Ibid*.
12. *Ibid*., para.26.
13. [1999] 2 W.L.R. 827 ("*Pinochet*").
14. *Supra* n.1, para.49.
15. *Ibid*.
16. See *Knuller (Publishing, Printing and Promotions) Ltd* v. *Director of Public Prosecutions* [1973] A.C. 435.
17. *Supra* n.1, paras.53 and 54.

In his dissent, Justice Merkel found that genocide had been adopted into Australian municipal law via what he called a common law adoption approach. He agreed with the majority that the incorporation theory is not the dominant view in Australia, but differed on how an international customary norm could be transformed into Australian law.[18] Justice Merkel relied on Dixon J's "source" view in *Chow Hun Ching* v. *The King*,[19] which he said supported the view that a rule of international law can become a part of municipal law when it is adopted by legislation *or* by judicial decision (common law adoption). He held that a rule could be adopted into Australian law if a court determined that it was not inconsistent with existing legislation, the common law or public policy.[20]

Justice Merkel rejected the view that the common law adoption approach involved the courts creating a new offence; the court was simply determining whether to adopt and receive as part of the common law an existing offence under international law which had gained the status of a universal crime.[21] Distinguishing *Polyukhovich* and relying upon *Attorney-General (Israel)* v. *Eichmann*[22] and *Pinochet*, he held that universal crimes having the status of *jus cogens* do not require a statutory vesting of jurisdiction, as it is the universality and *jus cogens* status that gives the result of vesting jurisdiction in all nation States.[23] He found that genocide was consistent with current law and practice, distinguishing section 1.1 of the Criminal Code as abolishing offences created by Commonwealth common law only, not those arising under customary international law or the common law generally.[24] Nevertheless, although Merkel J determined that genocide was part of Australian law, he found that the offences had not been proved by the appellants.

The proceedings were dismissed. The appellants intend to seek leave to appeal to the High Court.[25]

V. ANALYSIS

This judgment deals with a very unsettled area of law in Australia. Few cases have arisen for Australian courts to consider how international custom influences domestic law, and so in contrast to international convention, there is little

18. *Ibid.*, para.131.

19. (1949) 77 C.L.R. 449. This case was the last word by the High Court on the relationship between international custom and Australian law, and is generally seen as supporting the transformation doctrine. In his judgment, Dixon J stated that international law was not a part, but a source of municipal law, which Sawer interprets to include "a judicial discretion in the Australian (and English) Courts to ignore international law rules not so far 'received' on some ground of their inconsistency with general policies of our law, or lack of logical congruence with its principles". Sawer quoted by Mason quoted by Merkel J. *Supra* n.1, para.129.

20. *Supra* n.1, para.84.

21. *Ibid.*, para.167.

22. (1962) I.L.R. 277.

23. *Supra* n.1, para.145.

24. *Ibid.*, para.163.

25. Campbell, Roderick, "Genocide Cases have No Basis, Court says", *The Canberra Times*, 2 Sept. (1999) Part A, p.4.

guidance on this issue.[26] The judges have upheld unanimously the expectation that the transformation theory is the preferred approach in Australia:[27] however; they differ markedly on their interpretation of how international custom can be transformed or adopted into domestic law.

The majority's narrow interpretation of the transformation doctrine evidences a dualist view of the relationship between international law and domestic law. It considers that these two legal systems operate on separate planes, so that international law does not directly influence municipal law, but instead requires an active intention of the Commonwealth Parliament to incorporate international law into Australian law. On the other hand, with regard to international custom, Justice Merkel interprets the transformation theory more widely. His approach is more representative of the monist view of the relationship between international law and domestic law, which blends these two legal systems, although he still accords primacy to municipal law. Although Merkel J's judgment was in dissent his approach, which distinguishes between custom and convention, appears more in line with trends both abroad and in Australia in interpreting the impact of international law on domestic law.

The primary problem with the majority's position is that they do not consider custom should have a greater influence on domestic law than a treaty voluntarily entered into. In attempting to uphold Australia's sovereignty to determine its own laws, they fail to distinguish between these two sources of international law. However, there are considerable differences. Treaties are generally between particular parties only, they can be bilateral or multilateral, the issues which they discuss may be universal or specific, and they are negotiated by the Commonwealth Executive without any legislative input.[28] By contrast, norms of customary international law arise through State practice and *opinio juris*, that is, State acceptance and recognition of their status as customary norms in the international community. Norms which obtain the status of *jus cogens* are customary rules from which no derogation by any State is allowed.[29] The very different source and nature of custom suggest that it should be treated differently.[30]

A wider interpretation of the influence of custom on municipal law is more in line with the approach taken in other common law countries. In England, there

26. The High Court has not been asked to consider this question for more than 50 years: in *Polites* v. *The Commonwealth* (1945) 70 C.L.R. 60 the Court appeared to favour the incorporation approach, however Dixon's judgment four years later in *Chow Hung Ching* v. *R* (1949) 77 C.L.R. 449 has been interpreted as preferring the transformation approach.

27. *See* Shearer, I. A., "The Relationship Between International Law and Domestic Law" and Mason, Sir Anthony, "International Law as a Source of Domestic Law" in Opeskin, Brian R. and Rothwell, Donald R., *International Law and Australian Federalism* (1997) Melbourne University Press.

28. It is noted that some multilateral treaties do crystallise into customary law (as the Genocide Convention has in this case), likewise some customary rules of international law are incorporated into treaties. In both instances they should be treated as customary norms.

29. Article 53 of the Vienna Convention on the Law of Treaties 1969.

30. Shearer suggests that one reason why domestic courts may be reluctant to differentiate custom is the difficulty in ascertaining customary rules of international law: while some are clearly established, others are less so, and municipal tribunals may not be in the best position to determine State practice and *opinio juris*. Nevertheless, he notes that cases where Australian courts have been faced with this difficulty are hard to find. *Supra* n.27, p.60.

seems to be a revival of the incorporation doctrine, limited, however, to rules of international law that are clearly established and which do not require adaptation to domestic law.[31] In Canada and New Zealand, it would appear that customary international law is invoked as part of the domestic law by adoption, without the need for transformation by legislation, except where it conflicts with statutory law.[32] Ireland and South Africa both refer to international law in their constitutions and support the automatic incorporation approach.[33] Either via the incorporation approach or a wider interpretation of the transformation theory, it seems that these countries allow international custom to play a more direct role in influencing their municipal law.

It may seem curious that a court can reject the incorporation theory but accept the common law adoption doctrine, as the line between the two approaches seems very thin. Essentially the distinction is that in the case of incorporation the courts are required to apply international customary law except where there is a conflicting statute and, possibly, common law.[34] In the case of the common law adoption approach, the courts have a discretion to apply or not to apply a customary norm in the absence of conflicting municipal law and after a consideration of public policy.[35]

Within Australia too there have been developments which likewise indicate a growing closeness in the relationship between international law and municipal law. Numerous decisions by Australian courts in recent years on a variety of questions indicate that the international law is considered to be a "source" of Australian law.[36] In *Minister for Immigration and Ethnic Affairs* v. *Teoh*[37] the High Court of Australia held that where a treaty has been ratified but not incorporated into municipal law, provisions of that treaty can still be received into common law, not as part of the law, but as a source of the common law. As Mason suggests, it would seem that here the Court is applying a modified version of the transformation approach.[38] The High Court appears to go further in *Project Blue*

31. *Ibid.*, p.43.
32. *Supra* n.1, paras.118–122.
33. Shearer, *supra* n.27, pp.39–40.
34. There is some uncertainty as to whether the incorporation approach means that customary international law is part of the common law, or whether it is part of domestic law, separate and subordinate to common law and statute law. See Kristen Walker in Mason, *ibid.*, p.212.
35. *Supra* n.1, para.84, per Merkel J.
36. *Supra* n.27, Shearer p.51 and Mason pp.222–223. See also *Mabo* v. *Queensland (No. 2)* (1992) 175 C.L.R. 1, *Australian Capital Television Pty Ltd* v. *Commonwealth [No. 2]* (1992) 177 C.L.R. 106, *Dietrich* v. *R* (1992) 177 C.L.R. 292, *Polyukhovich* v. *Commonwealth* (1991) 172 C.L.R. 501 and *Minister for Immigration and Ethnic Affairs* v. *Teoh* (1995) 183 C.L.R. 273.
37. *Supra* n.3. In this case, the High Court held that Australia's ratification of the Convention on the Rights of the Child raised a legitimate expectation that a decision-maker would take into account the Convention when determining the deportation of a father, despite the fact that the Convention had not been incorporated into municipal law.
38. Mason, *supra* n.27, p.217.

Sky Inc v. *Australian Broadcasting Authority*,[39] where it invoked a quasi-incorporation doctrine. This doctrine allows for an international instrument that has not been directly incorporated into municipal law to nevertheless have a substantial impact. Rothwell proposes that the overall result may be much the same as direct incorporation, because although a treaty may not be directly incorporated there may still be a legal obligation under Australian law to apply the obligations that treaty imposes.[40]

While both of these cases concerned the impact of treaties on municipal law, they illustrate very clearly the recent trend of the High Court of Australia to use international law as a "source" of municipal law, thereby placing greater importance on the role of international law to shape and mould Australia's domestic law. In light of these trends both at home and abroad, it is suggested that if the *Nulyarimma* case is brought before the High Court there may well be support for Merkel J's common law adoption of customary international law norms in Australia. Shearer appears to support this assertion when he says that the "significance of customary international law as a source of Australian law ... will continue to grow as the parallel growth of customary law out of conventional international law comes to be discerned, especially in the fields of human rights and the protection of the natural environment".[41]

Justices Wilcox and Whitlam were concerned that a wider interpretation of the adoption theory would involve Australian courts "creating" new law and usurping the role of the legislature. There was particular concern that international criminal law should be treated with great caution as there is a strong presumption in favour of the notion that there is no crime unless expressly created by law.[42] But as Merkel J pointed out, in relation to offences having universal jurisdiction the courts are not creating new criminal offences by reference to the court's view of public policy, rather "the courts are determining, by reference to criteria established by the common law, whether by adoption, municipal law is to recognise and therefore receive that which has evolved into a crime of universal jurisdiction in international law".[43] As he went on:

> It would be anomalous for the Municipal Courts not to continue their longstanding role of recognising, by adoption, the changes and developments in international law. Accordingly, in my view there is no inconsistency involved in the common law *continuing* to recognise the historical, and increasingly important, role of customary international law, always of

39. (1998) 153 A.L.R. 490. In this case, the High Court held that the Australian Broadcasting Authority ("ABA"), which operated under the provisions of the Broadcasting Services Act 1992 (Cth) ("Act"), was bound to follow the Australia New Zealand Closer Economic Relations Trade Agreement because the Act required the ABA to perform its functions in a manner consistent with Australia's obligations under any convention.

40. Rothwell, Donald R, "Quasi-Incorporation of International Law in Australia: Broadcasting Standards, Cultural Sovereignty and International Trade" (1999) 27 *Federal Law Review* 527, pp.544–545.

41. Shearer, *supra* n.27, p.61.

42. *Supra* n.1, para.26, per Wilcox J.

43. *Ibid.*, para.179.

> course, subject to the legislature's power to abrogate, vary or confirm the operation of the common law of Australia in that regard.[44]

The final arbiter of Australia's law-making remains the Commonwealth Parliament, as it has the ultimate power to legislate clearly and unambiguously on an issue of international concern. In this respect, it cannot be overlooked that the Parliament has passed section 1.1 of the Criminal Code (Cth). Whether Merkel J's interpretation that the crime of genocide, having its source in international custom and not Commonwealth common law, means that this section does not apply to it is questionable. Arguably, the Parliament has legislated clearly and unambiguously that the only criminal offences recognised in Commonwealth law are those expressly created by statute. If the High Court did support Merkel J's common law adoption approach, it would need to state clearly how and on what basis international custom was being adopted into Australia's domestic law.

VI. CONCLUSION

In *Nulyarimma* the Federal Court of Australia upheld unanimously the expectation that the transformation theory was the preferred approach for conceptualising the relationship between international customary law and domestic law in Australia, however, it was split on its interpretation of how custom could be transformed into Australian law. The majority view was that the transformation theory should be interpreted strictly, suggesting that, as with convention, customary norms should not directly influence municipal law. The dissenting opinion favoured a wider reading of adoption, distinguishing between treaty and custom and suggesting that the latter should play a more direct role in influencing Australian law. It is suggested that, if this case goes to the High Court of Australia, that Court may embrace the common law adoption approach. A broader interpretation of the transformation theory would be more in line with the trend, both overseas in relation to custom and in Australia in cases on convention, towards giving international law a greater role in influencing, directly or indirectly, municipal law in Australia.

KRISTEN DAGLISH*

THE BRIDGE ON THE STRAIT OF MESSINA: "LOWERING" THE RIGHT OF INNOCENT PASSAGE?

The Strait of Messina is a body of water in the Mediterranean Sea separating the island of Sicily to the west from mainland Italy to the east, linking the Lower Tyrrhenian Sea with the Ionian Sea. The strait is around 30 miles long and its width ranges from 1¾ miles (between Faro Point and the Rock of Scylla) to 10 miles (between Cape Alì and Cape Pellaro). At its northern end it reaches, at one point, a minimum depth of 70 metres.[1]

44. *Ibid.*, para.181.

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1. For a detailed description R. H. Kennedy, "Brève étude géographique et hydrographique des détroits qui constituent des voies de passage internationales", *Conférence des Nations Unies sur le droit de la mer*, 1 *Documents préparatoires* (1958), Doc. A/Conf.13/6, pp.136–137.

Legally speaking, this natural channel is undoubtedly an international strait under the United Nations Convention on the Law of the Sea (UNCLOS), as it is located entirely within the internal and territorial waters of a coastal State (Italy), it connects two high seas zones and it is used for international navigation purposes.[2] As such, the regime applicable to navigation in the strait would have to be, at first sight, that of "transit passage". But UNCLOS provides otherwise. According to Article 38.1, transit passage does not apply if "the strait is formed by an island of a State bordering the strait and its mainland" and "if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics". For these straits the relevant discipline is that established by Article 45 of UNCLOS which prescribes a non-suspendable right of innocent passage, i.e. the regime applicable in the ordinary territorial sea plus the illegality of any temporary suspension of it.

That the Strait of Messina falls within the exception of Article 38.1 is rather clear-cut. Indeed, this clause is often referred to as the "Messina exception",[3] after its introduction in the Convention on the insistence of the Italian Delegation, which wished to avoid the more stringent discipline of transit passage being applied to said strait. Yet the application of the innocent passage rule has not been without dispute (see *infra* in the text) and may possibly be in contrast with the envisaged project of a bridge over the Strait. The first modern exploratory studies[4] on the infrastructure were conducted in 1969 and led to the approval of Law No. 1158 (17 December 1971)[5] on a fixed road and rail linkage between Sicily and the Italian mainland. The Law provided for the establishment of a Company (the *Stretto di Messina* S.p.A., created in 1981)[6] to whom it entrusted all the necessary research activities (through feasibility studies) for the realisation of the infrastructure, as well as its design and construction. The management of the road linkage was to be attributed to the Company, while the rail linkage would have remained the domain of the Italian State Railways. Of the three original alternatives—underground tunnel, submerged bridge, normal bridge—the last one, because of its lower costs, widely-proven safety, shorter construction times, easy and

2. Articles 34–36 of UNCLOS. On the "international" aspects of the Strait see M. Gestri, "Libertà di navigazione e prevenzione dell'inquinamento: Il caso dello Stretto di Messina", LXIX *Rivista di diritto internazionale* (1986), pp.280–306, in particular p.285.

3. Gestri, *op. cit.*, p. 287; T. Treves, *Il diritto del mare e l'Italia* (Giuffrè Editore, Milano, 1995) pp.54–55; J. A. de Yturriaga, *Straits Used for International Navigation—A Spanish Perspective* (Martinus Nijhoff, Dordrecht/Boston/London, 1991) p.13. L. M. Alexander, "Exceptions to the Transit Passage Regime: Straits with Routes of 'Similar Convenience' ", 18 *Ocean Development and International Law* (1987), pp.484–486.

4. The idea of a bridge or system of bridges over the Strait seems to have been contemplated even by Emperor Charlemagne back in the IX Century. L. La Spina, "Il Ponte sullo Stretto lungo un'illusione", *La Stampa*, 18 Sept. 1999, p.11.

5. 8 *Gazzetta Ufficiale della Repubblica Italiana*, 11 Jan. 1992.

6. The Law provided for the Company shares to be allotted as follows: 51% to the Institute for Industrial Reconstruction (IRI—*Istituto per la Ricostruzione Industriale*), 12.25% to the Italian State Railways (FS—*Ferrovie dello Stato*), 12.25% to the National Roads Authority (ANAS—*Azienda Nazionale Autonoma delle Strade*), 12.25% to Calabria's regional government, 12.25% to the Sicilian regional government.

cost-effective maintenance, was soon deemed to be the optimal solution,[7] so that the first projects for a suspension bridge were undertaken. In 1992 the *Stretto di Messina* S.p.A. completed and handed over to the competent authorities and interested parties (mainly the Italian State Railways and the National Roads Authority) the detailed preliminary design of the bridge, integrated with reports on costs and construction times. Five years later, the Italian Higher Council for Public Works gave unanimous approval to the upgrading of the project from preliminary stage to executive, subject to further studies, that were completed in November 2000 and gave an affirmative response to the feasibility of the bridge.[8]

Currently, the most likely outcome of this prolonged analysis is a 3,300 meter single span suspension bridge between Sicily and Villa San Giovanni (Calabria) with a highway platform capable of bearing a traffic flow of 9,000 vehicles per hour and a double track railway that could allow the passage of 200 trains a day (thus necessitating a width of 60 metres and a total surface of about 22 hectares). Last but not least, its height above sea level should be around 64–70 metres.[9]

The final decision on the construction of the bridge has not yet been taken. Environmental and budget concerns are the main stumbling blocks facing the project. There is, however, a third factor in the equation to be dealt with, that of the above-mentioned right of non-suspendable innocent passage. The height of the proposed bridge may, in fact, impair the passage of certain types of ships, namely drill ships, crane vessels and drill and oil rigs. According to a survey of Lloyd's Register, in 1992, 36 drill ships operated around the world, their derricks being between 75 and 90 metres high. Similarly, crane vessels may pose a problem, as certain types do in fact exceed 64 metres.[10] Drill and oil rigs present an even worse case scenario, as some can be 150–180 metres in height. Finally, there is scope to argue that the shipping industry will be able to build ships that will surpass the height limits of the Messina bridge.

The problem has already been subject to international scrutiny in the past. The case concerning passage through the Great Belt between Finland and Denmark presents various similarities to a possible dispute arising from the Messina bridge case.[11] In that instance Finland objected to the construction of a bridge in the Danish strait, called the Great Belt, by pointing out that the planned infrastructure would have impaired the right of free passage of drill ships, oil rigs and reasonably foreseeable future vessels, precisely because of the height (65 metres) of the proposed bridge. It is interesting to note, for the purposes of this article, that

7. For a detailed history of the Project, see the official website of the *Stretto di Messina* S.p.A., at <http://www.strettodimessina.it>.

8. E. d'Errico, "Ponte sullo Stretto, c'è il sì degli esperti", *Corriere della Sera*, 27 Nov. 2000, p.24. G. Pogliotti, "Rapporto degli advisers: il ponte sullo stretto costerà 9–10 mld", Il Sole 24 Ore, 13 Jan. 2001, p.10.

9. For all the technical details see <http://www.stettodimessina.it/data_p_e.htm>.

10. M. Koskenniemi, "Case Concerning Passage through the Great Belt", 27 *Ocean Development and International Law* (1996), pp.264–265; for an earlier version in French see Koskenniemi, "L'affaire du passage par le Grand-Belt", XXXVIII *Annuaire Français de Droit International* (1992), pp.905–947.

11. Koskenniemi, *op. cit.*, pp.255–289. The ICJ, which refused to indicate provisional measures as requested by Finland—*Passage Through the Great Belt (Finland* v. *Denmark)*, I.C.J. Rep. 1991, pp.12–21—never came to a decision on the merits as Denmark and Finland concluded a separate agreement which resolved the issue. I.C.J. Rep. 1992, pp.348–349.

Denmark's position, apart from trying to exclude the contested categories of oil rigs from the right of innocent passage and giving a stricter interpretation of what constituted "reasonably foreseeable vessels", focused on the fact that drill ships and similar vessels above 65 metres would still have been able to enjoy the right of free passage, once the bridge had been completed. How? Simply by using another strait, which, along with the Great Belt, formed part of what was and still is known as the Danish Straits and to which national law, customary law and treaties—and the obligation on Denmark to allow free passage—refer "in block".[12] In a few limited cases some modifications to those special vessels mentioned above could have been necessary but these were considered minor technical corrections which did not amount to an impairment of the right of unhindered passage. In other words, for Denmark, the existence of an alternative route within the Danish straits, and the limited amount of ships over the 65 metres benchmark, rendered the accusation of violating the regime of free passage completely unfounded. The difference from the Strait of Messina is apparent. This body of water is, as said, an international strait which corresponds to the definition of Article 38.1 of UNCLOS. General customary law and treaty law thus apply, as opposed to that which may be relevant in the Danish Straits, in particular its being a system of straits and the relevance to it of an *ad hoc* customary regime.[13] The result is that the use of all straits is taken into consideration as part of a unitary legal dimension. According to Denmark "The international Danish straits in respect of which there is a right of passage are not constituted only by the Great Belt … the obligation of allowing passage … is fulfilled equally whenever the passage may be safely completed through the Sound. *In other terms, there is a right of passage through the Danish straits; there is not an exclusive and specific right of passage through the Great Belt*" (emphasis added).[14]

On the other hand, the closure represented by the height limit for the bridge over the Strait of Messina would become permanent, with no legal and practical safety valve as provided by the "pluralistic" nature of the Danish Straits. The permanent nature of the obstacle is clearly in contrast with the non-suspendable right of innocent passage which applies to the area. The regime of simple innocent passage, applicable in ordinary territorial waters, would be at loggerheads with a facility which would constitute something much more onerous to sustain for foreign ships than a temporary suspension of passage. Bearing this in mind, the

12. Among others, the main relevant instrument of international law, peculiar to the Straits, was and still is the Treaty on the Redemption of the Sound Dues (Copenhagen, 14 March 1857). Text (in French, official language) in G. F. de Martens, 16 *Nouveau recueil général des traités et autres actes relatifs aux rapports de droit international*, 2nd Series (Dieterich, Gottingue, 1891), pp.345ff. Similarly important were bilateral treaties concluded with the powers that had not participated in the Copenhagen multilateral convention. Counter-memorial submitted by the Government of the Kingdom of Denmark, para.661, available at <http://www.icj-cij.org/icjwww/Icases/ifd/iFDpleadings/ifd_ipleadings_toc.html>. These treaties make the Danish Straits one of those international waterways subject to Article 35 UNCLOS: "Nothing in this Part affects: … (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

13. Koskenniemi, *op. cit.*, p.281, *supra* n.12.

14. Paras.676–677, Counter-memorial submitted by the Government of the Kingdom of Denmark, *supra* n.12.

contrast with a regime which does not allow even a temporary suspension is more than evident.

Can other factors change the legal picture? The answer varies radically according to the argumentation analysed. To be excluded is that the existence of a similarly convenient route seaward of Sicily (i.e. through the Sicilian Channel) renders the bridge obstacle legitimate. The definition of the Strait of Messina in these terms was elaborated to create a regime less burdensome on the coastal State than the otherwise applicable transit passage discipline, not to allow for a unilateral discretionary regime in which the right of passage was subject to the will and necessities of said coastal State. A certain tendency in this direction, represented by the 1985 Italian Ministerial Decree prohibiting the passage of oil tankers over 50,000 tonnes through the strait[15] and the accompanying *note verbale* of the Italian government (15 May 1985), which specifically refers to the existence of an alternative route,[16] can not be really cited as a relevant precedent. Apart from the fact that said Decree attracted the protest of at least one major sea power (the US),[17] the 1985 Decree focused essentially on the dangerous nature and volume of the cargo transported, i.e. on those characteristics that were deemed to represent an objective danger to the essential interests of the State concerned, thus contrary to the innocent nature of the passage. This approach, which has always sparked off controversy (the traditional perspective being that the innocence of the passage is related to its modalities and not to pre-established qualities of the vessel[18]) would simply not apply to the obstacle represented by the bridge. What essential interests of the coastal State would be infringed by the passage of ships over 64–70 metres in height? Damage to the bridge once completed could be the first and obvious answer, but, of course, one that is faulted by the classical expression of "the cart before the horse".

But is this a real problem? In other words, is the Strait of Messina currently being used by ships which would not be able to pass through it once the bridge were to be completed? Both Finland and Denmark examined the data relating to the utilisation of the Great Belt, arriving at quite different conclusions as regards the significance of the impact of the bridge on certain ships. If it were to be proved that absolutely no ship higher than 64–70 metres has ever passed through the strait or that it is extremely unlikely to do so in the future, Italy's case would be rather difficult to contest. However, even in this instance, there would still remain some serious doubts. The non-exercise of a right may well lead to its demise but this is not at all an easy process. Much more significant would be the argumentation that,

15. The Decree (8 May 1985) prohibited the passage of all ships over 50,000 tonnes transporting oil or other noxious substances, as defined by the treaties which currently bind Italy. 110 *Gazzetta Ufficiale della Repubblica Italiana*, 11 May 1985.

16. B. B. Jia, *The Regime of Straits in International Law* (Clarendon Press, Oxford, 1998), p.181. The note was addressed to the U.S.

17. The protest had been made in relation to an earlier Decree (see *infra* n.37) but was couched in terms so general as to be relevant for the later Decree as well. J. A. Roach & R. W. Smith, *Excessive Maritime Claims* (Naval War College, Newport R.I., 1994), pp.197–200; T. Treves, "Codification du droit international et pratique des états dans le droit de la mer", 223 *Recueil des Cours* (1990), pp.134–135.

18. Gestri, *op. cit.*, pp.292–297; G. Cataldi, *Il passaggio inoffensivo delle navi straniere attraverso il mare territoriale* (Giuffrè Editore, Milano, 1990), pp.102–103.

for example, because of the natural and hydrological characteristics of the straits, no such ship would be capable of crossing the Strait. This does not appear to be the case.

Another possible line of reasoning is that the limited number of ships and vessels out of the existent world fleet total exceeding the bridge height (especially if excluding the contested oil rigs from the category of ships: the Danish position, see *supra*), would make the impairment of their rights more or less acceptable within the frame of important national interests of the coastal State, worthy of protection and advancement.[19] Yet the limits of this possible percentage-motivated exception would create a dangerous precedent. And even accepting such a possibility, the existence of viable alternatives[20] would put the coastal State under pressure to harmonise its perceived essential interests with the interests of the international community.[21] Nor would the difference in cost or the absolute necessity of the infrastructure be an excuse. The present estimates generally point to a sum which, albeit enormous, is well within the reach of a wealthy industrial country.[22]

But amendments to the current main project will probably be unnecessary from an international legal perspective. Indeed, if a country were to object to the possible decision of going ahead with the project, Italy could count on the so called acquiescence of the international community at large,[23] with more valid grounds than the similar Danish argumentation in relation to the original Finnish silence over the Great Belt fixed link. In 1988 the Italian Government notified the International Maritime Organization of the Messina Bridge project, seeking "advice on the navigational aspects of the bridge with special reference to its minimum clearance above sea level".[24] According to Article 22.3 of UNCLOS "In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account: (a) the recommendations of the competent international organization", i.e. the IMO.[25] The bridge project only partially fitted into this category (especially the double span version, which would have needed some kind of traffic separation scheme due to

19. Law No. 1158 (*supra*, n.5) defined the creation of a permanent road and railway linkage between Sicily and the Mainland to be an infrastructure "of national interest".

20. Technically speaking, the submerged or underground alternatives were considered feasible. *Supra* n.7.

21. The right of passage is valid *erga omnes*, for all nations to enjoy.

22. In the Great Belt case, Denmark underlined the necessity of the bridge for the efficiency of its economy, as opposed to the competitive edge of a few companies which Finland was trying to protect by claiming the illegality of the infrastructure. Finland intelligently argued that it was not asking Denmark to give up the project, but simply to modify the plan (increased height, an opening in the bridge etc.) or examine other alternatives (e.g., a tunnel).

23. On the significance of this point L. Lucchini & M. Vœlckel, *Droit de la mer* (Pédone, Paris, 1996), p.370.

24. Doc. NAV 35/Inf. 4, 10 Oct. 1988. Doc. MSC 57/INF.2, 10 Oct. 1988.

25. Contrary to transit passage for which (Article 41) "... States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them".

the pylon in the middle of the Strait[26]) but Italy's notification served the purpose of communicating to the world maritime community the potential transformation of the Strait. The Sub-Committee on Safety of Navigation reported to the Maritime Safety Committee that the minimum clearance foreseen for the single span bridge "would be not less than 64 metres in the central span of 1,400 metres" and that, consequently, "*these minimum clearances should be more than adequate for ships likely to use the Strait of Messina*, *so far as can be foreseen*" (emphasis added).[27] The Maritime Safety Committee endorsed the Sub-Committee's Report,[28] thus apparently putting an end to all possible disputes concerning the navigational aspects in the Strait of Messina following the construction of the bridge. If the project had been deemed illegitimate, protests or concerns should have been expressed in this ambit, that of an organization whose members currently amount to 158[29] (plus two associate members) and represent more than the absolute majority of the world merchant fleet. Added to this, the language of the Report would seem to constitute a difficult hurdle to overcome for a possible legal challenge based on hypothetical future ships taller than the minimum clearances, as it refers to all "ships likely to use the Strait … *so far as can be foreseen*" (emphasis added), thus adopting an extensive formula the use and practical implementation of which has by no means gone uncontested in other instances.[30] It is also worthwhile mentioning that from 1955 until 1992 the Strait was crossed by a functioning electric transmission line, positioned at around 80 metres above sea level[31] (its lowest height being 70 metres, at a point 2,167 metres from the Calabrian coast and 1,479 metres from the Sicilian coast).[32] This power line, owing to its height, could not create problems for the safe passage of ships at the time of its initial installation and apparently did not create problems thereafter. Certain modern ships and vessels, such as those partly identified by Finland, would have been hindered by this electric infrastructure. Yet its very duration—almost 40 years—with no known protest on the part of the international community, would not have made legal opposition to it very successful.

26. At the time there were two projects, one for a single span bridge (which subsequently prevailed) and the other for a double span bridge. The Italian Government also submitted (9 Feb. 1989) a further project for "a submerged bridge … at a uniform depth … of 30 m below sea level". Doc. MSC 57/INF.2/Add.1. According to the Italian Shipping Register (*RINA*) the depth of the extrados of this structure (known as the Archimedes Bridge) would have allowed "a free navigation to ships of any tonnage".

27. Doc. NAV/35/14, Report of the Sub-Committee on Safety of Navigation on its 35th Session, 2 Feb. 1989 (Navigational Aspects of a Bridge in the Strait of Messina), paras.3.7.1–3.7.4. The Sub-Committee also expressed its preference for a single-span bridge "since the obstruction caused by the central pier of a double-span bridge would pose a navigational hazard in the strong currents encountered in the Strait … and in strong winds".

28. Doc. MSC 57/27, Report of the Maritime Safety Committee on its 57th Session, 2 May 1989 (Navigational Aspects of a Bridge in the Strait of Messina), paras.10.2.16–10.2.17.

29. "IMO Has 158 Member States", *IMO Briefing*, 21 March 2000. However, at the time of the adoption of the Report of the Sub-Committee, the members were "only" 135. Many of the new entrants have resulted form the dissolution of previous States (USSR, Yugoslavia). Data available on <http://www.imo.org/imo/members.htm>.

30. Koskenniemi, *op. cit.*, pp.268–269.

31. Kennedy, *op. cit.*, p.137.

32. The references were the sustaining pylons. Information kindly provided to the author by the *Capitaneria di porto* of Reggio Calabria.

Its presence and, more importantly, the acquiescence to it could potentially be used by Italy to prove an historical right on her side, as coastal State, against the right of passage for ships over 80 metres; the weak point in this reasoning is the relatively easy nature of the removal of such an obstacle and the demise of its operational function from 1994 onwards.

In conclusion, can we say that the way is clear for the bridge over the Strait of Messina? The answer lies quite certainly in the affirmative, but with some reservations. Firstly, while the IMO has an impressive membership, it lacks universality. More significantly, at the time the Sub-Committee made its Report, membership numbers were inferior to the current ones.[33] So, are the new members and those States which have never been part of the IMO estopped from protesting against the proposed bridge because of the Sub-Committee Report? Probably not. But nonetheless, it could be argued that, if these States had some complaints to make on the proposed bridge, they should have by now expressed their concerns to the competent Italian authorities, and this does not seem to be the case. The similarity to the Great Belt passage case may be of use in examining this issue a little more thoroughly. Denmark's claim that, in any case, Finland had accepted the bridge project as it had waited until 1989 to protest, notwithstanding the fact that the Finnish government had first received notice of the fixed link 12 years earlier, was severely weakened, in the eyes of Finland, by the fact that the project had been modified various times (not ruling out the tunnel option) and that guarantees as to international shipping being able "to proceed as in the past" had been given.[34] In the specific case of the bridge over the Strait of Messina, it has to be again underlined that no definitive decision has yet been taken on the final go-ahead, this requiring, according to Law No. 1158 (*supra*) a joint Ministerial Decree and a Law setting aside the funds to be possibly devolved by the State for the construction of the infrastructure.[35] So, arguably, Finland's position in relation to the Great Belt could be adopted by States concerned with the right of passage in the Strait of Messina, thus taking advantage of the lack of a definitive decision. The fact that the Messina bridge project is already rather advanced in its preliminary stages would make this challenge less sound than would at first appear. But the Government's instructions for the technical report which was commissioned in 1999 from independent advisers (for the evaluation of environmental, social and economic issues connected to the infrastructure), referred not only to the preliminary bridge project approved by the Higher Council for Public Works (see *supra*) but also to "other possible arrangements for the communication linkage between Sicily and the Mainland that could guarantee the

33. *Supra* n.29. Among the new members, many have a Mediterranean-Black Sea profile, thus are probably likely to use the Strait more frequently: Croatia (1992), Albania (1993), Bosnia & Herzegovina (1993), The former Yugoslav Republic of Macedonia (1993), Georgia (1993), Slovenia (1993), Ukraine (1994).

34. Koskenniemi, *op. cit.*, p.269.

35. Opinions in the Italian political spectrum and indeed within the Government are not unanimous. A. Baccaro, "Sì al Ponte di Messina. Mattioli e Wwf contro", *Corriere della Sera*, 28 Nov. 2000, p.13; R. Giovannini, "Messina, un ponte da 10.800 miliardi", *La Stampa*, 24 Jan. 2001, p.10; S. Rizzo, "Messina, 11 anni per il ponte", *Corriere della Sera*, 24 Jan. 2001, p.19.

maximum development possible of the economies of the regions concerned".[36] So, again, not only there remains a final decision to be taken but other alternatives (such as an improved system of ferry transport[37]) have still not been completely ruled out. The similarities to the Great Belt case are rather significant. From the above-described perspective, Finland's claim as to its silence to the original Danish notes that "it might have been more prudent if [it] had responded to it [the 1997 Note] in writing" could be used by States raising a legal challenge to the Strait, albeit only those who in 1989 were not part of the IMO or have not subsequently become bound by the IMO stances, would have some chance of success. A superficial analysis of the interests and legal positions of this group of countries would definitely seem to suggest that any legal challenge to the bridge is extremely unlikely. Apart from the fact that some of the new entrants in the IMO may still be bound by the previous membership of their predecessor, what is more significant is the fact that none would seem to have such shipping interests that may be impaired by a new height limit in the Strait of Messina.[38]

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36. Available on <http://www.strettodimessina.it//atti.htm>. See also n.26 *supra* and Pogliotti, *op. cit.*

37. Giovanni, *op. cit.*; Rizzo, *op. cit.*

38. It is quite significant that the closure of the Strait to 50,000 tonne tankers and the temporary interdiction for 10,000 tonne tankers (Ministerial Decree, 27 March 1985; 76 *Gazzetta Ufficiale della Repubblica Italiana*, 29 March 1985) seemingly attracted only the U.S. protest. Treves, "Codification …", *op. cit.*, p.135.

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