

# WAIKATO LAW REVIEW

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First published in 1993, *Taumauri* – the Waikato Law Review provides authoritative and critical analysis on a broad range of legal issues. The journal is hosted by *Te Piringa* Faculty of Law at the University of Waikato and reflects the Faculty's founding objectives of biculturalism, the study of law in context, and professionalism.

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### **Submissions**

Articles, case notes, and book reviews should be emailed (as Microsoft Word attachments) to the Editor in Chief by **31 October**.

Submissions should comply with either the New Zealand Law Style Guide (3rd Edition) or OSCOLA (4th Edition), and should conform with the general layout of articles, case notes, and book reviews published in previous issues of the Waikato Law Review. Articles should be within the range of 8,000 to 12,000 words (maximum) including footnotes, and other submissions should be within the range of 4,000 to 8,000 words.

**Contact details for submissions:** Dr Trevor Daya-Winterbottom FRSA FRGS, Editor in Chief, Waikato Law Review. Email: [wlreditor@waikato.ac.nz](mailto:wlreditor@waikato.ac.nz).

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# EDITORIAL: ANTARCTIC TREATY SYSTEM – ACHIEVEMENTS AND PROSPECTS

## I. INTRODUCTION

The 2019 issue of *Taumauri*, the Waikato Law Review, emphasises the foundation objectives of *Te Piringa* Faculty of Law at the University of Waikato: biculturalism, law in context, and professionalism. This issue also celebrates the establishment of the Waikato Public Law and Policy Research Unit hosted by the Faculty of Law, and the symposium held by the Unit in Wellington on 28 November 2018 critically analysing “The Antarctic Treaty System: Past achievements and future prospects”.

The Waikato Public Law and Policy Research Unit promotes the widest conception of public law and policy, encompassing administrative law, charity law and the regulation of civil society, constitutional law, criminal law and justice, and international law. It was established in 2018 to fill a clear gap in the interrogation of these issues in an integrated and holistic way. This issue of the Waikato Law Review furthers these aims and objectives.

## II. THE ANTARCTIC TREATY SYSTEM: PAST ACHIEVEMENTS AND FUTURE PROSPECTS

As part of its focus on public international law, the Unit hosted the symposium on the Antarctic Treaty System. The New Zealand Law Foundation, who provided the grant funding to cover the accommodation and travel costs for bringing the international speakers to New Zealand, generously supported the symposium.

The Antarctic Treaty 1959 has now been in place for over 60 years and is regarded by informed commentators as one of the most successful multi-party international treaty systems. The symposium was held on the cusp of the 60th anniversary of the Treaty, and provided an opportunity to look back and take stock of previous success – and more importantly, an opportunity to assess the future prospects for the Treaty system.

New Zealand has played a key role in the Antarctic Treaty system and has had a long involvement with Antarctica since accepting the transfer sovereignty over the Ross Dependency from the United Kingdom in 1923. The symposium was therefore highly relevant for lawyers, policy-makers, regulators, scientists, and academics working on both applied and theoretical research in relation to the continent and New Zealand’s interests in Antarctica. It attracted a diverse range of attendees from across the Department of Conservation, a former Judge of the International Court of Justice, the Ministry for Foreign Affairs and Trade, the New Zealand Defence Force, the Office of the Auditor General, and academics from the University of Auckland, the University of Southern Denmark, the University of Waikato, and Victoria University of Wellington.

### A. *The Antarctic Treaty System: Challenges and Opportunities*

Marcus Haward from the Institute for Marine and Antarctic Studies at the University of Tasmania addressed “The Antarctic Treaty System: Challenges and Opportunities”. He emphasized the key

importance of the Antarctic Treaty system in maintaining the peaceful use of the continent and underlined that its success could be measured by the way in which the Treaty system has managed external and internal pressures by avoiding disputes, addressing challenges (e.g. whaling), and by providing a guideline for addressing future issues (e.g. protecting biodiversity in areas beyond national jurisdiction (BBNJ) based on techniques derived from the Convention for the Conservation of Antarctic Marine Living Resources). Haward also noted the Cold War background to the Treaty negotiations and, what he termed, the “elegant simplicity” of Article IV in freezing sovereignty disputes and enabling the parties to focus on peace and security. He also drew attention to the capability for expansion of the Treaty system into areas such as the protection Albatrosses and other migratory sea birds. In terms of emerging issues, Haward identified the protection of the Southern Ocean under the United Nations Convention on the Law of the Sea (UNCLOS) and the negotiation of a new implementing agreement regarding BBNJ, the human impact of tourism, biological prospecting, climate change, and fishing as the key emerging issues that will test the strength of the Treaty system. He concluded by stressing that maintaining key norms from the Treaty system would require careful work.

*B. Why does the Antarctic Matter? Re-imagining the Treaty Regime from a European Perspective*

Catherine Mackenzie from the University of Cambridge addressed the question “Why does the Antarctic matter? Re-imagining the treaty regime from a European perspective”. She approached this “big” question by asking what makes a treaty work – does this arise because it is specific or common, or does uniqueness matter. Mackenzie found that treaty making is something that runs deep in the European conscience (citing the Treaty of Medina 622) and that it is a dynamic and ongoing process. She also found that, typically, treaties are focused on the community interest in maintaining borders. For example, as a result of the Treaty of Westphalia 1648 Mackenzie observed that we know what sovereign states look like, based on territorial claims and cultural influence. In contrast, the Antarctic Treaty system challenges these notions by freezing territorial claims (Article IV). As a result, she noted that, regime building has not therefore followed, and while states retain legislative competence - the traditional state trappings have not emerged. These observations led Mackenzie to focus on the mechanics of collective regimes (e.g. the Antarctic Treaty system, the Convention on Biological Diversity (CBD), the Ramsar Convention, and the World Heritage Convention) based on the concept of the common heritage of mankind. She found that the common heritage of mankind is a conceptual notion that is not defined or limited by borders. Mackenzie therefore questioned whether collective regimes generally are incapable of enforcement based on public choice economics that typically (in her view) produce third-best options and the impulse of collective decision-making where compromise is prevalent (e.g. the European Union). As a result, she found that there is a fundamental clash between the collective nature of the Antarctic Treaty system and the traditional (ideological) approach of state parties.

Mackenzie then examined the attributes of successful treaty regimes. Generally, she found that treaties with a smaller number of parties tend to be more effective, but that success can sometimes be diluted (e.g. CBD) because expectations are lowered to the lowest possible level. She also found that the objectives of treaty making are important (noting Haward’s emphasis on peace and security in relation to the Antarctic Treaty system), and that sometimes regime effectiveness can simply be based on the fact that “something positive” can be identified in relation to the particular regime by most observers.

In conclusion, Mackenzie noted a number of critical points when reimagining the Antarctic Treaty system, namely, that problem definition (looking at where regime fractures could occur – e.g. climate change or mineral exploitation), the time required to conclude treaty negotiations (e.g. UNCLOS), the political will to implement multi-lateral environmental agreements, the need for capacity building to support developing nations, that there is no single formula that works in treaty negotiations, that good results are rarely the product of a single factor, and that where problems occur the treaty document itself will generally be the ultimate tool that determines how issues are resolved. Finally, in relation to the question of whether uniqueness matters, Mackenzie observed that Antarctica (notwithstanding its importance) is merely one of a number of wilderness areas that deserve protection, that there is real tension between the precautionary approach and evidence based standard setting, that the elephants in the room are minerals (including oil) exploration and climate change, that territorial claims would be problematic absent Article IV, and that the biggest issue facing Antarctica could arise from establishing a permanent population and any resulting pressure for self-determination.

### *C. So What? Using Scientific Knowledge to Inform Antarctic Decision-making*

Julia Jabour also from the Institute for Marine and Antarctic Studies at the University of Tasmania posed the provocative question “So what? Using scientific knowledge to inform Antarctic decision-making?”. She noted that scientific research enables states to become parties to the Antarctic Treaty system and is a hedge against exclusion. In particular, Jabour observed that climate change makes science important due to the impact of climate change on ice, light, temperature, salinity, and ecology. This led her to argue strongly for cap and trade schemes to limit greenhouse gas emissions, but she noted that such action would require political decisions by states. Jabour also noted the trend towards the politicization of scientific research in Antarctica, and questioned whether in practice it supports or informs policy. For example, she noted the review by the Commission for the Conservation of Antarctic Marine Living Resources that found that scientific research was not always funneled toward or connected with decision-making, and more recent national trends that require academic research to demonstrate that it will be in the national interest of the funding state or provide national benefits to the funding state. Generally, Jabour observed the conflict between conservation and use of Antarctic resources and argued that these considerations should in practice be balanced. She concluded by emphasizing the increasing use of technology in Antarctic scientific research such as biotelemetry tagging, the use of drones and satellites for surveillance, and the use of 3D printing and imaging of krill to assist with monitoring. Overall, Jabour found that scientific research is a legitimate peaceful activity that provides state credibility for participation in the Antarctic Treaty system, and that scientific research is valuable where it can be translated into decision-making.

### *D. Biodiversity in the Antarctic: A Race against Time, but Who Owns What?*

Christopher Battershill from the University of Waikato addressed the challenging topic of “Biodiversity in the Antarctic: a race against time, but who owns what?” He focused on bio prospecting and questions around the ownership of Antarctic bio-resources, and the intellectual property rights of indigenous people. In particular, Battershill reported on case studies regarding metabolites found in sponges (that can be used to block certain cancers) that revealed questions about the sample sizes required for pharmaceutical testing and the need for environmental impact

assessment. For example, he noted that small sample sizes can sometimes have a disproportionate adverse impact and he argued for a case-by-case approach. This led Battershill to look at legal responses outside the Antarctic Treaty system (e.g. Rio Declaration, Nagoya Protocol, and the findings from the Waitangi Tribunal Report (WAI 262) regarding Maori interests in plant species and the need to regulate scientific research and commercialization) and to suggest that UNCLOS could be used as a model for providing more detailed regulation of bio-prospecting.

### *E. Drawing the Themes Together, A New Zealand Perspective on Antarctic Law*

Finally, Alberto Costi from Victoria University Wellington provided a thought provoking overview “Drawing the themes together, a New Zealand perspective on Antarctic law”, while Amy Laurenson from the Ministry of Foreign Affairs and Trade spoke briefly about her role as the New Zealand Commissioner under the Convention for the Conservation of Antarctic Marine Living Resources. Costi noted (like Haward and Mackenzie) that the Antarctic Treaty system is based on good will and cooperation. He then considered what the next challenges for the Treaty system are likely to be. Overall, Costi identified ten wide-ranging issues. First, emerging political trends over the next 20 years in terms of the role of China within the Antarctic and the action of Russia in testing the law. Second, that there will likely be increased competition for resources as a result of bio prospecting. Third, (more positively) that the Sustainable Development Goals may become more important for resolving issues. Fourth, that there could be a potential shift in the Antarctic Treaty system away from the current focus on peace and security, research, and high standards of environmental management. Fifth, future challenges could include growing membership that may affect the balance of power between the original Antarctic Treaty signatories, and the potential for new members to take a more cynical approach to resource exploitation. Sixth, whether the Antarctic Treaty system could cope with future challenges giving its low cost institutional structure and whether consensus decision-making would find it difficult to address hard questions (described by Costi as “thickening governing issues”) – as a consequence, there is a risk that the Antarctic Treaty system may become ineffective absent more investment. Seventh, that when viewed from an external perspective, New Zealand “punches above its weight” and exhibits a sense of duty to the wider international community. Eighth, that regime development is important, and that remaining outside the United Nations framework is likely to be beneficial, and that the long-term interests of the parties would likely best be served by a pragmatic approach to addressing issues. Ninth, that climate change and biodiversity remain key issues. Tenth, that Antarctic research must be used to inform decision-making both by regulators and commercial and industrial interests.

The keynote papers by Marcus Haward and Julia Jabour are now disseminated by publication in this issue of the Waikato Law Review.

## III. INTERNATIONAL LAW SCHOLARSHIP

This issue of the Waikato Law Review also reflects the Faculty’s research in the field of international law that focuses on armed conflict, conflict of laws, foreign investment law, humanitarian law, human rights, international criminal law, international environmental law, international trade, and law of the sea. For example, the article by Sheikh Mohammad Towhidul Karim and George F Tomossy from Macquarrie University on the progressive realisation of the right to health draws the important connection between human rights and the environment emphasised by the Sustainable Development Goals. While the article by Ashley Murphy from the University of

Chester argues persuasively that the climate change emergency should be viewed through a security initiative lens to underscore the urgent need for climate change mitigation. The article by Sharifah Saeedah Syed Mohamed from the University of Technology MARA emphasises the importance of international trade and the need for effective commercial terms of trade to underpin a sustainable global economy, and also provides a neat segue to the article by John Farrar noted below. These themes also link into the book review of *Human Rights and the Environment: Legality, Dignity and Geography* (Edward Elgar Publishing, Cheltenham, 2019) by James R May and Erin Daly from Widener University.

#### IV. LAW IN CONTEXT AND PROFESSIONALISM

Finally, the article by Emeritus Professor John Farrar (formerly Dean of Law at the University of Waikato) focuses on the career of William Larnach and his role in the commercial and corporate world of 19th century New Zealand. This article reflects the Faculty's commitments to the study of law in context and professionalism, and its innovation in being the first New Zealand law school to teach the Law of Corporate Entities as a compulsory subject in the LLB degree programme.

#### **Acknowledgement**

*Te Piringa* Faculty of Law acknowledges the generous grant support from the New Zealand Law Foundation that enabled Marcus Haward, Julia Jabour, and Catherine Mackenzie to present their research at the Antarctic Treaty System symposium in Wellington in November 2018.

Dr Trevor Daya-Winterbottom FRSA FRGS

Editor in Chief

*Te Piringa* Faculty of Law

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# THE ANTARCTIC TREATY SYSTEM: CHALLENGES AND OPPORTUNITIES

BY MARCUS HAWARD<sup>1</sup>

## I. INTRODUCTION: ANTARCTIC GEOPOLITICS

Over the last 60 years, the scope of international governance of Antarctica has steadily expanded in scope. In 1959, during the geopolitical tension of the early cold-war period, the Antarctic Treaty<sup>2</sup> was formed by the twelve original states to primarily prevent security competition in the Antarctic region. From its very creation, resolution – or at least management – of geopolitical tension has been a core norm of the Antarctic Treaty. This instrument was negotiated and entered into force during a period of heightened Cold War competition between the United States and the Soviet Union.<sup>3</sup> The Antarctic Treaty effectively managed this tension by demilitarising the Antarctic continent and directing all human presence on the continent towards peaceful use and scientific research. Throughout its history the Antarctic Treaty has been viewed as a successful example of international governance because of its successful responses to internal and external pressures.<sup>4</sup>

The Antarctic Treaty now faces a potential new set of geopolitical strains. The current parties include emerging economic and strategic powers of China and India and newly acceding members such as Malaysia and Pakistan. There are also significant governance challenges from increased tourism, shipping, fishing and bio prospecting, economic uses that create new interests and potential geopolitical tensions. A warming climate is a key driver of change within Antarctic and the Southern Ocean environments.<sup>5</sup> This change will likely generate new geopolitical tensions between states, including tensions arising from range shifting of commercially valuable marine species from mid to high latitudes.<sup>6</sup> There also remains ongoing discussion of the mining prohibition under the

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2 The Antarctic Treaty, 402 U.N.T.S. 71, entered into force June 23, 1961.

3 M Haward and T Griffiths (editors) *Australia and the Antarctic Treaty System: Fifty Years of Influence* (UNSW Press, Sydney 2011) at 2.

4 O R Young *Institutional Dynamics: Emergent Patterns in International Environmental Governance* (Cambridge Mass. MIT Press, 2010) at 53.

5 A J Constable, J Melbourne-Thomas, S P Corney, *et al.* “Climate change and Southern Ocean Ecosystems I: How Changes in Physical Habitats Directly Affect Marine Biota” (2014) 20 *Global Change Biology* 3004.

6 A J Hobday and G T Pecl “Identification of Global Marine Hotspots: Sentinels for Change and Vanguards for Adaptation Action” (2014) 24, 2 *Reviews in Fish Biology and Fisheries* 415.



Madrid Protocol, although much of this discussion appears to misunderstand, or misinterprets, the specific provisions and element underpinning this prohibition.<sup>7</sup>

## II. DEVELOPMENT OF THE ANTARCTIC TREATY

The development of the Antarctic Treaty was a significant diplomatic effort balancing the aspirations and interests of a number of different actors.<sup>8</sup> The Antarctic Treaty, in summary:

- Stipulates that Antarctica should be used exclusively for peaceful purposes — military activities, such as the establishment of military bases or weapons testing, are specifically prohibited;
- Guarantees freedom to conduct scientific research;
- Promotes international scientific cooperation and requires that the results of research be made freely available;
- Sets aside the potential for sovereignty disputes between Treaty parties by providing that no activities will enhance or diminish previously asserted positions with respect to territorial claims, provides that no new or enlarged claims can be made, and makes rules relating to jurisdiction;
- Prohibits nuclear explosions and the disposal of radioactive waste;
- Provides for inspection to ensure compliance with the Treaty — a world-first inspection system;
- Requires advance notice of expeditions; and
- Provides for the parties to discuss measures to further the Treaty.<sup>9</sup>

Article VI of the Antarctic Treaty defines its area of application as south of Latitude 60° South. This area includes all ice shelves and airspace, but it does not include airspace above high seas. While the Treaty applies to marine areas it explicitly states that it does not prejudice high seas rights in international law.<sup>10</sup>

## III. THE ANTARCTIC TREATY SYSTEM

Following the entry into force of the Antarctic Treaty in 1961, international governance of Antarctic steadily expanded through formation of a number of issue-specific treaties that sit under, or side-by-side, with the Antarctic Treaty. These treaties are the 1972 Convention for the Conservation of Antarctic Seals,<sup>11</sup> 1980 Convention on the Conservation of Antarctic Marine Living Resources

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7 S Vöneky and S Addison-Agyei “Antarctica” in R Wolfrum (editor) (2012) 1 *Max Planck Encyclopaedia of Public International Law* 418; A J Press “The Antarctic Treaty System: Future Mining Faces Many Mathematical Challenges” (2015) 7, 1 *The Yearbook of Polar Law* 623.

8 M Haward, D R Rothwell, J Jabour, R Hall, A Kellow, L Kriwoken, G Lugten, and A Hemmings “Australia’s Antarctic Agenda” (2006) 60, 3 *Australian Journal of International Affairs* 439.

9 A Bergin and M Haward *Frozen Assets: Securing Australia’s Antarctic Future*. Strategic Insight No 34, (Canberra, Australian Strategic Policy Institute, 2007).

10 Antarctic Treaty Art VI “The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area”.

11 Convention for the Conservation of Antarctic Seals, 11 February 1972. 29 U.S.T. 441, 11 ILM. 251 (1972).

(CCAMLR)<sup>12</sup> and 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol).<sup>13</sup> In 2001, a related treaty, the Agreement on the Conservation of Albatrosses and Petrels (ACAP),<sup>14</sup> was formed to provide protection to sub-Antarctic seabirds. ACAP is an agreement under the Convention on Migratory Species (CMS).<sup>15</sup>

This related group of treaties and the yearly meeting of parties to the Antarctic Treaty – the Antarctic Treaty Consultative Meeting (ATCM) – have become collectively known as ‘The Antarctic Treaty System’ (ATS) or treated in academic literature as a leading institution in international environmental governance.<sup>16</sup> At least at face value, the ATS has been very successful in ensuring that Antarctica and the Southern Ocean have been free from military conflict, retained their demilitarised status, and that decision-makers within the regular ATCM meetings have balanced the interests of claimant and non-claimant states. In this sense the regime that developed from the treaty has been effective – in that it has avoided the problem (i.e. security competition) that led to its original negotiation.<sup>17</sup>

#### IV. ANTARCTIC GOVERNANCE: MANAGING INTERNAL STRESSORS AND EXTERNAL CHALLENGES

The ATS has demonstrated significant ability to respond and adapt to major pressures and challenges.<sup>18</sup> In this period since 1961 the ATS has faced significant internal debates – most notably on the regulation of mineral resource activities; and faced external criticism – most clearly focused through the Malaysian-led United Nations debate on the “Question of Antarctica” in the period 1982–2002.<sup>19</sup> Critics have, however, argued that over recent decades, the ATS has been slow to respond to emerging issues<sup>20</sup>; but alternative views have also been presented.<sup>21</sup> This criticism suggests that the ongoing success of the ATS cannot be taken for granted and its ongoing positive development to address emergent issue and concerns will likely require careful management.

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12 Convention for the Conservation of Antarctic Marine Living Resources. 33 UST 3476; 1329 UNTS 48; 19 ILM 841 (1980).

13 Protocol on Environmental Protection to the Antarctic Treaty 30 ILM 1455 (1991).

14 Agreement on the Conservation of Albatrosses and Petrels, done 19 June 2001, 2258 UNTS 257 (entered into force 1 February 2004).

15 Convention on Migratory Species of Wild Animals. 1651 UNTS 333; 19 ILM 15 (1980).

16 C C Joyner *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (Columbia, University of South Carolina Press, 1998); see also Young, note 4.

17 Haward and Griffiths, 2011, note 3; O S Stokke and D Vidas (editors) *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System*, (Cambridge, Cambridge University Press, 1996); O R Young “Building and International Regime Complex for the Arctic: Current Status and Next Steps” (2014) 2, 2 *The Polar Journal* 391–407.

18 Young, 2010, note 4, at 56.

19 R Tepper and M Haward “The Development of Malaysia’s Position on Antarctica: 1982–2004” (2005) 41 (217) *Polar Record* 113; B A Hamzah, “Malaysia and the Southern Ocean: Revisiting the Question of Antarctica” (2010) 41, 2 *Ocean Development and International Law* 186–195.

20 S L Chown, J E Lee, K A Hughes, J Barnes, et al. “Challenges to the Future Conservation of the Antarctic” (2012) *Science* 337 13 July 2012 158; D French and K Scott “International Legal Implications of Climate Change for the Polar Regions: Too Much, Too Little, Too Late?” (2009) 10, 2 *Melbourne Journal of International Law* 631; A D Hemmings “Antarctic Politics in a Transforming Global Geopolitics” in K Dodds, A D Hemmings and P Roberts (editors) *Handbook on the Politics of Antarctica* (Cheltenham, Edward Elgar Publishing, 2017) 507–522.

21 M Haward, J Jabour and A J Press “Antarctic Treaty System Ready for a Challenge” (2012) 338 *Science* at 603.

### A. *Internal Stressors: Old Norms and New Players*

The guiding norms of the Antarctic Treaty – international collaboration, peaceful use and scientific endeavour – originated in the planning for Antarctic activities associated with the International Geophysical Year (IGY) of 1957–58. The IGY reactivated the “standstill” proposal developed by Chilean academic Professor Escudero as a solution to the “Antarctic problem”,<sup>22</sup> that is collaboration and scientific cooperation should take place without being used to advance challenges to existing Antarctic territorial claims or support disputes over the claims. These norms have been reinforced; the preamble to the Madrid Protocol states, “that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord”.<sup>23</sup> Article 2 of the Madrid Protocol reiterates that Antarctic shall be a “natural reserve, devoted to peace and science”.<sup>24</sup>

The membership of the Antarctic Treaty has significantly expanded from its 12 original signatories (ATCPs) in 1961 (including the 7 claimants)<sup>25</sup> to 53 contracting parties including Monaco that acceded in 2008, Malaysia (acceded in 2011), Pakistan (acceded in 2012), Mongolia (acceded in 2015), Iceland (acceded in 2015) and Kazakhstan (acceded in 2015).

**Table 1 – Parties to the Antarctic Treaty**

	ATCP*	CP**	Cumulative Total
<b>1961–70</b>	12	1	13
<b>1971–80</b>	1	1	15
<b>1981–90</b>	13	9	37
<b>1991–00</b>	1	4	42
<b>2001–10</b>	1	4	47
<b>2011–18</b>	1	5	53
<b>Total</b>	29	24	53

\* ATCP Antarctic Treaty Consultative Parties

\*\* CP Contracting Parties

Source: Author compiled from data from Antarctic Treaty Secretariat.

Table 1 provides interesting data. The Antarctic Treaty had the largest number of accessions in the period in which it was under the most internal stress – the period 1981–1990 – in which first a proposed treaty to regulate mining in the Antarctic was developed, and second as this instrument,

22 E W Hunter Christie *The Antarctic Problem* (London, George Allen & Unwin, 1951).

23 Madrid Protocol note 13, Preamble.

24 Ibid. Madrid Protocol Article 2 “The Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science”.

25 M Haward “The Originals: The Role and Influence of the Original Signatories to the Antarctic Treaty” in Alan Hemmings, Klaus Dodds and Peder Roberts (editors) *Handbook on the Politics of Antarctica* (Cheltenham, Edward Elgar Publishing, 2017): 232–240.

the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA)<sup>26</sup> was set aside and the Protocol on Environmental Protection to the Antarctic Treaty<sup>27</sup> was being negotiated.

The development of the Protocol on Environmental Protection to the Antarctic Treaty has attracted a considerable literature.<sup>28</sup> While the process was unprecedented, with Australia and France declaring their opposition to CRAMRA once the instrument had been concluded, both these parties worked hard to ensure the maintenance of the Antarctic Treaty System and to rebuild, and then maintain, consensus.

The debate over development of marine protected areas (MPAs) in CCAMLR has displayed similar stresses. While CCAMLR did establish the world's first high seas MPA in 2009 with the South Orkney Islands southern shelf (an MPA of 94 000 km<sup>2</sup> in area in the South Atlantic) progress with other MPAs has been difficult. In 2011 CCAMLR adopted Conservation Measure 91-04 (CM 91-04) General Framework for the Establishment of CCAMLR Marine Protected Areas.<sup>29</sup> At the 2012 CCAMLR Meeting a suite of MPAs were proposed:

- East Antarctic representative system of MPAs (proposed by Australia, France and European Union)
- Ross Sea (proposed by New Zealand and United States of America) – originally separate proposals but linked during debate at the 2012 Commission meeting.
- West Antarctic (proposed by the European Union).

Consensus not achieved on any of these proposals. Agreement was reached to hold a special meeting of the Commission in June 2013 to continue discussions. At this special meeting further concerns and legal argument over MPAs were raised by Russia. Commission meetings in 2013, 2014 and 2015 failed to gain consensus on MPAs, with continued debate on the East Antarctic and Ross Sea MPAs. At the 2016 meeting of the Commission agreement was reached on the designation of the Ross Sea MPA.<sup>30</sup>

The debate over MPAs in CCAMLR provides an example of the ongoing internal stresses within the ATS. Parties may have different views how issues areas should be managed and addressed, and consensus can be difficult to achieve. The MPA case also highlights the impacts of external challenges, interplay between the ATS and other environmental and resource management regimes applying to, or seeking to be applied to, Antarctica and the Southern Ocean.

## *B. External Challenges*

Institutional interplay in Antarctica and the Southern Ocean has two, related, effects on the Antarctic regime. It influences current institutional resilience and second acts as a key driver in shaping

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26 The Convention for the Regulation of Antarctic Mineral Resource Activities 27 ILM 868. Did not enter into force.

27 Protocol on Environmental Protection, note 13.

28 This literature focuses on the development of the protocol following the setting aside of the CRAMRA agreement, its entry into force and implementation, the use of environmental impact assessment, and the assessment of the performance.

29 Conservation Measure 91-04 (2011) states that “CCAMLR MPAs shall be established on the basis of the best available scientific evidence and shall contribute, taking full consideration of Article II of the CAMLR Convention where conservation includes rational use, to the achievement of the objectives specified” CM 91-04 General framework for the establishment of CCAMLR Marine Protected Areas. [www.ccamlr.org/en/measure-91-04-2011](http://www.ccamlr.org/en/measure-91-04-2011).

30 Conservation Measure 91-05 (2016) Ross Sea Region Marine Protected Area. [www.ccamlr.org/sites/default/files/91-05\\_11.pdf](http://www.ccamlr.org/sites/default/files/91-05_11.pdf).

interaction arising from external issues. To this end we claim evolving patterns of institutional interplay will continue to shape a regime complex, such that future governance of the region will be as much influenced by such external interactions as it is by the work of the ATS. Different regimes may claim interest and jurisdiction and compete for competence. Examples of competition include the focus on the Law of the Sea Convention to provide alternative norms and principles.<sup>31</sup> One outcome of duplicate claims for competence may be the creation of possibilities of ‘forum shopping’.<sup>32</sup> A relevant example here is with the regulation of open ocean iron fertilization<sup>33</sup> that resulted in the CBD<sup>34</sup> and London Protocol/Convention<sup>35</sup> arriving at different outcomes.

While increasing competition between regimes is a possibility, with challenges to specific competence of either the ATS or other regimes addressing specific issue areas or regimes, complementarity and congruence will also provide important drivers of the emerging regime complex. While the ATS has continued to develop it has address interplay in a range of ways, all helping to shape an evolving regime complex. The ATS has tended to address marine resource management, environmental protection, biological prospecting and heritage issues in this way, that is assert its competence.

The ATS has also recognized the competence of another body. Southern Ocean whaling<sup>36</sup> is a good example of complementarity as it is specifically excluded from CCAMLR’s competence by the parties’ interpretation of Article VI of the CAMLR Convention. This article states that ‘Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals’.<sup>37</sup> In an interesting example the ATCPs defer to the IAATO to provide industry-based self-regulation of Antarctic tourism operations while setting broad frameworks and operational guidelines.

The ATS’s adoption of the International Maritime Organization (IMO) standards for shipping and the (eventual) adoption by the ATS of the IMO’s mandatory International Code of Safety for

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31 M Haward “The Law of the Sea Convention and the Antarctic Treaty System; Constraints or Complementarity” in S-Y Hong and J van Dyke (editors) *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden, Martinus Nijhoff Publishers, 2009) 231–251.

32 H Murphy and A Kellow “Forum Shopping in Global Governance: Understanding States, Business and NGOs in Multiple Arenas” (2013) 4, 2 *Global Policy* 139.

33 Antarctic Climate and Ecosystems Cooperative Research Centre *Position Analysis Ocean Fertilisation: Science and Policy Issues* (Hobart, ACE CRC, 2008); S Broder and M Haward “The International Legal Regimes Governing Ocean Iron Fertilization in Paik, Lee and Schieber, (editors) *Implementing the Law of the Sea: Institutions and Regions in Ocean Governance* (Leiden, Martinus Nijhoff Publishers, 2013) 185–220.

34 Convention on Biological Diversity, 31 ILM 842 (1992).

35 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 26 UST 2403, 1046 UNTS 120, 11 ILM 1294 (1972). Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London 1996 (1997) 36 ILM 1.

36 J Jabour and M Iliff “Theatre Sports in the Southern Ocean: Engagement Options for Australia in Whale Research Protest Action” (2009) 63, 2 *Australian Journal of International Affairs* 268.

37 Article VI of the CAMLR Convention.

Ships Operating in Polar Waters (Polar Code)<sup>38</sup> shows the broadening and deepening of interplay and emergence of congruent actions

### 1. *Antarctica, the Southern Ocean and the Law of the Sea*

Antarctica was specifically excluded from discussion at the third United Nations Conference on the Law of the Sea (UNCLOS III) but the nexus between the two regimes is likely to be a significant driver in the future.<sup>39</sup> The sub-Antarctic Islands – under national jurisdiction and outside the Treaty Area are not subject to Article IV of the Antarctic Treaty – can legitimately generate Exclusive Economic Zones and continental shelves.<sup>40</sup> The Australian sub-Antarctic Territory of Heard Island and McDonald Islands, for example, due to its distinctive seabed geomorphology, generates significant large area that can be delimited as ‘legal continental shelf’ under section 76 of the LOSC.<sup>41</sup>

The relation of the LOSC to the Antarctic Treaty remains an important and unresolved issue area. The unresolved issues centre on the extent to which claimant states can claim rights as ‘coastal states’ or even whether coastal states exist in Antarctica, given the particular status of Antarctic claims under the Antarctic Treaty. This links also to the critical issue of whether an EEZ and/or Continental Shelf can be claimed, with differences between Treaty Parties over declaration of maritime zones offshore Antarctica.<sup>42</sup>

### 2. *Human Impacts and Tourism*

Management of human impacts will continue to be a challenge for all Treaty Parties, including Australia. Antarctic tourism is expanding, with increased visitor numbers impacting on a small number of sites (mostly in the Antarctic Peninsula, south of South America). Antarctic tourism is regulated under the ATS, but also relies heavily on national controls by Treaty Parties and self-management by tour operators through the International Association of Antarctica Tour Operators (IAATO).<sup>43</sup> Antarctic tourism operations are segmented; ship-borne visits are the major component, with smaller numbers of airborne tourists landing on the continent. While there are limited ship-borne tourist operations landing tourists within the AAT, the sub-Antarctic Macquarie Island is a stopping-off point for such cruises, with limits on landings and numbers of people.<sup>44</sup> One aspect of Antarctic tourism is worth noting. Tourist flights from Australia to Antarctica are popular, with an Australian travel company chartering a Boeing 747 400 to overfly the AAT in the summer season.<sup>45</sup> The numbers of these types of tourists are counted in annual IAATO statistics on tourism

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38 J Jabour “‘Safe Ships and Clean Seas’: Evading a Mandatory Shipping Code for Antarctic Waters”, (2008) 6, *New Zealand Yearbook of International Law* 93; J Jabour “Progress Towards the Mandatory Code for Polar Shipping” (2014) 6, 1 *Australian Journal of Maritime and Ocean Affairs*: 64–67.

39 Haward 2009, note 21.

40 R Baird “Can Australia assert an Extended Continental Shelf off the Australian Antarctic Territory Consistent with the Law of the Sea and Within the Constraints of the Antarctic Treaty?” (2004) 138 *Maritime Studies* 1–19.

41 Ibid.

42 J Jabour “The Australian Continental Shelf: Has Australia’s High Latitude Diplomacy Paid Off?” (2008) 33 *Marine Policy* 429.

43 J Jabour “Strategic Management and Regulation of Antarctic Tourism” in T Tin, D Liggett, P Maher and M Lamers (eds) *Antarctic Futures: Human engagement with the Antarctic Environment* (Dordrecht: Springer, 2014) 273–286.

44 note 28.

45 Antarctic Flights. <https://www.antarcticaflights.com.au> <accessed 17 March 2019>.

and the popularity of such flights reinforces the public interest in Antarctica. Increasing interest in ‘adventure tourism’ and small expedition-style activities have led to concerns from Treaty Parties related to search and rescue, and repatriation of individuals following accidents.<sup>46</sup>

### 3. Resource Management

The adoption and entry into force of the Madrid Protocol was a key factor in environmental and resources management. A key aspect of the Protocol is the moratorium it places upon mineral resource activities in Antarctica. Whilst for the time being exploitation of these resources is prohibited under the Madrid Protocol, the Protocol only binds a small number of States in the international community.

The ATS, through CCAMLR, is continuing to address the problem of illegal unregulated and unreported (IUU) fishing in the Southern Ocean.<sup>47</sup> The Commission for the Conservation of Antarctic Marine Living Resources has worked hard to address the significant management challenges posed by IUU fishing within the CCAMLR area.<sup>48</sup>

### 4. Environmental Protection

In addition to the ATS instruments, there are a number of other environmental instruments that can intersect with the ATS and apply to Antarctica and the Southern Ocean. The Convention Concerning the Protection of the World Cultural and Natural Heritage<sup>49</sup> (World Heritage Convention) has been utilized by Australia to secure World Heritage listing for the sub-Antarctic Macquarie Island, and the Heard and McDonald Islands. The CMS<sup>50</sup> has been used to address issues related to the impacts of incidental catch of seabirds, regarded as a major conservation problem within the CCAMLR and Antarctic Treaty Areas, linked the Agreement for the Conservation of Albatrosses and Petrels (ACAP).<sup>51</sup>

At the CBD’s seventh meeting of the conference of parties in 2004, parties highlighted “the urgent need for international cooperation and action to improve conservation and sustainable use of marine biodiversity in ABNJ”.<sup>52</sup> In the same year the United Nations General Assembly established the Ad Hoc Open-Ended Informal Working Group “to study issues related to conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction”. The 9th meeting of the Ad Hoc Open-ended Informal Working Group, held in New York from 20–23 January 2015 recommended proceeding with a new legally binding instrument on the conservation and

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46 J Jabour “Underneath the Radar: Emergency Search and Rescue Insurance for East Antarctic Tourism” (2007) 4, 2 *Tourism in Marine Environments* 202–220.

47 M Haward “The Southern Ocean, Climate Change and Ocean Governance” in Clive Schofield, Seokwoo Lee, and Moon-Sang Kwon (editors) *The Limits of Maritime Jurisdiction* (Leiden, Martinus Nijhoff Publishers, 2014) 507–523.

48 J A Nilsson, E A Fulton, M Haward and C Johnson “Consensus Management in Antarctica’s High Seas – Past Success and Current Challenges” (2016) 73 *Marine Policy* 172–180.

49 Convention Concerning the Protection of World Cultural and Natural Heritage, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972).

50 Convention on Migratory Species, note 15.

51 ACAP, note 14. See also R Hall “Saving Seabirds” in L Kriwoken, J Jabour and A D Hemmings (editors) *Looking South: Australia’s Antarctic Options* (Sydney, Federation Press, 2007).

52 High Seas Alliance “A Legally Binding Instrument For The Conservation of Marine Life on the High Seas” [http://highseasalliance.org/sites/highseasalliance.org/files/HSA\\_Legally\\_Binding\\_Treaty\\_june2018\\_English.pdf](http://highseasalliance.org/sites/highseasalliance.org/files/HSA_Legally_Binding_Treaty_june2018_English.pdf) 2018. Accessed 22 March 2019.

sustainable use of marine life in ABNJ.<sup>53</sup> At this meeting governments agreed to meet to develop the draft text of this legally binding instrument and to request that the U.N. General Assembly establish an intergovernmental conference to finalize this instrument.<sup>54</sup>

A resolution, “Development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” was adopted by the UNGA on 19 June 2015.<sup>55</sup> The first meeting of the intergovernmental conference in BBNJ was held in New York in September 2018 and its ongoing works has direct influence on the ATS, even though the ATCM has not formally engaged with the BBNJ process.

### 5. *Biological Prospecting*

While the Madrid Protocol provides a comprehensive regime to regulate the Antarctic environment, a number of challenges still remain. These challenges centre on emergent issues such as Antarctic biological prospecting (bio prospecting).<sup>56</sup> The issue of bio prospecting activities and related outcomes is relatively new to the Antarctic Treaty Consultative Parties (ATCPs). Although bio prospecting has been occurring from the 1980s, it was not until 1999 that the Scientific Committee on Antarctic Research (SCAR) addressed this issue. While the ATCMs have received information and working papers on this topic there has yet to be any decision within the ATS on regulating biological prospecting.<sup>57</sup>

### 6. *Climate Change*

Antarctica is providing important data on climate change, and considerable scientific effort has been directed at increasing understanding of the role of Antarctica in the global climate system.<sup>58</sup> The Antarctic and Southern Ocean also face direct effects of global climate change, with potential impacts on sea-ice and marine ecosystems, as well as on terrestrial Antarctica.<sup>59</sup> Research from Antarctica and the Southern Ocean is, however, increasingly important in ongoing responses to climate change.<sup>60</sup>

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53 Ninth Meeting of the Ad Hoc Open-ended Informal Working Group, <http://sdg.iisd.org/events/ninth-ad-hoc-open-ended-informal-working-group-to-study-issues-relating-to-the-conservation-and-sustainable-use-of-marine-bbnj/>.

54 Ibid.

55 United Nations General Assembly, 2015 A/RES/69/292.

56 J Jabour “Biological Prospecting in Antarctica: Fair game?” in A-M Brady (editor) *The Emerging Politics of Antarctica* (Abingdon: Routledge, 2013) 242–257.

57 Ibid.

58 note 37.

59 note 23.

60 M Haward “Climate change and the Southern Ocean: the regime complex for regional governance” in Paul G. Harris (editor) *Climate Change and Ocean Governance: Politics and Policy for Threatened Seas* (Cambridge, Cambridge University Press, 2019): 201–214.



## V. THE EMERGENCE OF AN ANTARCTIC REGIME COMPLEX<sup>61</sup>

A number of regimes and instruments have areas of application that include the Southern Ocean. These include, *inter alia*, the Law of the Sea Convention, (LOSC)<sup>62</sup> the International Convention for the Regulation of Whaling (ICRW),<sup>63</sup> the Convention for the Prevention of Pollution from Ships (MARPOL),<sup>64</sup> the Convention on Migratory Species of Wild Animals (CMS)<sup>65</sup> and the Convention on International Trade of Endangered Species Wild Flora and Flora (CITES).<sup>66</sup> In addition, global regimes governing the world's cultural and natural heritage (the Convention Concerning the Protection of World Cultural and Natural Heritage – World Heritage Convention)<sup>67</sup>, biodiversity (the Convention on Biological Diversity – CBD)<sup>68</sup> and climate change (the United Nations Framework Convention on Climate Change – UNFCCC)<sup>69</sup> have increasing influence on Antarctica and the Southern Ocean.

The increasing interplay between the ATS and these instruments suggests an emerging ‘*regime complex*’ in Antarctica and the Southern Ocean. A regime complex is defined ‘as a loosely coupled set of specific regimes’<sup>70</sup> ‘that pertain to the same issue domain or spatially defined area ... and interact with one another in the sense that the operation of each affects the performance of the others’.<sup>71</sup> Interplay involving signatory states and non-state actors with interests in Antarctica and the Southern Ocean, such as the International Association of Antarctica Tour Operators (IAATO) and the Antarctic and Southern Ocean Coalition (ASOC), has increased since key non-state actors were formally included as observers to the ATCM in the early 1980s.<sup>72</sup>

As discussed above, a number of different regimes and institutions, the number and scope of which have grown significance in the past five decades,<sup>73</sup> govern human activity in the Antarctic and Southern Ocean region. Activities in other regimes giving rise to interplay with the ATS

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61 This section is derived from M Haward “Contemporary Challenges to the Antarctic Treaty and Antarctic Treaty System: Australian Interests, Interplay and the Evolution of a Regime Complex” (2017) 9, 1 *Australian Journal of Maritime and Ocean Affairs* 21–24; and J McGee and M Haward “Antarctic Governance in a Climate Changed World” (2019) 11, 2 *Australian Journal of Maritime and Ocean Affairs* in press.

62 United Nations Convention on the Law of the Sea, 1833 UNTS 3; 21 ILM 1261 (1982).

63 International Convention for the Regulation of Whaling, 62 Stat. 1716; 161 UNTS 72.

64 International Convention for the Prevention of Pollution from Ships, 12 ILM 1319 (1973); TIAS No. 10,561; 34 UST 3407; 1340 UNTS 184.

65 Convention on Migratory Species, note 15.

66 Convention on International Trade in Endangered Species Wild Flora and Flora, 27 UST 1087; TIAS 8249; 993 UNTS 243.

67 Convention Concerning the Protection of World Cultural and Natural Heritage, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972).

68 Convention on Biological Diversity 31 ILM 842 (1992).

69 United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

70 K Raustiala and D Victor “The Regime Complex for Plant Genetic Resources” (2004) 58, 2 *International Organization* 277.

71 O R Young, note 17 at 394.

72 M Haward, note 61.

73 R Mitchell *International Politics and the Environment* (London, Sage Publications, 2010).

that leads to a ‘regime complex’<sup>74</sup> – potentially provides a wider and more nuanced lens on the processes and effects of interplay between international institutions.<sup>75</sup> Regime complexes are, as noted by Keohane and Victor, ‘outcomes that emerge from real-world political, organizational and informational constraints’.<sup>76</sup>

The Antarctic and Southern Ocean regime complex has generally evolved rather than been the outcome of deliberate global design. It is important to recognize that design can play a part here, usually in terms of specific and deliberate decisions recorded in the preamble or text of an instrument claiming or deferring competence (for example, the express recognition in CAMLR convention of IWC competence over whaling). As noted by Keohane and Victor, a regime complex arises through “connections”.<sup>77</sup> That is, the regime complex is the product of an ongoing pattern of interplay between institutions as issues emerge, in the absence of an overall architecture or hierarchy that might structure the whole set of relevant institutions.<sup>78</sup>

## VI. CONCLUSION

The ATS has been the primary and preeminent regime governing the Antarctic and Southern Ocean from the early 1960s. It has addressed key problem areas such as peaceful use of the region, maintaining international collaboration over science and managing geopolitical tensions between claimants and other parties. At the same time the ATS has been faced with development of sectorally focused regimes in areas such as marine pollution, natural and cultural heritage, and species and biodiversity protection that together have together contributed to an emergent regime complex in the Southern Ocean.<sup>79</sup>

The ATCM is likely to face further competition in issue areas such as marine biodiversity conservation. Interplay over climate change issues in the broader regime complex is however, identifying elements of complementarity and congruence, with the ATS increasing engaging with climate change. The ATCM has increasingly engaged with the climate change regime since 2010–12.<sup>80</sup> These developments suggest future governance of Antarctica and Southern Ocean is likely to focus on managing regime interplay between the ATS and other environmental and resource management regimes. Such interplay will likely require new and profound institutional resilience within the ATS, providing useful insights into the evolution of a regime complex.

### Acknowledgement

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74 note 59.

75 O S Stokke and S Oberthür, “Introduction: Institutional Interaction and Global Environmental Change” in S. Oberthür and O.S. Stokke (editors) *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (Cambridge, Mass. MIR Press, 2011) 12–13.

76 R Keohane and D Victor “The Regime Complex for Climate Change” (2011) 9, 1 *Perspectives on Politics* 7 at 19.

77 Ibid.

78 Ibid at 8.

79 McGee and Haward, note 61.

80 Ibid.

# SO WHAT? USING SCIENTIFIC KNOWLEDGE TO INFORM ANTARCTIC DECISION-MAKING

BY JULIA JABOUR<sup>1</sup>

## I. INTRODUCTION

Scientific research is both a priority<sup>2</sup> and the ‘currency of credibility’ in the Antarctic. It is a legitimate peaceful activity that is part of the object and purpose of the Antarctic Treaty – peace and science.<sup>3</sup> Scientific endeavour elevates ordinary contracting states to consultative (decision-making) states.<sup>4</sup> States use the existence of their scientific research programs as the pathway into Antarctica and for some, also as a hedge against being excluded from future resource development. Nevertheless, many scientific results are becoming increasingly important and useful in understanding today’s changing environmental conditions. The value of Antarctic-derived research should not be underestimated.

Early Antarctic scientific research was largely curiosity-driven, with scientists exploring an unknown continent and its surrounding water for new knowledge. They anticipated novelty because of the unusual natural regimes such as ice, light, temperature, salinity and prolonged isolation.

The author of one history of Antarctic science, Gordon Fogg,<sup>5</sup> chose to use the word ‘science’ in the singular rather than the plural as a way of highlighting the holistic nature of research in and about the Antarctic. This holism, he speculated, was partly a product of the necessity for scientists from many different disciplines to share logistics and resources in pursuit of their own scientific knowledge about the remote, inhospitable south. The closeness this requires is not only physical, but intellectual as well. The contemporary melding of scientific disciplines, e.g. biological oceanography, attests to the importance of deeper and broader understanding of the connectedness of our world, in this case how oceanographic processes influence living things in ecosystems. The holistic outlook, Fogg suggested, was one of the defining features of Antarctic research and not only is this rare within the competitive, discipline-based scientific community, but it is also ‘of great value to present day science’.<sup>6</sup>

Today, greater knowledge about Antarctica has led to the employment of more technologically sophisticated equipment and procedures in the search for new information. This has given researchers access to high quality, high value data, and resources of high commercial interest, e.g. for pharmaceutical and nutraceutical companies’ potential downstream development of products of high commercial value.

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2 Protocol on Environmental Protection to the Antarctic Treaty, 30 ILM 1461 (Madrid Protocol) Article 3.3.

3 Antarctic Treaty, 402 UNTS 71, Articles II and I.

4 Ibid, Article IX.2.

5 Gordon Fogg, *A history of Antarctic science* (CUP, 1992).

6 Ibid, pp 1–2.

Today's research is providing evidence of the dramatic, sometimes irreversible changes that are occurring in the Antarctic, e.g. record high atmospheric temperatures<sup>7</sup> and melting ice contributing to sea level rise,<sup>8</sup> along with historical evidence of CO<sub>2</sub> in the atmosphere and what this means for ocean pH and living organisms.<sup>9</sup> This knowledge is both intrinsically scientifically valuable and of great utility in explaining or predicting global events.<sup>10</sup>

There are two principal opportunities to feed scientific research results into decision-making bodies within the Antarctic legal regime. First, national Antarctic science programs, in part informed by the needs and directions of the Scientific Committee on Antarctic Research (SCAR), feed their research results into their country's delegations to Committee for Environmental Protection (CEP) meetings. Each year the CEP meets and discusses the implementation of the Madrid Protocol.<sup>11</sup> The meeting's discussions and any recommendations the Parties agree to make are reflected in a report presented to the annual decision-making body, the Antarctic Treaty Consultative Meeting (ATCM). The CEP itself cannot make measures of a legally binding nature; it can only advise. Sometimes that advice is not heeded as contentious issues, such as providing a definition of 'biological prospecting', are put on the back burner for continuing discussion.<sup>12</sup>

Secondly, the national programs conduct research of relevance and present its results to the Scientific Committee on the Conservation of Antarctic Marine Living Resources (SC-CAMLR). As with the CEP, SC-CAMLR meets and discusses the operation of its parent instrument – the CAMLR Convention<sup>13</sup> – and provides advice and recommendations in its report to the decision-making body, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). CCAMLR can, and does, make legally binding decisions annually on both environmental protection and resource harvesting. It also defers decisions on contentious issues, as the slow adoption of marine protected areas illustrates.<sup>14</sup>

The ATCM and CCAMLR are the only two Antarctic forums where recommendations from their scientific and technical organisations are discussed and where measures – i.e. new laws – can be made. Previously, very little attention was paid to the 'quality' of scientific research, but this is changing, with new guidance issued for the attainment of Consultative Party status. There is also increasing speculation about the politicisation of scientific research. This is hardly surprising since most Antarctic scientific research is government-funded and governments sometimes want/need

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7 National Aeronautical and Space Administration (NASA) 'Antarctica melts under its hottest days on record' <https://earthobservatory.nasa.gov/images/146322/antarctica-melts-under-its-hottest-days-on-record> (accessed 02 March 2020).

8 Chris Turney et al, 'Early Last Interglacial ocean warming drove substantial ice mass loss from Antarctica', *PNAS*, 2020, DOI: 10.1073/pnas.1902469117.

9 Y Yan et al, 'Two-million-year-old snapshots of atmospheric gases from Antarctic ice', *Nature* 574, 663–666 (2019) <https://doi.org/10.1038/s41586-019-1692-3>; J Gardner et al, 'Southern Ocean pteropods at risk from ocean warming and acidification', *Marine Biology* 165, 8 2018, <https://doi.org/10.1007/s00227-017-3261-3>.

10 E.g. Eleanor Frajka-Williams et al, 'Atlantic Meridional Overturning Circulation: Observed Transport and Variability', *Frontiers in Marine Science*, 07 June 2019 <https://doi.org/10.3389/fmars.2019.00260>.

11 Madrid Protocol, Articles 11 and 12.

12 Julia Jabour, 'Biological Prospecting: The ethics of exclusive reward from Antarctic activities', 10 *Ethics in Science and Environmental Politics* (2010) 19.

13 Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention) 19 ILM 837.

14 Danielle Smith and Julia Jabour, 'MPAs in ABNJ: Lessons from two high seas regimes', *ICES Journal of Marine Science* (2017) <https://doi.org/10.1093/icesjms/fsx189>.

research results that support, rather than inform, their policies. This paper briefly examines these issues in an attempt to evaluate how science is used to inform decision-making in the Antarctic.

## II. THE ORIGIN AND VALIDITY OF SCIENCE PRIORITY

There are a number of specific references to science in the Antarctic Treaty and its Madrid Protocol that support scientific research as a high-status activity. First, in the Treaty's Preamble, the following words appear:

Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica

Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind ...

There are differing opinions about the legal status of statements in a treaty's preamble.<sup>15</sup> Irrespective of whether you consider preambular paragraphs as merely 'ceremonial' or 'substantive' in law,<sup>16</sup> let us conclude, as Hulme does, that preamble text does matter in a search for context, and in the determination of a treaty's object and purpose.

In this case it is clear that the 1957–58 IGY played an important role in the creation of the *conditions for*, if not the wording itself, of the Antarctic Treaty. The *travaux préparatoires*<sup>17</sup> provide useful insights into the origin and intention of the scientific obligations contained both here and in the first three articles of the Antarctic Treaty, where the most substantive evidence is found:

### ARTICLE I

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

### ARTICLE II

Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

### ARTICLE III

1. In order to promote international cooperation in scientific investigation in Antarctica, as provided for in Article II of the present Treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable:
  - (a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;
  - (b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;
  - (c) scientific observations and results from Antarctica shall be exchanged and made freely available.

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15 M Hulme, 'Preambles in Treaty Interpretation', 164 *University of Pennsylvania Law Review* (2016) 5: 1281–1343s.

16 *Ibid*, p 1289.

17 Many of these documents are available from the new searchable Antarctic Documents Database, hosted by the Library of the University of Tasmania, <https://www.utas.edu.au/library/atadd> (accessed 20 March 2020).

2. In implementing this Article, every encouragement shall be given to the establishment of cooperative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica.

Scientific research is clearly a significant component of a Party's legitimate presence in the Antarctic, and thus also provides a platform for States wishing to have access to current or future resources. This is amplified by the fact that the *bona fides* for being elevated from a contracting to a consultative party in the Antarctic Treaty Consultative Meeting is thus:

#### ARTICLE IX

2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.

The Madrid Protocol, which is the environmental instrument through which the possible impact of all authorised human activity – including scientific research – in the Antarctic is appraised, has further mandated this strong scientific imperative, first, in its Preamble:

Acknowledging further the unique opportunities Antarctica offers for scientific monitoring of and research on processes of global as well as regional importance ...

Then in its second Article on objective and designation:

The Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science.

To emphasise the point, this is carried over to its third Article on environmental principles:

- 1.1 The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research

...

- 3.2. ...

(b) ...

(vi) degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance;

(c) activities in the Antarctic Treaty area shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment and dependent and associated ecosystems and on the value of Antarctica for the conduct of scientific research

...

- 3.3. Activities shall be planned and conducted in the Antarctic Treaty area so as to accord priority to scientific research and to preserve the value of Antarctica as an area for the conduct of such research, including research essential to understanding the global environment.

However, there is a major limitation on this priority given to scientific research:

- 3.4. Activities undertaken in the Antarctic Treaty area pursuant to scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required in accordance with Article VII (5) of the Antarctic Treaty, including associated logistic support activities, shall:
- (a) take place in a manner consistent with the principles in this Article; and
  - (b) be modified, suspended or cancelled if they result in or threaten to result in impacts upon the Antarctic environment or dependent or associated ecosystems inconsistent with those principles.

These extensive references quoted in full add substance to the argument that while the law gives considerable weight to scientific endeavour, scientific research should not be a priority at any cost – particularly environmental. To complicate matters further, there is no definition of ‘scientific research’ in international law; essentially any activity that fits within a category of a pursuit of knowledge would be acceptable. As Gogarty pointed out, by failing to define what scientific research was, or was not, in the *Australia v. Japan Whaling Case*, the International Court of Justice also ‘failed to take the opportunity to offer a clear determination to states on their legal–scientific obligations within international law’.<sup>18</sup>

In the Antarctic context, not only is research not defined, but also there has been very little attention paid to the quality of scientific research, providing it is carried out in a manner consistent with the laws of peace, collaboration and environmental evaluation. However, recent discussions in the ATCM have begun to address this shortcoming.

### III. IDENTIFICATION AND ORGANISATION OF SCIENTIFIC REQUIREMENTS

The identification and organisation of many of the Antarctic scientific research requirements are conducted by two key Antarctic bodies – the Scientific Committee on Antarctic Research (SCAR) and the Council of Managers of National Antarctic Programmes (COMNAP). While very different bodies, together they play crucial yet understated roles in protecting Antarctica.

#### A. SCAR

The Scientific Committee on Antarctic Research (SCAR), established in 1958, is an international non-governmental organisation (NGO) outside the Antarctic Treaty System, that is a member of the International Council for Science. It is the body with carriage of the organisation of Antarctic scientific research.<sup>19</sup>

SCAR’s mandate is ‘the initiation, promotion and co-ordination of scientific research in Antarctica’.<sup>20</sup> SCAR also provides international, independent scientific advice to the Antarctic Treaty System and other bodies. SCAR members are usually but not always Antarctic Treaty Contracting Parties, e.g. the Islamic Republic of Iran is an Associate Member of SCAR, though not a Party to the Antarctic Treaty.

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18 Brendan Gogarty, ‘Conceptions and (Mis)conceptions of Science in International Treaties; the ICJ Whaling Case in Context’, *The Yearbook of Polar Law VII* (2015) 607–622, 607.

19 Scientific Committee on Antarctic Research, <https://www.scar.org/> (accessed 18 March 2020).

20 Ibid, What is SCAR?, <https://www.scar.org/about-us/scar-overview/> (accessed 18 March 2020).

According to SCAR's Strategic Plan 2017–22, its vision is to be an 'engaged, active, forward-looking organization that promotes, facilitates, and delivers scientific excellence and evidence-based policy advice on globally significant issues that are relevant to Antarctica'.<sup>21</sup> The task of the delivery of 'policy advice' is interesting, since it would seem that advising on policy would be outside the remit of scientists. However, the relatively new inclusion of policy research, with the convening of an Expert Group on Social Sciences and Humanities in 2014, is likely to give this task more standing.

SCAR's objectives, therefore, are to amplify its leadership in Antarctic research by further strengthening and expanding high-quality collaborative and visionary Antarctic research and to offer independent scientific advice to ATCMs and other bodies dealing with Antarctic and Southern Ocean matters. SCAR is able to enhance and grow research capacity in its member countries and enhance public awareness and understanding of Antarctic issues through communication of research results. An important job is to facilitate unrestricted and free access to Antarctic research data. It routinely submits Working, Information and Background Papers to the ATCM and the CEP; in 2019, SCAR submitted a total of 23 papers to these Antarctic meetings.

### B. COMNAP

The Council of Managers of National Antarctic Programs (COMNAP) is the body charged with the practical day-to-day management of the logistics of operating in the Antarctic.<sup>22</sup> Established in 1988, COMNAP is an intergovernmental organisation within the Antarctic Treaty System. Its membership comprises the national officials responsible for planning, conducting and managing support for science on behalf of their respective governments – all Consultative Parties to the Antarctic Treaty.

COMNAP's role is to 'develop and promote best practice in managing the support of scientific research in Antarctica'.<sup>23</sup> To achieve this it serves as a forum for developing best practices; facilitates and promotes international partnerships (e.g., between states with Southern Ocean search and rescue responsibility); provides opportunities and systems for information exchange (primarily via its website); and provides the Antarctic Treaty System with objective and practical, technical and non-political advice drawn from the National Antarctic Programs' pool of expertise. Unlike SCAR, COMNAP does not suggest that it provides 'policy advice'.

But like SCAR, COMNAP does have expert groups. Theirs are air operations, environmental protection, safety, marine platforms, advancing critical technologies, joint expert group on human biology and medicine, science facilitation, and education, outreach and training. Some of its strategic programs include the Antarctic Flight Information Manual, and the new Asset Tracking System (for recording the positions of vessels). Only some of the information from these expert groups is publicly available.

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21 Ibid, Strategic Plan 2017–2022, <https://www.scar.org/strategic-plans/774-2017-strategic-plan/> (accessed 18 March 2020).

22 Council of Managers of National Antarctic Programs, About COMNAP, <https://www.comnap.aq/> (accessed 19 March 2020).

23 Ibid.



COMNAP also maintains a Station Catalogue, which has information critical for response to emergencies because it describes the facilities that are available at each station, and the characteristics of that place that give good situational awareness in such times.<sup>24</sup>

COMNAP has been able to influence the ATCM in a number of ways, including indicating best practice (e.g. fuel handling, flight information), establishing international partnerships (all the managers of national Antarctic programs routinely meet to discuss common issues and to provide advice to ATCMs), exchanging information (COMNAP submitted a total of seven papers to the ATCM in 2019), and providing non-political advice (especially regarding practical matters such as safety, mapping and the like).

The kinds of information and advice that both SCAR and COMNAP feed into the ATCM and CCAMLR is expert, but whether or not this is heeded is influenced by the decision-makers themselves, who are also those that conduct the majority of scientific research projects in and about the Antarctic.

#### IV. QUESTIONS OF QUALITY

Science is the currency of credibility in Antarctica, and some scientific research is clearly of high value, as the earlier examples illustrate. But some is mildly specious, or even of no value at all. The latter does not go unnoticed. For example, a 2014–15 Antarctic Peninsula inspection by a joint team from the UK and Czech Republic reported to the 38th ATCM that it found some base occupants were only conducting routine, or no, scientific research, evidenced by lack of scientific laboratories and equipment.<sup>25</sup> In the most diplomatic terms, the inspectors recommended that, *inter alia*:

National Antarctic Programmes should ensure they use an appropriate system of expert peer review to ensure the science undertaken in Antarctica is of the highest quality and importance, and that its impact can be established.<sup>26</sup>

At the 39th ATCM in 2016, Venezuela – a Contracting Party – was unsuccessful in its bid to become a Consultative Party.<sup>27</sup> This led to the convening of an Intersessional Contact Group (ICG) by the ATCM to review the criteria for Consultative Party status.<sup>28</sup> It is unusual for an application for Consultative Party status to be rejected. If an application had been received that was unlikely to be successful, the *in camera* Heads of Delegation meeting that occurs just prior to the official opening of the ATCM would decide to reject the matter even being put on the agenda. However, tracking this through publicly available official final reports is impossible because there is no record of the meeting.

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24 COMNAP, Antarctic Station Catalogue, [https://www.comnap.aq/wp-content/uploads/2019/11/COMNAP\\_Antarctic\\_Station\\_Catalogue.pdf](https://www.comnap.aq/wp-content/uploads/2019/11/COMNAP_Antarctic_Station_Catalogue.pdf) (accessed 30 March 2020).

25 Governments of United Kingdom and Czech Republic, ‘General Recommendations from the Joint Inspections undertaken by the United Kingdom and the Czech Republic under Article VII of the Antarctic Treaty and Article 14 of the Environmental Protocol’, Working Paper WP019 rev.3 to ATCM XXXVIII, Bulgaria, 2015.

26 *Ibid.*, p5.

27 Antarctic Treaty Secretariat, Final Report of ATCM XXXIX, Santiago, Chile, 2016, paras 92–98.

28 *Ibid.*

In a similar vein, in the second performance review of CCAMLR in 2017, the following was noted:

A working mechanism is needed to better coordinate the research activities among Members in terms of both the focus of research and the temporal–spatial scales to maximise the delivery of such collaborative efforts to support the work of the Commission.<sup>29</sup>

These comments and decisions point to suspicion that a low level of unease was brewing within the Antarctic regime regarding the conduct and coordination of scientific research and the corresponding imperative to have undertaken ‘substantial scientific research activity’ in order to be granted ATCM decision-making status.

The 2016 ICG was coordinated by Chile, New Zealand and Uruguay and a report was prepared for and presented to ATCM XL in Beijing in 2017.

#### *A. Consultative Party Status Review*

At that 2017 ATCM, the report of the ICG on Criteria for Consultative Status was discussed.<sup>30</sup> It is important to note that while the ICG drew up a set of recommended guidelines to assist prospective states in preparing an application, as well as those Consultative Parties assessing applications, the Parties noted that ‘the proposed guidelines did not attempt to generate new requirements for Treaty Party [sic] requesting Consultative Status’.<sup>31</sup> This is interesting because it begs the question: Why review the criteria if the recommendations do not generate a new interpretation of Article IX?

Nevertheless, the ATCM did adopt the guidelines recommended by the ICG. They include requirements to demonstrate quality and collaboration:

- list publications related to Antarctica, including both articles in peer-reviewed scientific journals as well as papers to international bodies;
- list publications with co-authors from different countries;
- detail citations of relevant papers that scored well in a science citation index;
- detail data you contributed with emphasis on data cited in publications that score well in a science citation index and on data contributed to Antarctic scientific programmes and databases;
- create data sets that are accessible to the scientific community; and/or
- give examples of research prizes or formal recognition of accomplishments.<sup>32</sup>

Because the adoption was effected through a Decision, none of these recommended guidelines are legally binding.

For the first time in the 60-year history of the Antarctic Treaty, benchmarks of ‘quality’ have been applied to Antarctic scientific research. The application is limited to Contracting Parties wishing to

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29 CCAMLR, 2nd Performance Review 2017, <https://www.ccamlr.org/en/organisation/second-ccamlr-performance-review>, para 37.v (accessed 27 March 2020).

30 Governments of Uruguay, Chile and New Zealand, ‘Report of the Intersessional Contact Group (ICG) on Criteria for Consultative Status’, Working Paper WP 3 to ATCM XL, Beijing, China; see also Final Report at paras 91–93.

31 Final Report, ATCM XL, para 92.

32 Antarctic Treaty Secretariat, ‘Guidelines on the procedure to be followed with respect to Consultative Party status’, ATCM XL, Decision 2/2017, <https://ats.aq/devAS/Meetings/Measure/653> (accessed 29 March 2020).

elevate themselves to decision-makers, but still, asking ‘so what is your science contributing?’ is a major policy deviation for the actors in the Antarctic Treaty system.

## V. IS ANTARCTIC SCIENTIFIC RESEARCH POLITICISED?

Politicisation of scientific research is more common than we would like to imagine. The clearest indication of this is the way in which climate science is pitted against government policies, ironically whilst also acknowledging that climate problems ultimately require political solutions. Contentious ATCM issues that might be politicised in the decision-making forum, despite the best scientific evidence available, concern, e.g. human impact. The Madrid Protocol compels ATCPs to heed ‘the best scientific and technical advice available’ in implementing their environmental principles.<sup>33</sup> Further, the ATCM is required to ‘review the work of the Committee [CEP] and shall draw fully upon its advice and recommendations’.<sup>34</sup> But the CEP is only advisory and ATCM can, and does, defer discussion on contentious topics raised by the CEP. Some of these topics have included the definition of ‘biological prospecting’, strict regulation of tourist and non-governmental activities, and the inability of the CEP to recommend the rejection of environmental impact assessments of projects that could potentially cause serious environmental harm.

The CAMLR Convention can be interpreted to have dual objectives: those of conservation and rational use. But while some Commission Members see these as needing to be equally balanced, others do not. The case of the negotiation and adoption of marine protected areas highlights the problems this dichotomy raised at the time, and will continue to blight CCAMLR’s future.<sup>35</sup> Therefore, even though CCAMLR has specifically adopted into practice the legal requirement to accept the best scientific evidence available,<sup>36</sup> this has been politicised in instances where conservation is unequally opposed to rational use.

## VI. ENVIRONMENTAL IMPACT OF SCIENTIFIC RESEARCH AND LOGISTICS

A similar analogy to CCAMLR’s MPAs exists with the application of the Madrid Protocol. The Protocol urges sharing of facilities, cooperation in the planning and conduct of activities, with plans to be best environmental practice, and the like.<sup>37</sup> Yet there weaknesses, such as a seeming lack of commitment by national operators to these ideals, a lack of legal obligation/remedy, and perhaps the main shortcoming – no veto over state activity that is more or less compliant, because of the ambiguous and subjective nature of the language used in the environmental evaluation requirements, and the lack of a legal mechanism to effect a veto.

Parties that submit environmental evaluations clearly indicating environmental risk can be asked by the ATCM to consider modifications, alternatives, or even suspension. It can be a lengthy process to deal with these kinds of considerations.<sup>38</sup> Sometimes, environmental evaluations will

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33 Madrid Protocol, Article 10.1.

34 Ibid, Article 10.2.

35 Smith and Jabour, note 13.

36 CAMLR Convention, Article IX.1 (f).

37 Madrid Protocol, Article 3.

38 For example, the joint Russian/US/French sub-glacial Lake Vostok drilling program and the entire attendant environmental reporting that went with it, took more than a decade to complete.

conclude that while an activity might very well cause a major impact, the value of the activity (either scientific research itself, as in the Lake Vostok drilling project, or one in support thereof, such as the Mario Zucchelli runway) will outweigh the risks to the environment.<sup>39</sup> Because no veto exists, these activities can proceed.

This was recognised by the CEP in a Working Paper submitted by the United Kingdom, Australia, Belgium, New Zealand and Norway in 2017 relating to policy issues that arose in an intersessional examination of EIA guidelines.<sup>40</sup> Some matters were thought to require considerably more thought and discussion, and this veto potential was one of them.

In 2017 the CEP, which cannot make legally binding measures itself, asked the ATCM for advice on, *inter alia*:

the extent to which the CEP should begin work on...creating an appropriate and effective method within the Antarctic Treaty System of preventing an environmentally-damaging project proceeding.<sup>41</sup>

When this was raised in the ATCM, responses from the parties included:

some caution may need to be applied to consideration of a mechanism for preventing activities

...

reviews of CEEs by external organisations may not be desirable.<sup>42</sup>

Unsurprisingly, consensus was not achieved on how (or even if) to allow the CEP to proceed because of the difficulties and sensitivities of creating a legally binding EIA veto. Discussion was concluded with the following statement ‘... *look forward to further discussions on the matter.*’<sup>43</sup> However, no further discussions have been recorded at subsequent ATCMs. This can partially be explained by the short extraordinary meeting held in Argentina the following year (2018) when Ecuador was unable to host, and in the Czech Republic in 2019, when the ATCM/CEP dealt with the backlog of work from the previous year. Rather, the matter of CEP policy considerations generally, including this particularly sensitive topic of veto, has been placed as an item on the ATCM Multi-year Strategic Work Plan.<sup>44</sup> This work plan has no definite timeframe attached to that task.

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39 For example, the conclusion of the Italian Antarctic Program’s CEE was that ‘The result of CEE suggests that the benefits that will be obtained from the permanent runway will grossly outweigh the “more than a minor or transitory” impacts of the runway on the environmental and on the ecosystem.’ Government of Italy, Final Comprehensive Environmental Evaluation Proposed construction and operation of a gravel runway in the area of Mario Zucchelli Station, Terra Nova Bay, Victoria Land, Antarctica, Information Paper IP070 to ATCM XL, Beijing, China, 2017, <https://ats.aq/devAS/Meetings/DocDatabase?lang=e>, (accessed 26 March 2020) p 5.

40 United Kingdom, Australia, Belgium, New Zealand and Norway, ‘Environmental Impact Assessments – Update on broader policy discussions’, Working Paper WP 41 to ATCM XL, Beijing, China, 2017, <https://ats.aq/devAS/Meetings/DocDatabase?lang=e>, (accessed 26 March 2020).

41 Antarctic Treaty Secretariat, ATCM XL Final Report 2017, [https://documents.ats.aq/ATCM40/fr/ATCM40\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM40/fr/ATCM40_fr001_e.pdf) (accessed 26 March 2020), para 52.

42 Ibid, para 54.

43 Ibid, para 55.

44 Antarctic Treaty Secretariat, ATCM XLI Final Report 2018, ‘ATCM Multi-Year Strategic Work Plan’, Decision 3 (2018) Annex, Item 8, [https://documents.ats.aq/ATCM41/fr/ATCM41\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM41/fr/ATCM41_fr001_e.pdf) (accessed 26 March 2020).

## VII. SO WHAT?

The funding bodies, governments and informed public will increasingly require Antarctic research to be useful to the decision-makers in Antarctic fora, as well as to the agencies back home. That is primarily because there is great competition for not only science funding, but other kinds of support that communities require from a federal budget in a competitive arena. The following short case studies illustrate typical examples of how utility can be introduced into hard sciences and value added by asking, so what?

### A. *Marine Telemetry*

Marine telemetry is a rapidly developing technology that provides a range of data on species at sea: their movements, behavior, habitat use, prey consumption rates and ocean properties. It is extremely valuable as a research tool because it is able to collect data that cannot be obtained in any other way.<sup>45</sup>

An Australian conservation biology project initially used a mixture of acoustic and satellite (archival) tags to gather biological data on cryptic species such as Southern Elephant seals and Patagonian toothfish in the Southern Ocean. The researchers subsequently and coincidentally found that the baseline data they sought also had other very important uses including imaging water temperature profiles, light levels (that can indicate chlorophyll), the continental shelf profile and hotspots of foraging activity.<sup>46</sup> Through their scientific networks the researchers became aware of other projects that were using the same technology to conduct tracking research on other marine species at risk.

This new insight enabled the establishment of a network of linked projects that culminated in a paper published in *Nature* in 2020 that was authored by 81 scientists from around the world. In it they describe how their joint research/sharing of data has enabled them to identify so-called ‘areas of ecological significance’ in the Southern Ocean, which will be useful in Antarctic law making. Specifically, designating these special areas where a range of birds and mammals forage as no-go areas will help to mitigate against the pressures the Southern Ocean ecosystems are experiencing from resource exploitation, which is directly within CCAMLR’s ambit, and climate change, which is not.<sup>47</sup>

The *Nature* paper is unashamedly conservation-centric, although the authors are from both conservation-oriented CCAMLR Parties such as Australia and the US, and fishing countries such as Norway and New Zealand.

This paper is a synthesis of projects conducted between 1991–2016 on 17 different marine species from across the Southern Ocean. The paper is based on the premise that ‘using the at-sea distributions of an ecologically diverse suite of predators...can identify areas of ecological importance’.<sup>48</sup> The data from 2,823 tracks of individual foraging trips to 2.3 million locations

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45 Julia Jabour, et al, ‘Marine Telemetry and the Conservation and Management of Risk to Seal Species in Canada and Australia’, *Ocean Development and International Law Special Edition* 47:3 (2016) 255–271 DOI 10.1080/00908320.2016.1194094.

46 Ibid.

47 Mark Hindell et al, Tracking of marine predators to protect Southern Ocean ecosystems, *Nature*, 18 March 2020, <https://doi.org/10.1038/s41586-020-2126-y>.

48 Hindell et al, note 44, Methods p1.

revealed the importance of habitat selection in the various life history stages of the species tracked. This ultimately resulted in the identification of high biodiversity and biomass hotspots, leading to the conclusion that these were areas of ecological significance that were crucial information for CCAMLR as it makes rules about harvesting and MPAs.

However, the scientists identified that ‘authorities face the considerable challenge of implementing conservation goals within existing management frameworks’ – the dichotomy alluded to earlier.<sup>49</sup> Nevertheless, their paper offered the comment that their results ‘highlight where future science-informed policy efforts might best be directed, including both adaptive spatial protection and improved robust management of fisheries’.<sup>50</sup>

### B. *Autonomous Underwater Vehicles (AUVs), Drones and Satellites*

New technology is being used by scientists to undertake a number of tasks that were also previously too difficult or too intrusive to carry out in and around Antarctica. These include mapping the extent, thickness and other characteristics of sea ice, population counts, footprint measurements and the like using unmanned aircraft (drones) and submarine craft (AUVs), and satellite remote sensing.

Polar regions are a strategic priority of the World Meteorological Organization (WMO) and its various task groups. They collect and disseminate data relevant for, *inter alia*, the CEP’s Climate Change Response Work Programme and Subsidiary Group on Climate Change Response. The WMO also provides weather and climate information (including the state of sea ice and the ocean) on time scales from hours to decades to assist in situational awareness during maritime activities. Today, drones are also being flown from ice-bound ships to visualise free water leads and ridges, which is a navigation aid as required under the International Code for Ships Operating in polar Waters (Polar Code) and very much within the interest areas of COMNAP – the people who operate those ships.<sup>51</sup>

The ATCM showed its flexibility by handing over carriage of the development of the Polar Code to the International Maritime Organization after initially rejecting their expertise in favour of keeping custody of Antarctic affairs in-house.<sup>52</sup>

While there are some concerns about the impact of drone noise on animal colonies, low surveillance flights are employed in place of human presence to reduce the intrusive aspects of conservation biology tasks such as population counts. This works even better with remote sensing from satellites.<sup>53</sup>

The Integrated Marine Observing System collects observational data from a range of facilities including Argo floats, ships of opportunity, ocean gliders, AUVs and acoustic tags on animals. One project, for example, calibrates satellite altimeters that measure global mean sea level and

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49 Ibid, Article p1.

50 Ibid, p5.

51 Guy Williams, ‘Drones in science: Rising beyond pretty pictures’, ABC News: Science, Australia, 18 August 2016.

52 Julia Jabour, ‘Maritime security: Investing in safe shipping operations to help prevent marine pollution’ In Hemmings AD, Rothwell DR and Scott KN (eds) *Antarctic Security in the 21st Century: Legal and policy perspectives* (Abingdon: Routledge, 2012) 238–256.

53 Mathew R Schwaller et al, ‘A continent-wide search for Antarctic petrel breeding sites with satellite remote sensing’, *Remote Sensing of Environment* 210, 1 June 2018, 444–451.

this supplies information that is used by the CEP to help inform decisions about vulnerable coastal Antarctic infrastructure.<sup>54</sup>

The extent of sea ice is relatively easy to measure but measuring thickness is still problematic. Now there has been some success using AUVs, measuring draft as the first part of calculation of thickness.<sup>55</sup> This also provides crucial information for biological scientists studying krill feeding on ice algae over winter because there is a strong causal relationship between sea ice and the mortality of juvenile krill. When CCAMLR is setting krill harvesting catch limits, this is vital information.<sup>56</sup>

Finally, drone photographs, combined with high-resolution continent-wide satellite data, have been used to map human footprint in Antarctica.<sup>57</sup> Mapping revealed that 10% of Antarctica's ice-free areas show signs of human disturbance, with a building footprint of 390,000 m<sup>2</sup> and a disturbance footprint of 5.2 million m<sup>2</sup>. This is the first time such a comprehensive mapping project has been undertaken and researchers judge that their estimates are conservative. This project outcome has been described as 'the most comprehensive inventory of infrastructure across Antarctica to date, and could contribute to a baseline for the regular and effective monitoring of environmental impacts by Antarctic Treaty Parties'.<sup>58</sup>

The problem with uptake is that the ATCM and CCAMLR both operate on the consensus rule (the absence of formal objection) for decision-making. This means that despite the value of the scientific research in purely academic terms, taking up the research and making substantive decisions is not a simple task. Decisions also factor in political sensitivities that are often played down because the objective of these forums is to maintain harmony and to make decisions that meet the benchmark of the lowest common denominator. Were it otherwise, consensus would not be possible.

## VIII. CONCLUSION

Antarctic scientific research is a legitimate peaceful activity prescribed throughout various articles in the Antarctic Treaty, its Madrid Protocol, and the CAMLR Convention. Scientific research provides credibility to a state's interest and presence in the region, and for some, acts as a hedge against exclusion from future resource development. Quality of scientific research was formerly not questioned – overtly, at least – but increasingly parties are being made aware of some shortcomings in relation to the kinds of scientific research undertaken. These parties will be held to account, especially in applications for Consultative Party status to the ATCM. New technologies are providing opportunities for cross-disciplinary appreciation and use of data once thought inaccessible. However, there are limited opportunities to feed scientific information into decision-making bodies in the Antarctic Treaty System, even though the rhetoric suggests that

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54 IMOS, What is the Integrated Marine Observing System, <http://imos.org.au/about/>.

55 Hanumant Singh et al 'Inexpensive, small AUVs for studying ice-covered polar environments, *Science Robotics* 2, ean4809 (2017).

56 CS Reiss et al, 'Overwinter habitat selection by Antarctic krill under varying sea-ice conditions: implications for top predators and fishery management', *Marine Ecology Progress Series* 568:1-16, (2017) <https://doi.org/10.3354/meps12099>.

57 Shaun Brooks et al, 'Our footprint on Antarctica competes with nature for rare ice-free land', *Nature Sustainability* Vol 2, March 2019, 185–190.

58 Government of Australia, 'Footprint in Antarctica' Information Paper IP41 to ATCMXLII, Prague, Czech Republic, 2019, <https://ats.aq/devAS/Meetings/DocDatabase?lang=e> (accessed 03 April 2020).

decisions will be evidence-based. Politicisation is an ever-present possibility. While some research results contribute positively to activities such as those under the ambit of COMNAP (e.g. maritime transport and safety), other results are applicable to more sensitive areas such as those under the ambit of the CEP, ATCM and CCAMLR, (e.g. environmental impact, marine protected areas). Understanding the scale and scope of the human footprint in Antarctica, or identifying areas of ecological significance, are all very well academically, but responding to those results in a substantive way is difficult under the consensus rule of decision-making.

Science is given priority but irrespective of their rhetoric, it cannot be assumed that the decision-makers always want to make decisions based on the best scientific evidence currently available to them. For example, the environmental impact of scientific programs, there projects (e.g. Lake Vostok drilling) and their support infrastructure (e.g. bases, airstrips, shipping operations) attract critical attention from some parties, but also from the academic and media commentariat and environmental NGOs. Strong conservation arguments often trump rational use arguments in CCAMLR. Awareness that some equipment (e.g. drones) can have dual civilian/military application, and concern that both are occurring in the Antarctic, also attracts attention. However, there is virtually nothing that a party cannot do in the Antarctic in the name of science, providing all legal obligations are complied with.<sup>59</sup> It is the party's own interpretation of those obligations that is the prevailing force. For example, there is no veto power over environmental evaluations that potentially, inappropriately balance the value of science against the risk to the environment.

It would be fair to conclude that the Antarctic decision-makers are more political than egalitarian by nature, especially those with claimed territory and the reserved claimants, and national agendas play a significant role in determining the uptake of some important but contentious scientific research results.

### **Acknowledgement**

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<sup>59</sup> Julia Jabour, 'What countries can and can't do in Antarctica in the name of science', *The Conversation*, 10 November 2018, <https://theconversation.com/explainer-what-any-country-can-and-cant-do-in-antarctica-in-the-name-of-science-105858>.



# PROGRESSIVE REALISATION OF THE RIGHT TO HEALTH: AN OPPORTUNITY FOR GLOBAL DEVELOPMENT

BY SHEIKH MOHAMMAD TOWHIDUL KARIM<sup>1</sup> AND GEORGE F TOMOSSY<sup>2</sup>

## I. INTRODUCTION

The Right to Health has been recognised as a core socioeconomic right under international law since the proclamation of the Universal Declaration of Human Rights. As Gostin and Meier rightly note, “human rights have become a cornerstone of global health governance, foundational to contemporary policy discourses, programmatic interventions, and public health advancements.”<sup>3</sup> The centrality of health promotion in global health policy is also readily apparent from the third Sustainable Development Goal of the United Nations’ “2030 Agenda for Sustainable Development” (2015) – Good Health and Wellbeing – which states that “ensuring healthy lives and promoting the wellbeing of all ages is essential to sustainable development.” Nevertheless, the degree to which a “right to health” is implicitly or explicitly contained within that framework is a matter for debate, with resulting implications for its enforcement.<sup>4</sup> Ambiguities in its meaning and scope have arguably impeded the development of health systems, which in many countries remain inequitable, poorly funded, unsafe and regressive.<sup>5</sup> On the other hand, extensive efforts by national and international policy makers, courts, international organisations, nongovernmental organisations and other stakeholders have been remarkably successful in promoting the goal of achieving the highest attainable standard of health.

This article examines the development of the concept of a right to health in order to improve understanding of the concept and provide guidance for policy makers and legislators in order to enable more effective protection and implementation of the right. It will examine the right to health from four approaches: theoretical and philosophical conceptions; the international legal framework; enforcement obligations of states; and a pragmatic notion of progressive realisation.

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3 LO Gostin and BM Meier, ‘The origins of human rights in global health’ in BM Meier and LO Gostin (eds), *Human Rights in Global Health: Rights-Based Governance for a Globalizing World* (OUP 2018) 21.

4 CE Brolan and others, ‘Did the right to health get across the line? Examining the United Nations resolution on the sustainable development goals’ (2017) 2(3) *BMJ Global Health* e000353.

5 G Schmets, D Rajan and S Kadandale (eds), *Strategizing National Health in the 21st Century: A Handbook* (WHO 2016) 29; WHO, *Everybody’s Business-Strengthening Health Systems to Improve Health Outcomes: WHO’s framework for action* (WHO 2007) 1.

## II. THEORETICAL AND PHILOSOPHICAL PERSPECTIVES ON THE RIGHT TO HEALTH

Although the concept of a right to health is frequently pitched at the international level, it remains problematic both within the international community and for individual states with regard to its scope and meaning. Whilst much of the debate revolves around a state's ability to protect, guarantee and enforce the right to health, many scholars have commented that a right to health is rarely self-evident.<sup>6</sup> Regardless, under the framework of the UN Sustainable Development Goals, health as physical and mental wellbeing becomes an important indicator of the success for governments in providing for the needs of their people.

Health has been recognised in various human rights instruments and defined as a desirable human condition, vital to the social and political good.<sup>7</sup> Simply put, health means “the art and the science of preventing disease, promoting health, and extending life through the organised effort of society”.<sup>8</sup> A more holistic approach enunciated in the preamble to the Constitution of the World Health Organization provides that “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Moreover, a right to health would embody the entitlement to live in a physical and social environment that is conducive to leading a full and healthy life, including access to health services.<sup>9</sup>

In light of such an expansive conception of “health,” linking across all aspects of human existence, a right to health becomes one of the most fundamental human rights.<sup>10</sup> Moreover, “health” should be maximised. As expressed in Article 14(2) of the UNESCO Universal Declaration on Bioethics and Human Rights (2005), “the enjoyment of the highest attainable standard of health” comprises a fundamental right of all citizens irrespective of their race, colour, religion, and political affiliation, economic or social condition. A myriad of social, political and philosophical factors have thus contributed to framing the right to health. For example, it has been observed that the notion of human rights was particularly developed during the ideological war between the East (focused on economic, social and cultural rights) and the West (focused on civil and political rights) during the Cold War period.<sup>11</sup> Hence, the Universal Declaration of Human Rights adopted civil and political rights as well as economic, social and cultural rights for the protection and promotion of human rights for all.

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6 VA Leary, ‘The right to health in international human rights law’ (1994) 1(1) *Health and Human Rights* 24; SB Shah, ‘Illuminating the possible in the developing world: guaranteeing the human right to health in India’ (1999) 32(2) *Vanderbilt Journal of Transnational Law* 435; K Tomasevski, ‘Health’ in O Schachter and CC Joyner (eds), *United Nations Legal Order*, Vol. 2 (Cambridge University Press 1995) 873; DP Fidler, ‘International law and global public health’ (1999) 48 *University of Kansas Law Review* 1.

7 SB Shah, ‘Illuminating the possible in the developing world: guaranteeing the human right to health in India’ (1999) 32(2) *Vanderbilt Journal of Transnational Law* 435, 455.

8 D Acheson, *Independent inquiry into inequalities in health report* (The Stationery Office 1998) 1; T Evans, ‘A human right to health?’ (2002) 23(2) *Third World Quarterly* 197.

9 T Evans, ‘A human right to health?’ (2002) 23(2) *Third World Quarterly* 197.

10 The Constitution of the World Health Organization, opened for signature 22 July 1946 (entered into force 7 April 1948) World Health Organization, New York; The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000).

11 J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013); S Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006).

Exploring philosophical ideas about the right to health is helpful to counter scepticism regarding the right in international law.<sup>12</sup> With significant disagreement amongst scholars and policy makers about its enforceability, some claim that the right to health is a positive right whilst others maintain that it is a negative right. The positive conception of a right to health evolved in the nineteenth century when public health reformers and human rights activists advocated for government involvement in the development of a public health system.<sup>13</sup> Objections focusing on a normative view of rights and obligations, however, proposed that in the absence of a readily identifiable duty-bearer or specific set of obligations, the right to health could not provide the basis for a coherent policy.<sup>14</sup> Although the right to health, like other economic and social rights, should be recognized and treated as a universal human right, the justification for abstract rights is often “muddled” or “vague” because of a perceived failure to properly allocate the obligations necessary to realize such rights.<sup>15</sup> On the other hand, this position has been rebutted on the basis that it fails to make a reasonable attempt to interrogate the text of the international treaties on the right to health to evaluate the nature of a state’s obligations.<sup>16</sup>

In terms of enforcement, the international community, including major donors and drug companies, would become the duty-bearers appointed to secure the right to health.<sup>17</sup> Such an approach gains traction with views that would set limits on the positive duty of the state in terms of an obligation to protect individual health against threats that were beyond their capacity to control.<sup>18</sup> Further, the right to health can be conceptualised not simply an abstract moral ideal, but rather as a “meaningful and operational right” that must be justiciable and enforceable under international law.<sup>19</sup> This approach imposes correlate obligations on both state and non-state actors to protect and promote health, demonstrating that progressive realisation of the right to healthcare will not be manifest without “individual and societal commitments to public moral norms.”<sup>20</sup> Hence, the state, international community and non-state actors are all important in order to full realisation of the right to health.

In general, human rights including the right to health can be viewed as a set of norms based on ethical principles incorporated into national and international legal systems with a view to regulating the actions of states and non-state entities (individuals and groups).<sup>21</sup> Theoretically, the right to health is a vital socioeconomic right that provides a normative framework for political

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12 J Tobin, *The Right to Health in International Law* (OUP 2012).

13 ED Kinney, ‘The international human right to health: what does this mean for our nation and world? (property, wealth and inequality)’ (2001) 34(4) *Indiana Law Review* 1457.

14 G Sreenivasan, ‘II – Gopal Sreenivasan: a human right to health? Some inconclusive scepticism’ (2012) 86(1) *Aristotelian Society Supplementary* 239; O O’Neill, ‘The dark side of human rights 1’ (2005) 81(2) *International Affairs* 427.

15 O O’Neill, ‘The dark side of human rights 1’ (2005) 81(2) *International Affairs* 427.

16 J Tobin, *The Right to Health in International Law* (OUP 2012).

17 J Wolff, ‘The demands of the human right to health’ (2012) 86(1) *Proceedings of the Aristotelian Society Supplement* 217.

18 HT Engelhardt, *The Foundations of Bioethics* (OUP 1996); J Tobin, *The Right to Health in International Law* (OUP 2012).

19 JP Ruger, *Health and Social Justice* (OUP 2010).

20 JP Ruger, *Health and Social Justice* (OUP 2010).

21 SP Marks, ‘The emergence and scope of the human right to health’ in J M Zuniga, S P Marks and L O Gostin (eds), *In Advancing the Human Right to Health* (OUP 2013).

commitment as well as a lens through which states can make decisions when balancing competing interests.<sup>22</sup> A capability approach provides an important tool to develop the right to health in international healthcare policy. For example, gender equality linked to health equality can provide a normative and evaluative framework for promoting social justice whereby empowering women is necessary for achieving public health goals,<sup>23</sup> including “to reduce child neglect and mortality, to decrease fertility and overcrowding and more generally to broaden social concern and care”.<sup>24</sup> The expansion of an individual’s capabilities – real opportunities and freedom that people have to do and to be – should be the absolute aim of public policy.<sup>25</sup> Health is a critical element in the development process, with good health and economic growth supporting each other in parallel. Improving health is a necessary part of a country’s development and a healthy population is a vital part of economic prosperity.

Nevertheless, a common tendency of many scholars is to view socioeconomic rights as merely aspirational.<sup>26</sup> The right of liberty, for example, is fundamental and universal, and can, therefore, be justified without reference to any covenants or institutions; but rights to goods and services are special or institutional rights that can only be justified after signing and ratifying covenants. Under this conception, it is difficult to claim that human rights and obligations form corollary normative claims, with the default position rejecting the idea of human rights as prescriptive or normative and thus see the claim of human rights as aspirational.<sup>27</sup>

In contrast, the UNDP emphasised that socioeconomic rights, including healthcare, are not merely aspirations:

[...] health care and other social and economic achievements are not just development goals. They are human rights inherent in human freedom and dignity. But these rights do not mean an entitlement to a handout. They are claims to a set of social arrangements – norms, institutions, laws, an enabling economic environment – that can best secure the enjoyment of these rights. It is thus the obligation of governments and others to implement policies to put these arrangements in place.<sup>28</sup>

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22 JP Ruger, ‘Toward a theory of a right to health: capability and incompletely theorized agreements’ (2006) 18(2) *Yale Journal of Law & the Humanities* 273; A Sen, ‘Why and how is health a human right?’ (2008) 372(9655) *The Lancet* 2010; M Kavanagh, ‘The right to health: institutional effects of constitutional provisions on health outcomes’ (2016) 51(3) *Studies in Comparative International Development* 328.

23 A Sen, ‘Gender inequality and theories of justice’ in M Nussbaum and J Glover (eds), *Women, Culture and Development: A Study of Human Capabilities* (OUP 1995); see also M Nussbaum, ‘Capabilities as fundamental entitlements: Sen and social justice’ in B Agarwal, J Humphries and I Robeyns (eds), *Amartya Sen’s Work and Ideas: A Gender Perspective* (Routledge, 2005) 35.

24 A Sen, ‘The many faces of gender inequality’ *The New Republic* (New York, 17 September 2001) 35, 39.

25 A Sen, *Commodities and Capabilities* (North Holland 1985); M Fox and M Thomson, ‘Realising social justice in public health law’ (2013) 21(2) *Medical Law Review* 278.

26 J Griffin, ‘Discrepancies between the best philosophical account of human rights and the international law of human rights’ (2001) 101(1) *Proceedings of the Aristotelian Society* 1-28; O O’Neill, ‘The dark side of human rights 1’ (2005) 81(2) *International Affairs* 427, 432.

27 O O’Neill, ‘The dark side of human rights 1’ (2005) 81(2) *International Affairs* 427, 432.

28 UNDP, ‘Human development report 2000 – human rights and human development’ (United Nations Development Programme 2000).

The notion that human rights and health are inseparably connected as normative and binding matters<sup>29</sup> provides an important dimension to understanding the right to health. For example, compulsory detention of a person suffering from a disease without a public health justification would certainly violate both the freedom of movement and the right to health because the detention serves no reasonable public health purpose.<sup>30</sup> It is thus viable, under international law, to replace the dichotomy of “negative” or “positive” human rights with an approach that holds that each right, whether civil and political right or economic, social and cultural right, creates a series of governmental obligations to respect the right from any direct infringement.<sup>31</sup> Thus, although substantial scepticism about the theoretical or philosophical conception of a right to health may remain, including whether it is a positive or negative right, a normative foundation nevertheless exists to support implementation of a right to health for the welfare of all human beings.

### III. THE RIGHT TO HEALTH WITHIN AN INTERNATIONAL LEGAL FRAMEWORK

In addition to having a viable theoretical foundation, the right to health possesses legal identity by virtue of the “International Covenant on Economic, Social and Cultural Rights 1966” (ICESCR) and other relevant international treaties. The right to health has been extended to many countries through international treaties and conventions.<sup>32</sup> Although international documents on health proclaim the right to health in different ways, such as a “standard of living adequate for health,” “the highest attainable standard of physical and mental health” or the “right to healthcare,” the main theme of all these attempts is actually the establishment of a system of health opportunity and equality for everyone. It is noted that international instruments are not only concerned with the right to health, but also several health-related issues. This means that definite improvements in the right to health will ultimately be reflected in improvements in other areas such as public health and healthcare services. Most provisions of international right to health instruments formulate member state obligations with regard to a broad range of health-related issues that include healthcare, reproductive health, occupational, environmental and child health.<sup>33</sup>

As a legal concept, the history of the right to health dates back many decades. The constitution of the WHO first proclaimed the right to health in 1946. WHO regulations came into force automatically for all member states after due notice had been given of their adoption by the World Health Assembly, except for members that duly notified the Director General of rejection or reservations. Two years later after the adoption of the WHO constitution, the Universal Declaration of Human Rights was adopted by the General Assembly of United Nations following the horrific

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29 R Pangalangan, ‘The Domestic implementation of the international right to health: the Philippine experience’ in JM Zuniga, SP Marks and LO Gostin (eds), *Advancing the Human Right to Health* (OUP 2013).

30 DP Fidler, ‘International law and global public health’ (1999) 48 *University of Kansas Law Review* 1.

31 AE Yamin, ‘Taking the right to health seriously: implications for health systems, courts, and achieving universal health coverage’ (2017) 39(2) *Human Rights Quarterly* 341.

32 The treaty bodies that monitor the actions of ICESCR 1966, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, the CRC 1989 have adopted general recommendations and general comments on the right to health and health-related issues. Apart from these treaties, many declarations, such as the Declaration of Alma-Ata 1978, the United Nations Millennium Declaration and Millennium Development Goals, the Sustainable Development Goals and the Declaration of Commitment on HIV/AIDS 2001 have also emphasized on the right to health and health-related issues.

33 CAT Bright and A Toebes, *The Right to Health as a Human Right in International Law* (Intersentia 1999) 4.

events of the holocaust during the Second World War. Article 25 of the UDHR is particularly important for health rights:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care [...].

In this spirit, many countries, including those in the European Economic Community and socialist countries, introduced free and easily accessible healthcare for their citizens.<sup>34</sup> The UDHR (1948) also emphasized the need to provide special care to those patients who were vulnerable such as pregnant women or children and also to provide special protection to children whether born in or out of wedlock.

The rights stated in the UDHR and other international documents are deliberately general in nature so as to ensure the widest consensus concerning the application of social, political, economic and cultural norms in a state.<sup>35</sup> Despite the universal nature of the UDHR, many considered it to be an aspirational document.<sup>36</sup> No member state has accepted or adopted the provisions of the UDHR in its full form.

The ICESCR, unlike the UDHR, was the first binding covenant to provide a conclusive formulation of the right to health. Article 12 states that:

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health [...] (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include [...] assure to all medical service and medical attention in the event of sickness.

The ICESCR set out some important considerations for the full realisation of the right to health, including that governments are mandated to provide medical services to their citizens under Article 12 (2)(d). The United Nations Committee on Economic, Social, and Cultural Rights (CESCR), through General Comment No. 14 on “The Right to the Highest Attainable Standard of Health”, stated that:

Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.

The CESCR and Office of the United Nations High Commissioner for Human Rights (OHCHR) both referred to a normative approach for developing fully accountable mechanisms for full realisation of the right to health.<sup>37</sup> Under this approach, the right to health depends on and is necessary for the

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34 YM Barilan and M Brusa, ‘Human rights and bioethics’ (2008) 34(5) *Journal of medical Ethics* 379.

35 JT Eberl, ED Kinney and MJ Williams, ‘Foundation for a natural right to health care’ (2011) 36(6) *Journal of Medicine and Philosophy* 537.

36 M Robinson, *Realizing Human Rights: Take Hold of it Boldly and Duly*, Oxford University Romanes Lecture (11 November 1997); S Yecies, ‘Sexual orientation, discrimination, and the universal declaration of human rights’ (2011) 11(2) *Chicago Journal of International Law* 789.

37 VFL Schieck, ‘Towards the full realization of the human right to adequate food and nutrition’ (2015) 57(2) *Development* 155; OHCHR and WHO, ‘The Right to Health’, Fact Sheet No. 31 (OHCHR and WHO 2008); WHO, ‘Leading the realization of human rights to health and through health: report of the high-level working group on the health and human rights of women, children and adolescents (WHO 2017).

realisation of other human rights, including both freedoms and entitlements. However, the right to health was not to be understood as a right to be healthy. The stated freedoms include the right to control one's own health, including sexual and reproductive freedom, and the right to be free from interference, such as non-consensual medical treatment, torture and experimentation. The entitlements refer to equality-based health systems designed so that all people may enjoy the highest attainable standard of health.<sup>38</sup> In Comment 14, the Committee explained its practical approach to promote the right to health and also recognised that this right imposed general, not individual, obligations on governments. The committee's goal is for member states to adopt and implement policies tailored for their own populace.<sup>39</sup> Thus, states need to ensure four interrelated principles of the right to health: availability, accessibility, acceptability and quality of healthcare facilities, goods and services for their citizens.<sup>40</sup> The guidelines for how to respect, protect and fulfil the right to health provided in this Comment can be looked upon as a comprehensive blueprint for how governments can best legislate effective policies and implement them satisfactorily. The CESCR specifies the duties and obligations of member states to provide and promote healthcare facilities to all and treats other health-related issues in an equitable and non-discriminatory manner, particularly for the most vulnerable and marginalised groups in the population. According to this Comment, the obligations of member states encompass both technical and legal obligations. Preparing a national action plan for healthcare services and designing benchmarks and indicators for monitoring progress, as well as educating people who participate in health decisions, are all technical obligations. On the other hand, legal obligations must also be met for policy adoption and implementation by the member states in order to ensure health rights and address underlying determinants of health.

Interpretation of the right to health, as proclaimed by the CERD, not only includes providing timely and appropriate healthcare to individuals, but also spells out the underlying determinants of health, such as access to safe and clean drinking water, effective sanitation facilities, healthful occupational and environmental conditions, an adequate supply of safe, nutritious food, appropriate housing and access to health-related education and information.<sup>41</sup> It also guarantees that medical treatment shall be non-discriminatory and non-coercive, and that entitlements, such as the right to essential primary healthcare,<sup>42</sup> will be maintained. Physicians for Human Rights recommends that policies for the right to health can best be achieved through a combination of skilled healthcare workers and access to essential medications, as well as through the underlying determinants

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38 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) para. 8; OHCHR and WHO, 'The Right to Health', Fact Sheet No. 31 (OHCHR and WHO 2008).

39 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) para. 18, 33, 35, 36.

40 OHCHR, *Health Policy Makers: Summary Reflection Guide on a Human Rights-Based Approach to Health* (United Nations 2015).

41 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) para. 11; P Hunt, 'The human right to the highest attainable standard of health: new opportunities and Challenges' (2006) 100(7) *Transactions of the Royal Society of Tropical Medicine and Hygiene* 603.

42 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) para. 8.

mentioned above.<sup>43</sup> An effective, accountable, integrated healthcare system of good quality is, without doubt, the minimum requirement for the realisation of a right to health.<sup>44</sup>

The Human Rights Commission (renamed as the Human Rights Council in 2006) established the post of UN Special Rapporteur in 2002 to ensure that states ensure the highest attainable standards of physical and mental health. Since then, it has gathered, requested, received and exchanged health information from all relevant sources, and discussed information with relevant stakeholders, such as governments, UN bodies, the WHO, NGOs and international financial institutions. It also recommends that UN member states adopt laws and policies for the promotion and protection of the right to health. In 2010, the Special Rapporteur of the Human Rights Council gave special attention to issues dealing with the elder population, gender identity, disabilities, AIDS, health systems and millennium development goals.<sup>45</sup> In the same year, the United Nations General Assembly recognised “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”.<sup>46</sup>

#### IV. STATE OBLIGATION FOR THE REALISATION OF A RIGHT TO HEALTH

International human rights law lays out both moral and legal obligations of member states to protect and promote the health of their citizens. Whilst the Universal Declaration of Human Rights sets out the moral obligations of member states, the ICESCR and ICCPR impose binding legal obligations. States are obliged to respect the provisions of covenants in terms of implementation, including submission of periodic compliance reports to concerned committees.<sup>47</sup> Between the two covenants, the ICESCR furnishes comprehensive, global protection today under international law for the establishment of the right to health. For example, according to Article 10 of the ICESCR, member states are responsible for arranging special protection to mothers during a reasonable period before and after childbirth and ensuring paid leave for them as employees. States are also required to take special measures and pass laws for the protection of the occupational health of employed people.

Significantly, Article 2 of the ICESCR imposes legal obligations on member states based on their available resources, including taking effective steps to enact domestic legislation to implement the right to health. A member state must implement such rights by maximal use of their resources, which depends on proper resource allocation and effective policy decisions by government agencies. Thus, the implementation of the right still remains dependent on state policy

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43 WHO, *Physicians for Human Rights: About the Global Health Action Campaign* (WHO, 2009).

44 P Hunt and G Backman, ‘Health systems and the right to the highest attainable standard of health’ (2008) 10(1) *Health and Human Rights* 81.

45 Human Rights Council, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 15th Session, UN Doc A/HRC/RES/15/22 (6 October 2010).

46 *The Human Right to Water and Sanitation*, GA Res 64/292, UN GAOR, 64th Sess, 108th plen mtg, Agenda Item 48, UN Doc A/RES/64/292 (28 July 2010). UNGA, Resolution 64/292, “The Human Right to Water and Sanitation,” July 28, 2010. Article 24 of the CRC and Article 14 of the CEDAW both expressly recognize the right to water.

47 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Article 16; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Article 40.



and available resources, which may be constrained by domestic socioeconomic and political priorities.<sup>48</sup>

Consequently, achieving this goal is not straightforward as there are no prescribed rules or specific systems for enforcement by states to secure rights enunciated in the ICESCR. It merits noting that General Comment 3 of the CESCR explained that Article 2, paragraph 1 of the ICESCR regarding the nature of the member states' obligations, outlines the minimum obligations, which are incumbent upon member states under the ICESCR. Accordingly, states have an obligation to satisfy the minimum essential levels of each of the rights described in the covenant. If a significant number of individuals are deprived of primary healthcare by a member state, it would be considered *prima facie* evidence that the state has failed to discharge its obligations under the Covenant. In such a circumstance, the state's requirements for ensuring the right to health, like other human rights, can be examined by three levels of obligation: the obligation to respect, the obligation to protect and the obligation to fulfil as enunciated in General Comment 14 of the CESCR. In order to do so, the CESCR spells out the main obligations and activities that states have to carry out to guarantee minimal adherence to the Comment with regard to the right to health. Indeed, it has been argued that states have a duty to guarantee the right to health expressed as a minimum core obligation under international law, with judicial adherence through the interpretation of domestic and international law playing a critical role in ensuring state compliance.<sup>49</sup> Whilst many countries, such as the USA, Australia, UK, India and Bangladesh, consider the right to health as nonjusticiable (not enforceable),<sup>50</sup> judicial intervention in many low- and middle-income countries has significantly expanded the justiciability of the right by interpreting constitutional provisions and recognising the right.<sup>51</sup>

These obligations and institutional activities encourage member states to prepare health policies for healthcare and protection, develop built-in indicators, introduce monitoring systems for healthcare and engage individuals and the community in health-related issues. Member states are thereby required to:

1. adopt framework legislation setting out a national strategy and plan of action, and earmarking sufficient resources to carry out the plan;
2. identify the appropriate right to health indicators and benchmarks; and
3. establish adequate remedies and accountability – for example, access to courts, ombudsmen or human rights commissions.<sup>52</sup>

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48 SD Jamar, 'The international human right to health' (1994) 22(1) Southern University Law Review 1; AL Taylor, 'Making the world health organization work: a legal framework for universal access to the conditions for health' (1992) 18(4) American Journal of Law and Medicine 301.

49 SMT Karim and others, 'Judicial adherence to the minimum core obligation of a right to health in Bangladesh: a critical review' (2019) 20(1) Asia Pacific Journal on Human Rights and the Law 131.

50 G Backman and others, 'Health systems and the right to health: an assessment of 194 countries' (2008) 372(9655) The Lancet 2047.

51 S Gloppen, 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10(2) Health and Human Rights 21; AE Yamin and O Parra-Vera, 'Judicial protection of the right to health in Colombia: from social demands to individual claims to public debates' (2010) 33(2) Hastings International and Comparative Law Review 431.

52 LO Gostin, 'The human right to health: a right to the highest attainable standard of health' (2001) 31(2) The Hastings Centre Report 29.

Due to contemporary human rights obligations, discourse and practice, many states have recognised the right to health as a fundamental right through their national constitutions and laws. The global trend of recognition through constitutional reform is gradually increasing. Only 17 percent of written constitutions of the world expressly declared the right to health in 1970,<sup>53</sup> but the number had increased to 51 percent by 2010. Likewise, domestic laws were recently found to guarantee the right to medical care services in 100 UN member states.<sup>54</sup>

Many countries have incorporated a right to health directly or indirectly in their national constitutions. For example, the Constitution of Brazil (1988) guarantees the right to health under Article 196 that “health is the right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness [...]” A similar provision is incorporated in the Constitution of the Republic of Haiti (1987) whereby there is an “absolute obligation to guarantee the right to life, health, and respect of the human person (Article 19).” In contrast, the constitution of Bangladesh indirectly provides direction for the progressive realisation of tangible health rights by making the government accountable for the provision of health services.<sup>55</sup>

The laws, policies and institutional practices of the WHO promote opportunities for people to lead healthy lives,<sup>56</sup> but establishing a legal basis for the right to health is essential to buttress a range of economic, social, physical, organisational, instructional, administrative, management and other supportive factors. In a Note to the UN General Assembly in 2003, the General-Secretary reinforced the relationship between health promotion and determinants of health,<sup>57</sup> and that a failure to address the aforementioned factors or inequalities is detrimental to health. Poverty and political strife present severe impediments to healthy living. For example, the mortality rate among children under the age of 5 per 1,000 live births in Somalia was 127 whereas in Finland it was only 2.<sup>58</sup> Somalia’s right to health legislation was enacted recently in 2012 while the right to health in Finland has been part of its constitution since 1919. Sweden introduced a new public health strategy, which included 11 policy domains; and among those 5 policies were related to social determinants of health, namely, active participation in healthcare equality, healthier working conditions, economic and social security, environmental policy and children and adolescent’s

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53 M Kavanagh, ‘The right to health: institutional effects of constitutional provisions on health outcomes’ (2016) 51(3) *Studies in Comparative International Development* 328.

54 J Heymann and others, ‘Constitutional rights to health, public health and medical care: the status of health protections in 191 countries’ (2013) 8(6) *Global Public Health* 639; R Dittrich and others, ‘The international right to health: what does it mean in legal practice and how can it affect priority setting for universal health coverage?’ (2016) 2(1) *Health Systems & Reform* 23.

55 *The Constitution of the People’s Republic of Bangladesh* (Bangladesh, 2014 last amendment) Article 16, 18; SMT Karim and others, ‘Judicial adherence to the minimum core obligation of a right to health in Bangladesh: a critical review’ (2019) 20(1) *Asia Pacific Journal on Human Rights and the Law* 131.

56 WHO, ‘Ottawa charter for health promotion’ (1986) 1 *Health Promotion* i.

57 There are multiple and interactive factors, such as personal, social, economic and environmental which influence health and determine the health status of individuals or communities. See WHO, ‘WHO Health Promotion Glossary. WHO Collaborating Centre for Health Promotion’, Department of Public Health and Community Medicine (University of Sydney 1998).

58 J Quinn, ‘Report 2018: estimates developed by the UN inter-agency group for child mortality estimation’ *Levels and Trends in Child Mortality* (The United Nations Children’s Fund 2018).

health.<sup>59</sup> In like fashion, the UK placed emphasis on the reduction of health inequalities in order to develop a comprehensive, inclusive health policy.<sup>60</sup> At present, both countries' health status is good according to the World Bank.<sup>61</sup>

Although international treaties impose legal obligations on states, such obligations are not always mandatory. In order to assess the actual legal obligations of a particular state, it is necessary to ascertain whether that state has registered any reservations against international treaties. Reservation clauses added before signing can allow state agencies to keep certain rights under Article 1(d) of the "Vienna Convention on the Law of Treaties" in order to exclude or modify the legal effects of certain provisions of the treaty. However, UN members are not allowed to enter into any reservations under that convention unless it is accepted by other member states or is not contrary to the object and purpose of the treaty. Hence, it becomes clear that while member states may have an obligation to implement a right to health under international law, various legal mechanisms as well as pragmatic considerations may limit the extent to which implementation can be achieved.

## V. PROGRESSIVE REALISATION OF THE RIGHT TO HEALTH

Progressive realisation is defined as the development of socioeconomic rights wherein each state has a duty to examine its existing barriers in legal, administrative, operational and financial terms, and to take necessary steps to ensure peoples' rights.<sup>62</sup> Article 2(1) of the ICESCR directs each member state to take necessary steps for the progressive realisation of socioeconomic rights, such as the right to health, within the limits of available resources. This directive has generated some confusion in how state parties are supposed to determine when the maximum level of rights has been ensured within their available resources. This vagueness affords flexibility to state policy makers in establishing their level of obligation to protect socioeconomic rights. Furthermore, the flexibility inherent in progressive realisation is useful in permitting a state to ensure socioeconomic rights over a longer period of time as a gradual process.<sup>63</sup> Indeed, as the Constitutional Court of South Africa observed in the "Grootboom case" and "Mazibuko case", it is not an easy task to determine the "minimum threshold for the progressive realization" of socioeconomic rights without identifying the reasonableness of such rights in a state.<sup>64</sup>

Access to resources is a leading determinant of a nation's ability to achieve the right to health progressively. Although resource availability gives flexibility to each state, the General Assembly of the UN recognized that, without sufficient resources, progressive realisation of healthcare rights

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59 C Hogstedt and others, 'The Swedish public health policy and the national institute of public health' (2004) 32(64) *Scandinavian Journal of Public Health* 60; M Marmot, 'Social determinants of health inequalities' (2005) 365(9464) *The Lancet* 1099.

60 D Acheson, *Independent inquiry into inequalities in health report* (The Stationery Office 1998).

61 J Quinn, 'Report 2018: estimates developed by the UN inter-agency group for child mortality estimation' *Levels and Trends in Child Mortality* (The United Nations Children's Fund 2018).

62 S Verma, 'Justiciability of economic social and cultural rights: relevant case law' (2005) working paper, International Council on Human Rights Policy, Rights and Responsibilities of Human Rights Organisations, Geneva, March 15.

63 L Chenwi, 'Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46(3) *De Jure* 275.

64 *Government of the Republic of South Africa & others v Grootboom & others* [2001] 1 SA 46 (Constitutional Court) para 32; *Mazibuko and Others v City of Johannesburg and Others* [2010] 4 SA 1 (Constitutional Court) para 60.

was impossible. Resources in this context do not only mean state resources, but also external advantages received from international sources as stated in paragraph 26 of the “Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles)” and paragraphs 3 and 38 of the CESCR General Comment Nos 3 and 14, respectively. According to the Convention on the Rights of the Child,<sup>65</sup> a state’s resources must be understood to include human, organisational, technological and information resources as well as financial revenues that are essential for the realization of socioeconomic rights. In this regard, the meaning of “resources” must be considered in terms of practicality as outlined in Section 31 of the “Vienna Convention on the Law of Treaties.”<sup>66</sup> Each state needs to examine its financial capital, human and other resources to allocate most effectively in practical terms for the progressive achievement of equitable and comprehensive healthcare. Nevertheless, paragraph 2 of General Comment 3 of the CESCR emphasised the crucial importance of initiating a definite set of “deliberate, concrete and targeted” steps for the timely realization of full health rights for all citizens.<sup>67</sup>

Although the notion of progressive realisation through sensible resource utilisation is relatively straightforward, there is still an ongoing debate about how to determine whether a member state has made progress considering its maximum available resources. In this regard, the United Nations’ guidelines for state practices provide a useful framework for measuring ongoing achievements of each state, with indicators and benchmarks to measure progress and monitor stagnation or retrogression. The Committee provided guidelines in CESCR General Comment 14 for the adoption of appropriate indicators and benchmarks along the path to universal health.<sup>68</sup> According to the Comment, the national health strategy of a member state will determine the appropriate indicators and benchmarks. The main purpose of utilising indicators is to monitor a state’s obligations as stated in Article 12 of the ICESCR. Having determined the necessary indicators, a state is required to set appropriate national benchmarks for measuring the status of each indicator in relation to the goals of providing fair and equitable healthcare to its citizens.<sup>69</sup> Subsequently, the UN General Assembly introduced three indicators for the right to health:<sup>70</sup> first, structural indicators, which address whether a state has key structures, systems and mechanisms in relation to human rights such as constitutionally entrenched rights to health, national human rights institutions, national health policies and plans of action, a government approved list of essential medicines and free drugs at primary public health facilities; second, process indicators, which monitor the effectiveness of actions implemented as part of health policy measures and programs, such as the percentage of pregnant women attended by skilled healthcare personnel for check-ups and the percentage of births attended by skilled birth attendants; and third, outcome indicators, which measure the results

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65 *The Committee on the Rights of the Child Convention on the Rights of the Child*, Chapter VII, 46th Session, UN Doc CRC/C/46/3 (22 April 2008).

66 J Tobin, *The Right to Health in International Law* (OUP 2012).

67 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 3: The Nature of States Parties’ Obligations*, 5th Session, UN Doc E/1991/23 (14 December 1990).

68 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000).

69 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) para. 57–8.

70 *The right of everyone to enjoy the highest attainable standard of physical and mental health*, Agenda item 117 (c), 58th Sess, UN Doc A/58/427 (10 October 2003).

achieved by health policies and programs, such as the number of maternal deaths per 100,000 live births, the number of perinatal deaths per 1,000 births and the percentage of men and women who are infected with HIV. Thus, the establishment of appropriate indicators and benchmarks constitutes a powerful system for monitoring and measuring progressive realisation of the right to health.

Each state should concentrate on the proper allocation of resources and not discriminate based on inequities.<sup>71</sup> In this respect, the Constitutional Court of South Africa remarked that a state “must accelerate reasonable and progressive schemes” to develop an appropriate healthcare environment for their citizens.<sup>72</sup> In addition, Article 25 of the “Limburg Principles” stated that member states are obligated to respect the right to a minimum level of health protection irrespective of their level of economic resources. In this context, a state’s duty is to utilise maximum available resources.

It is recognised that: full realisation of a right to health cannot be achieved within a short period of time; gradual progress toward achievement is expected; and that the rate will be different for every state. Undoubtedly, the budgets and performance of developed countries will be better than those of developing countries; however, the rate of progress in achieving universal health advantages for the citizenry of each state must be “rational and reasonable.” In order to determine what is rational and reasonable, states have to adhere to indicators and benchmarks defined by the General Assembly to measure their progress. For example, a state may take the initiative to reduce maternal deaths by 20–30 percent over the next five years within the limits of available resources. After five years, the state can measure achievement in accordance with this target. In addition, a state can introduce “retrogressive measures” to determine how well the utilisation of maximum available resources is supporting the progressive realization of health. Alternatively, a state can test its progress by judging whether its use of resources would be considered rational and reasonable. The use of retrogressive measures ensures that the current level of achievement cannot be reduced in subsequent years. For example, the public health budget of a state in a certain year cannot be less in the following year without justification of exceptional circumstances. This means that the CESCR prohibits the use of regressive policies to enhance people’s rights to health.<sup>73</sup> Every state has to utilise its resources in the best possible way to maintain progress toward personal health.

It should also be noted that a country cannot avoid the minimum obligation to adopt a plan of action by claiming a lack of available resources.<sup>74</sup> Comments 3 and 14 of the CESCR described the minimum core obligations of a state to its people. The Committee decreed that a member state must observe “minimum core obligations” to ensure at least minimum essential levels of socioeconomic rights including healthcare.<sup>75</sup> To that end, CESCR General Comment 14 authorised

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71 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) para. 19.

72 *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others* [2006] 2 SA 311; *Minister of Health & others v. Treatment Action Campaign & others* [2002] 5 SA 721.

73 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000).

74 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 11: Plans of Action for Primary Education*, 20th Session, UN Doc E/1992/23 (10 May 1999) para. 9.

75 See also SMT Karim and others, ‘Judicial adherence to the minimum core obligation of a right to health in Bangladesh: a critical review’ (2019) 20(1) *Asia Pacific Journal on Human Rights and the Law* 131.

the following six core obligations that every state needs to meet for providing the right to health for its population:<sup>76</sup>

1. non-discriminatory access to health facilities, goods and services;
2. access to the minimum essential safe and nutritious food;
3. access to basic shelter, housing and sanitation and safe and potable water;
4. essential drugs as defined by WHO;
5. equitable distribution of all health facilities, goods and services; and
6. adoption and implementation of a national public health strategy and plan of action.

As discussed earlier, the CESCR suggested in Comment 14 that national health policy should identify available resources and use those in the most appropriate way for the progressive realisation of the right to health. Otherwise, it will be treated as a violation of state obligations under Article 12 of ICESCR as enunciated in the same Comment. Hence, each state has to utilise the maximum available resources for progressing toward the essential right to health.

## VI. CONCLUSION

Ultimately, progressive realisation of a right to health should be understood as a *process* to achieve incremental gains towards a vision of health and wellbeing. This acknowledges pragmatic resource limitations faced by states. Thus, in addition to the necessary monitoring of clear milestones or targets, progress *along* a reform pathway should itself provide an indicator of success for the purpose of evaluating state accountability in meeting human rights obligations. This might include, for example, successful implementation of legal or institutional frameworks that have been empirically demonstrated to lead to positive changes in practices, promotion of rights or other outcomes. Policy makers could then aim to develop strategies that focus on alternative or indirect institutional reforms, including by leveraging other policy initiatives. For example, ‘wellbeing’, as expressed by the United Nations Sustainable Development Goals in its *2030 Agenda*, can be reframed as a set of goals that are intrinsically linked to environmental goals through interconnected institutional structures;<sup>77</sup> and in so doing, can inspire policies that would achieve social outcomes in both areas by targeting those structures. By incorporating a broader range of strategies within evaluative frameworks, progressive realisation can thus be reframed as an opportunity to achieve incremental improvements rather than as a means to rationalise falling short of an aspirational goal in the face of limited resources.

While there is continued debate about the meaning, scope and enforceability of a right to health, with ‘health’ depending on several factors or underlying social or environmental determinants, this article maintains that states nevertheless have a positive obligation to ensure a right to health and promote the highest possible standard of health and wellbeing. Although a state’s ability to implement strategies to meet the broad range of targets associated with a right to health is ultimately limited by the reality of available resources and competing national priorities, a pragmatic approach to promoting a right to health through progressive realisation provides a rational approach for policy makers and legal reformers. However, consistent with the trend internationally, entrenching

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76 The Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000).

77 J Waage and others (2015) ‘Governing the UN Sustainable Development Goals: interactions, infrastructures, and institutions’ *The Lancet Global Health* 3(5) e251–e252.

a right to health in domestic legal systems, whether through constitutional amendment or human rights legislation, should be the first step in those jurisdictions where explicit legal protection of the right to health remains absent.

# A CLIMATE SECURITY INITIATIVE: ANOTHER WAY TO MAKE INTERNATIONAL CLIMATE LAW

BY ASHLEY MURPHY<sup>1</sup>

## I. INTRODUCTION

In light of the recent findings from the Mauna Loa Observatory that the concentration of CO<sub>2</sub> in the atmosphere is continuing to increase, we must accept the conventional processes of international law have failed to find a solution to the intensifying climate change threat.<sup>2</sup> International law has been directed towards the problem since the inception of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. Since then the Kyoto Protocol has been introduced, its failure eventually leading to the Paris Agreement of 2015. The stark reality is that nearly four years after the introduction of the latest iteration of international climate law we are still witnessing an abject inability to halt global emissions. In the context of climate change the limitations more than the positives of international law have been exposed.

The challenge from climate change is so urgent that we must look for an alternative means in which to generate some semblance of an immediate fight back.<sup>3</sup> This is broadly the same rallying call Sir Geoffrey Palmer made in 1992 when he sought to find new ways to make international environmental law.<sup>4</sup> It is the argument here that in the context of the ordinary instruments of international law failing, we must find new ways to craft international climate law (ICL). One possibility found in the history of international security is the option to introduce a framework of principles outside the usual constraints of conventions. The prototype for this idea comes from the non-proliferation of nuclear weapons field, where the Proliferation Security Initiative (PSI) was introduced as an extraordinary means in which to generate a quick and effective response to the proliferation activities of non-state actors. The introduction and success of the PSI offers a blueprint for the climate change response agenda, and so it is argued here that a Climate Security Initiative (CSI) provides a useful and timely alternative that must be explored.

This paper intends to strike a practical tone and focus on the possibility of a CSI being introduced as soon as possible. By exploring this option it is the intention of this paper to provide policy makers and those willing states a means in which to pursue a more robust climate response agenda. The paper is structured according to three main questions: has international climate law failed; what model of response and benefit does the PSI offer; how could a CSI be created to fill the gaps left by international climate law.

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2 Mauna Loa Observatory, 'Daily CO<sub>2</sub>' (Mauna Loa Observatory Hawaii, 15th May 2019) <<https://www.co2.earth/daily-co2>> accessed 14th October 2019.

3 IPCC Report, 'Global Warming of 1.5 °C: Summary for Policy Makers' (8th October 2018).

4 G Palmer, 'New Ways to Make International Environmental Law' (1992) 86 (2) *The American Journal of International Law* 259.



## II. INTERNATIONAL CLIMATE LAW

To analyse the success or failure of an international regime it has to be decided by what standard of effectiveness it would be judged. Crucially different standards lead to different results.<sup>5</sup> The typical standards of effectiveness identified by Oran Young include: legal, behavioural and problem solving.<sup>6</sup> Sometimes referred to as: output, outcome, and impact.<sup>7</sup> The legal standard refers to the extent that an environmental problem can be transferred into a legal regime with normative character. Adoption of the legal standard alone implies an element of belief that the law matters in its own right, a point that is subject to debate.<sup>8</sup> The behavioural standard regards the ability of a regime to alter the behaviour of those subjected to it, in the achievement of its stated objective. This does provide a more comprehensive measure than the legal standard as it focuses on a greater level of impact beyond simple legal recognition.<sup>9</sup> However it is premised on the notion that the behaviour mandated by the regime is significant in its connection to the regime's objective, which is not a consistent reality.<sup>10</sup> The problem-solving standard extends the link between the regime and the actual problem being addressed, considering if a tangible improvement is evident. The application of this standard is particularly useful in the climate context, which experiences political and bureaucratic obstacles that project a veneer of progress with questionable impacts on the problem.<sup>11</sup>

It is a matter of choice as to which of these three standards of assessment are adopted. Subsequently, politicians around the world are able to claim they are not only partaking in ICL but also that it is successful, inevitably relying on the legal standard.<sup>12</sup> However, what is the point in declaring that ICL exists and that the Paris Agreement has 195 members when at the same time CO<sub>2</sub> emissions continue to rise, biospheres continue to alter, and extreme weather events

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5 H Breitmeier, A Underdal, O Young, 'The Effectiveness of International Environmental Regimes: Comparing and Contrasting Findings from Quantitative Research' (2011) 13 *International Studies Review* 579.

6 Young actually identifies six standards but it is these three that have been utilised in the literature, O Young, *International Governance: Protecting the Environment in a Stateless Society* (1st edn, Cornell University Press, 1994) Ch.6.

7 J Vollenweider, 'The effectiveness of international environmental agreements' (2013) 13 *International Environmental Agreements* 343.

8 Brunnee and Toope argue that law matters through its influence on regime evolution, as opposed to its legal nature solely: J Brunnee, S Toope, 'The Changing Nile Basin Regime: Does Law Matter?' (2002) 43 (1) *Harvard International Law Journal* 105.

9 See for a study focussing on the behavioural standard, J Wettestad, 'Designing Effective Environmental Regimes: The Conditional Keys' (2001) 7 (3) *Global Governance* 371.

10 For instance under the Kyoto Protocol Russia agreed a 5% reduction in its emissions by 2015, but this was not based on a motivation to alter behaviour towards this target but on the reality of an industrial decline that produced the reduction incidentally.

11 O Young, 'Effectiveness of international environmental regimes: Existing knowledge, cutting edge themes, and research strategies' (2011) 108 (50) *PNAS* 19853.

12 Brazil has pointed to its commitment to the Paris Agreement, expressing a level of legal effectiveness without making behavioural changes or addressing the problem, M Darby, 'Bolsonaro says Brazil will stay in the Paris Agreement' (Climate Home News, 26th October 2018) <<https://www.climatechangenews.com/2018/10/26/bolsonaro-says-brazil-will-stay-paris-agreement/>> accessed 28th August 2019; In 2015 David Cameron then Prime Minister of the UK said 'What do we tell our grand children if we fail to agree on a deal', indicating clearly his belief in the legal standard: A Vaughan, E Howard, A Holpuch, 'World Leaders Call for Action at Paris Climate Talks' *The Guardian* (London 30th November 2015) <[www.theguardian.com/environment/blog/live/2015/nov/30/paris-climate-summit-world-leaders-meet-for-opening-day-live](http://www.theguardian.com/environment/blog/live/2015/nov/30/paris-climate-summit-world-leaders-meet-for-opening-day-live)> accessed 14th July 2019.

become less extreme by virtue of their increasing frequency.<sup>13</sup> The only standard of effectiveness that really matters in this time of urgency is the problem-solving one. To solidify this claim, if we apply the legal standard then the Paris Agreement is a resounding success. Going further, the behavioural standard is also largely satisfied as many states have made minor efforts and submitted their Intended Nationally Determined Contributions to the secretariat.<sup>14</sup> Yet, the reality is emissions are continuing to rise and climate change is becoming an ever more severe threat.<sup>15</sup> Accordingly ICL must be judged to have failed in the pursuit of a response that is able to stem the problem of climate change. The remainder of this section will consider ICL and its level of failure according to the problem-solving standard.

If we consider ICL to have begun with the UNFCCC in 1992 then we have this convention plus the Kyoto Protocol and Paris Agreement to examine. However this paper does not need to rehash an analysis of the UNFCCC in great detail.<sup>16</sup> Suffice to say the framework was a useful starting point and brought states to the table in the recognition of a common problem. Its character as aspirational and absent any imposing obligations meant that its tone was largely discretionary and best encapsulated by the principle of common but differentiated responsibilities.<sup>17</sup> The UNFCCC contains the potential tools and processes for much more detailed responses and cooperative ventures. Yet with hindsight we can see the framework instead of acting as a tentative beginning leading to a more robust set of conventions, acted to create an atmosphere of individualism propagated by the notions of blame and responsibility.<sup>18</sup>

The Kyoto Protocol did attempt to lead the UNFCCC forward through the introduction of defined targets. Had it been successful the Protocol would have resulted in firm emission reductions, meaning it was in fact an example of hard or good law.<sup>19</sup> Nevertheless, the attitudes present at the founding of the UNFCCC were transplanted firmly into the Protocol and discord over the differentiated response model was rife. The USA signed the Protocol but failed to ratify it with then President George Bush citing the reason for this as inequity among states.<sup>20</sup> Other significant emitters like India and China did not take the Protocol seriously enough and so although the American position is vastly unhelpful it was perhaps predictable. Russia and Australia also

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13 D Easterling et. al., 'Observed Variability and Trends in Extreme Climate Events: A Brief Review' (2000) 81 *Bulletin of the American Meteorological Society* 417.

14 G Peters et. al., 'Key indicators to track current progress and future ambition of the Paris Agreement' (2017) 7 *Nature* 118.

15 T Radford, 'Human carbon emissions to rise in 2019' (Climate News Network, 31st January 2019) <<https://climatenewsnetwork.net/human-carbon-emissions-to-rise-in-2019/>> accessed 14th July 2019.

16 Singleton-Cabbage makes the point that the UNFCCC took too long and was likely out of step with the scope of the problem by the time it was in force, K Singleton-Cabbage, 'International Legal Sources and Environmental Crises: The Inadequacy of Principles, Treaty, and Custom' (1996) 2 *ILSA Journal of International and Comparative Law* 171; E Rowbotham, 'Legal Obligations and Uncertainties in the Climate Change Convention' in O'Riordan and J Jager (eds) *Politics of climate change: a European Perspective* (1st edition, Routledge, 1996) 32.

17 United Nations Framework Convention On Climate Change (adopted 9th May 1992, entered into force 21st March 1994) 1771 *UNTS* 107, Article 3.

18 These arguments engulf the climate change debate, see: M Paterson, M Grubb, 'The international politics of climate change' (1992) 68 *International Affairs* 293.

19 Kyoto Protocol to The United Nations Framework Convention on Climate Change (adopted 11th Dec 1997, entered into force 16th Feb 2005) UN Doc FCCC/CP/1997/7/Add 1, Article 3.

20 G Bush, White House Archives (White House Archives 16th April 2008) <<https://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080416-6.html>> accessed 15th July 2019.

managed to manipulate the Protocol with the former using economic downturn to set and meet reduction targets,<sup>21</sup> and the latter negotiating an increase in emissions.<sup>22</sup> Perhaps the Protocol's most damning assessment comes from the fact its successor the Paris Agreement exists and in a very different guise.

The Paris Agreement does not set any emission reduction targets for states. Instead Article 2 leads with the broad objective to prevent a 2°C temperature increase above pre-industrial levels.<sup>23</sup> Immediately the Agreement dampens its impression because within Article 2 the aspiration is noted to keep temperature increases below 1.5°C, 'recognizing that this would significantly reduce the risks and impacts of climate change'.<sup>24</sup> If 1.5°C is the figure that must act as the ceiling why not focus on this? The 2°C figure seems redundant except for the fact that states were even in this broad aspiration unprepared to commit to the more stringent objective. Without clarity as to the objective being sought the Agreement loses some of its impetus. In the wider sphere of global communication the clarity of message is vital, and the Paris Agreement is unable to set a clear tone right from the start, or rather the tone is perfectly clear in that states were not prepared to agree the type of convention required to stem the problem.

The Agreement takes an early deviation from the hard law of the Protocol by stating that it will be predicated on the principle of 'common but differentiated responsibilities and respective capability, in the light of different national circumstances'.<sup>25</sup> There is of course a solid foundation for this approach, some states are infinitely more developed than others, and consequently responsible for climate change, and so efforts at emission reduction should to some extent reflect this. However this provision is too vague giving those developed states a free pass to avoid robust climate actions. Instead it should have cast them into leadership roles tackling climate change from the front. Some would argue this type of commitment placed on the developed world would have been an example of neo-liberalism<sup>26</sup> and maybe neo-colonialism.<sup>27</sup> This is a negative interpretation and is just one way to characterise such action. The fact remains leadership, technology sharing, and capacity development are not neo-colonial activities but should be characterised as the actions of responsible states accepting their part in what is now a vital response to a pending global catastrophe.

Nevertheless, the common but differentiated response model prevailed through the inclusion of Intended Nationally Determined Contributions (INDCs).<sup>28</sup> Examining the INDC model reveals the extent to which the Paris Agreement is failing. Evidence is now starting to appear that the cumulative total of actual emission reductions from INDCs is not able to equate to a global effort

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21 B Chambers, 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2004) 16 (1) *The George Town International Environmental Law Review* 501.

22 B Bolin, 'The Kyoto Negotiations on Climate Change: A Science Perspective' (1998) 279 *Science* 330.

23 Paris Agreement to The United Nations Framework Convention on Climate Change (adopted 12th Dec 2015) UN Doc FCCC/CP/2015/L.9/Rev.1, Article 2.

24 *Ibid.* Article 2 (a).

25 *Ibid.* Article 2 (2).

26 D Hursh, J Henderson, D Greenwood, 'Environmental education in a neoliberal climate' (2015) 21 *Environmental Education Research* 299.

27 H Bachram, 'Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases' (2004) 15 *Capitalism Nature Socialism* 5; J Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 *Windsor Yearbook of Access to Justice* 129.

28 Paris Agreement to The United Nations Framework Convention on Climate Change (adopted 12th Dec 2015) UN Doc FCCC/CP/2015/L.9/Rev.1, Article 4.

capable of resulting in the 2°C aspiration.<sup>29</sup> This means that even if each INDC is upheld the overall objective of the Paris Agreement will not be achieved. States have chosen to submit INDC documents that are not significantly robust in terms of problem solving; instead they reflect efforts that do not interfere with their other priorities, predominantly perpetual economic growth. To exemplify this point the following paragraphs will examine some INDCs.

The EU communicated a combined INDC document committing to a ‘binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990 levels.’<sup>30</sup> Firstly, the 40% reduction is not ambitious particularly considering that some of the most developed economies and technologically capable are members of the EU. Hof and others who provided comparative data to argue that from a historical responsibility perspective the EU target is less ambitious than India, Mexico and Brazil best illustrate this point.<sup>31</sup> Secondly, the INDC document references its past ambition of a 20% reduction, which is used to justify the 40% figure and show an improved effort. However all this does is seek to show the EU has a history of adopting non-ambitious targets. The EU has put together a domestic target that would if reflected around the world not meet the 2°C ambition.<sup>32</sup>

Looking at Brazil as a comparator to the EU, its INDC document introduces a 37% emission reduction below 2005 levels.<sup>33</sup> This figure is comparable to the EU and might, considering the history of Brazil, be thought of as ambitious. However its achievement was premised not on a reduction of emissions but on a cutback in deforestation and a commitment to restore 12 million hectares of rainforest.<sup>34</sup> The problem with this is the alteration of the Brazilian Government that has seen the election of Jair Bolsonaro, an advocate of development at the expense of the Amazon rainforest.<sup>35</sup> The basis on which the INDC is built has been undermined and so Brazil is unlikely to post significant results that are able to match its commitment.<sup>36</sup> Thus highlighting the problem of discretion based agreements, which offer no consistency in the face of changing domestic or political conditions.

The Australian INDC begins by referring to its ‘strong record’ where climate commitments are concerned.<sup>37</sup> Yet this strong record is reflected through a 26–28% emission reduction target, which is noticeably low for one of the wealthiest and most developed states in the world. The basis for this

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29 Climate Action Tracker, ‘CAT Emissions Gaps’ (Countries, June 2019) <<https://climateactiontracker.org/global/cat-emissions-gaps/>> accessed 28th August 2019.

30 Intended Nationally Determined Contribution of the EU and its Members States, Article 3.

31 F Hof, M den Elzen, A Mendoza Beltran, ‘The EU 40% greenhouse gas emissions reduction target by 2030 in perspective’ (2016) 16 *International Environmental Agreements: Politics, Law and Economics* 375.

32 Climate Action Tracker, ‘EU’ (Countries, June 2019) <<https://climateactiontracker.org/countries/eu/>> accessed 15th August 2019.

33 Federative Republic of Brazil: Intended Nationally Determined Contribution, para 5.

34 Federative Republic of Brazil: Additional Information on the INDC for Clarification Purposes Only, para 14.

35 A Murphy, ‘Jair Bolsonaro wants to deforest the Amazon – what powers does the UN have to stop him? (The Conversation, 12th July 2019) <<https://theconversation.com/jair-bolsonaro-wants-to-deforest-the-amazon-what-powers-does-the-un-have-to-stop-him-120154>> accessed 30th October 2019.

36 P Rochedo, et al., ‘The threat of political bargaining to climate mitigation in Brazil’ (July 2018) *Nature* <<https://www.nature.com/articles/s41558-018-0213-y>> accessed 16th August 2019.

37 Australia’s Intended Nationally Determined Contribution to a new Climate Change Agreement (August 2015), para 2.

strong record claim and mismatched objective stems from Australia's perspective on global effort that situates its ambition as 'comparable to the targets of other advanced economies'.<sup>38</sup> Hidden behind this statement is a race to the bottom philosophy that reflects the lack of true leadership in the context of climate response. Australia is just one example highlighted that is effectively saying we will commit to this problem only to the extent that our comparable counterparts will commit. Furthermore, the Climate Action Tracker finds that Australia is likely to overshoot its target significantly.<sup>39</sup>

The Canadian INDC offers to cut 'greenhouse gas emissions by 30% below 2005 levels by 2030'.<sup>40</sup> The INDC twice says that this 'target is ambitious but achievable'.<sup>41</sup> Yet the level of ambition attached is unconvincing. The first problem is that 30% is not an overly impressive target, particularly for a developed state. Even compared to the limited number of states examined in this paper, Canada's target is not overly ambitious. Second, Canada chose 2005 and not 1990 as its base year, representing that it has taken the less determined pathway. The inclusion of statements arguing this is an ambitious target therefore appears designed to mask that this is not the case. Nonetheless, the existence of an INDC containing a target allows Canada to claim compliance under the Paris Agreement, granting legal effectiveness. It is not surprising the Climate Action Tracker finds the efforts of Canada would continue to allow a temperature increase between 2°C and 3°C.<sup>42</sup> For this reason the actions of Canada are classified as 'insufficient' in the fight against emissions.<sup>43</sup>

To surmise, ICL is predominantly resting on the Paris Agreement that is based almost exclusively on discretion. The intention behind this was to avoid the problems of the Kyoto Protocol and stimulate greater state involvement. Yet the INDC model found in the Paris Agreement is proving to suffer some historic problems and some new ones. The lack of global leadership in the climate context is striking and significantly stifling the success of ICL. The 2°C aspiration of Paris will not be met and so the problem is not being tackled.<sup>44</sup> If we consider the consequences of climate change are exacerbating daily, and the IPCC has warned the threat must be grasped by 2030, the only position we can embrace is that ICL is not solving the problem of global emissions and alternative options must be explored.<sup>45</sup>

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38 Ibid para 6.

39 Climate Action Tracker, 'Australia' (Countries, June 2019). <<https://climateactiontracker.org/countries/australia/current-policy-projections/>> accessed 15th August 2019.

40 Canada's INDC Submission to the UNFCCC, para 3.

41 Ibid, para 4.

42 Climate Action Tracker, 'Canada' (Countries, June 2019) <<https://climateactiontracker.org/countries/canada/>> accessed 17th August 2019.

43 Climate Action Tracker, 'Canada' (Germany, June 2019) <<https://climateactiontracker.org/countries/canada/>> accessed 17th August 2019.

44 Ibid.

45 IPCC Report, 'Global Warming of 1.5 °C: Summary for Policy Makers' (8th October 2018).

### III. THE PROLIFERATION SECURITY INITIATIVE

As early as the 1960s the international community took steps through the creation and implementation of the Non-Proliferation Treaty (NPT) to ensure nuclear weapons did not become commonly accessible.<sup>46</sup> Attached to weapons of mass destruction (WMDs) is a perception on the part of the international community that they are extraordinary in their capacity to cause destruction.<sup>47</sup> This allowed a rare unity across the international community, perhaps best exemplified by the major powers that even at the height of the Cold War did not resort to using these weapons. To further support the NPT, the UN Security Council adopted Resolution 255 in 1968 to provide signatories the assurances they needed to pursue a non-proliferation agenda.<sup>48</sup> There is very little disagreement that non-proliferation is an important international ambition, it was therefore unsurprising that the proliferation discoveries in the early millennium led to some extraordinary responses.

In 2002 the *So San Ship* was intercepted on course from the DPRK to Yemen, containing a number of materials related to WMDs and specifically the production of SCUD missiles.<sup>49</sup> The USA interdicted the ship but despite the illicit cargo was unsure of the legal ground on which they were acting, eventually taking the decision to allow the ship to continue on its journey. The involvement of the DPRK was particularly problematic because of its public withdrawal from the NPT,<sup>50</sup> which implicated it as a potential developer and source of WMDs.<sup>51</sup> According to Joyner, the *So San* incident was an awakening to the realisation that proliferation activities were taking place and ‘there was no justification under international law’ to prevent their transit, delivery or allow the seizure of such materials.<sup>52</sup> In addition to this international legal gap, the discovery compounded the USA’s belief that a nexus was developing between terrorism and proliferation that would challenge its security above all other threats.<sup>53</sup> Accordingly it began work on the PSI that was launched on the 31st May 2003.

The PSI was intended as an immediate response to the realisation that proliferation was taking place despite the NPT. The discovery of the *So San Ship* and the involvement of a rogue state meant the international community was already running behind the problem and in need of a means to catch up. Conventions are not typically known for their haste. It can take months of challenging negotiations to get a convention adopted, and often only the lowest common denominators are agreed.<sup>54</sup> The international community is comprised of 193 equal states and this has contributed

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46 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1st July 1968, entered into force 5th March 1970) 729 UNTS.

47 Debates of the UNSC have shown this unity: UNSC Verbatim Record (31st January 1992) UN Doc/S/PV/3046; UNSC Verbatim Record (19th June 1968) UN Doc/S/PV/1433.

48 UNSC Res 255 (19th June 1968) UN DOC/S/Res/255.

49 D Joyner, ‘The Proliferation Security Initiative: Non-proliferation, Counter-proliferation, and International Law’ (2005) 30 *Yale Journal of International Law* 507.

50 UNSC Res 825 (11th May 1993) UN Doc S/Doc/825.

51 J Joseph, ‘The Proliferation Security Initiative: Can Interdiction Stop Proliferation?’ (2004) 34 *Social Science* 6.

52 D Joyner, ‘The Proliferation Security Initiative: Non-proliferation, Counter-proliferation, and International Law’ (2005) 30 *Yale Journal of International Law* 507, 509.

53 M Valencia, ‘The Proliferation Security Initiative: A Glass Half-full’ (2007) 37 *Arms Control Today* 17.

54 G Palmer, ‘New Zealand’s Defective Law on Climate Change’ (2015) 12 *New Zealand Journal of Public International Law* 115.

to an environment of challenging negotiations and subsequently ineffective agreements.<sup>55</sup> The subject of proliferation is less beset by this problem because of the broad unity on the subject. Yet, even with broad agreement a convention still takes considerable time and conferences are lengthy processes where various priorities are balanced.<sup>56</sup>

The USA and its allies did not wish to see the content of the PSI subjected to negotiation.<sup>57</sup> The problem as they saw it was simple and as such there was a simple set of steps that would address it. The creation of the PSI was undertaken behind closed doors with the intention to maximise efficiency and avoid the traditional obstacles of international law.<sup>58</sup> As the USA was going to operate as the chief police officer of the PSI it saw this as a reason to take on a leadership role and avoid the involvement of too many other states at creation stage.<sup>59</sup> On the 31st May 2003 the PSI was publically launched, presented to the international community not as a draft convention to discuss but as a fully finished initiative that could only be endorsed.<sup>60</sup> It is because of this formulation strategy that the PSI came to life in a relatively short time frame and cut straight to the problem of proliferation. In many respects the PSI offers a model of international cooperation that has significant benefits over the traditional mechanisms of international law.

The creation of the PSI poses some interesting challenges for the meaning of international law. Examining Article 38 of the ICJ Statute, the sources of international law are customs, conventions, general principles and to a lesser extent the judicial decisions and teachings of qualified experts.<sup>61</sup> The PSI reflects a convention more than any other source. Yet the manner of its creation might preclude it being identified as such because it is not made between states. Does this mean that it is not an example of international law? The PSI was intended to act as a set of principles that did not automatically require states to undertake specific obligations, which is nothing new in the international setting and multilateral agreements also do not intend to bind third parties.<sup>62</sup> Instead states were asked if they wished to endorse the interdiction principles that were specifically directed towards the practical task of preventing proliferation.<sup>63</sup> If a state chooses to engage with the PSI it is expected to carry out, facilitate or allow certain actions. This latter point means the functionality of the PSI is almost identical to that of a convention. Thus the only real obstacle to thinking the PSI sits inside the meaning of international law comes from its creation.

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55 As the Paris Agreement exemplified in section two, even on catastrophic issues the international community struggles to overcome this problem.

56 C Joyner, 'Rethinking International Environmental Regimes: What Role for Partnership Coalitions?' (2004) 1 (1-2) *Journal of International Law and International Relations* 89.

57 J Joseph, 'The Proliferation Security Initiative: Can Interdiction Stop Proliferation?' (2004) 34 *Social Science* 6.

58 *Ibid.*

59 A Etzioni, 'Tomorrow's Institution Today: The Promise of the Proliferation Security Initiative' (2009) 88 *Foreign Affairs* 7.

60 J Yoo, 'The Proliferation Security Initiative: A Model for International Cooperation' (2006) 35 *Hofstra Law Review* 405.

61 United Nations, Statute of the International Court of Justice, (24th October 1945 entered into force 18th April 1946) 33 UNTS 993, Article 38 (1).

62 R Joseph, *The Proliferation Security Initiative: A Model for Future International Collaboration* (National Institute Press, 2009).

63 E Rosand, 'Combating WMD Terrorism: The Short-Sighted US-led Multilateral Response' (2009) 44 *The International Spectator* 81.

However, this can be overcome with reference to another contemporary source of international law that also sits outside of Article 38. The UNSC has in the last two decades assumed a role as global legislature.<sup>64</sup> The advent of international terrorism saw the introduction of Resolution 1373, which was intended to create long-term thematic obligations that all UN members were obliged to implement.<sup>65</sup> The role of the UNSC appears not in fact to be legislative in nature, nowhere in the Charter is there mention of a power to introduce international law. The practical effect of the Charter however presents a scenario almost identical to that of a legislator.<sup>66</sup> Article 24 casts the UNSC as having responsibility to maintain international peace and security. In achieving this, complete discretion is granted to the UNSC in the determination of threats and appropriate responses under Article 39. In combination with Articles 25 and 48 (1), that bind UN members to carry out the decisions of the UNSC, the scenario manifests that it is the master of its own remit and its decisions are to be followed by the remaining UN members.<sup>67</sup> It is therefore difficult to differentiate between the role of the UNSC and that of a legislative institution at the international legal level.<sup>68</sup>

This means the sources of international law can now step outside of Article 38, and as such the PSI although unique in terms of creation stage can be considered a form of international law because of the manner in which it creates obligations and responsibilities for those states that choose to endorse it. As the UNSC example shows, the manner in which contemporary international obligations come into existence does not preclude normative character. International law does not appear to have to follow a set process of creation. As such, the PSI can be considered a manifestation of international law that is useful in the contemporary setting. The question now centres on whether or not it functions proficiently according to the problem-solving standard.

The USA acts as the principle member of the PSI but it has no formal leadership role, and instead all states act autonomously, intent on pursuing PSI objectives through cooperation.<sup>69</sup> Any states coming to the PSI do so with the attitude of cooperation and intent to engage of their own volition. The lack of bureaucracy and formal structure of the PSI was deliberately intended to create a dynamic organisation that was able to respond with speed to potential proliferation activities.<sup>70</sup> The USA acts as a 'rudimentary police force' because of its global navy and all other states support its actions directly or through information sharing and allowing access to ports and resources.<sup>71</sup> The cooperation of states around the globe means the geographic reach of the PSI is vast, creating a net to prevent proliferation.<sup>72</sup>

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64 S Talmon, 'The Security Council as World Legislature' (2005) 99 *The American Journal of International Law* 175.

65 UNSC Res 1373 (28th September 2001) UN Doc/S/Res/1373.

66 P Szasz, 'The Security Council Starts Legislating' (2002) 96 (4) *The American Journal of International Law* 901.

67 United Nations, *Charter of the United Nations*, 24th October 1945, 1 UNTS XVI, Articles 25 and 48 (1).

68 The only substantive restriction on this power to introduce binding decisions is that they must concern the purposes of the UN in the maintenance of international peace and security. A procedural restriction could be considered the need for agreement among the permanent members.

69 M Bunn, et. al., 'Steps to Prevent Nuclear Terrorism' (2013) Belfer Centre for Science and International Affairs, <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:29914156>> accessed 7th September 2019.

70 A Etzioni, 'Tomorrow's Institution Today: The Promise of the Proliferation Security Initiative' (2009) 88 *Foreign Affairs* 7.

71 *Ibid.*, 8.

72 M Valencia, 'The Proliferation Security Initiative: A Glass Half Full' (2007) 37 *Social Science* 17.



Principle 1 of the PSI specifies that all states concerned should take on efforts either individually or in concert with other states to interdict the transfer of WMDs and related material.<sup>73</sup> Who should be subject to interdiction remains ambiguous, but the onus appears to be on those states involved to administer their collective territories and designate targets. The main thrust of this provision is essentially to create a net of willing participants to catch out those actors who are thought to be engaging in proliferation activities contrary to international law.

Principle 2 of the PSI expects members to develop ‘streamlined procedures for rapid exchange of relevant information’.<sup>74</sup> While Principle 3 demands national legislation to give effect to the two prior principles, which effectively means states have to work to ensure they do not simply join the PSI and fail to carry out its obligations. Though there is a discrepancy as to exactly what behaviours members of the PSI have carried out, the intention is to prevent free riding and this is useful given its ubiquity in certain areas of international law.<sup>75</sup> Moreover Principle 4 expects states to take ‘specific actions in support of interdiction efforts’.<sup>76</sup> Again this is useful because within Principle 4 there are a number of specific actions that members are expected to carry out, which enhances cooperative efforts. These actions are not overtly complicated nor do they allow a great deal of interpretation. This meant their implementation was somewhat straightforward, which was useful in the context of solving the proliferation problem.

This novel approach to addressing proliferation was met with the initial endorsement of eleven states. The membership now stands at 105 states. This might only represent approximately half of the international community and so appear to invite immediate criticism on the basis that it is not universal. However, these 105 states can cooperate across the globe to help maintain a substantial network of anti-proliferation, meaning although the PSI is not universal it is significant and able to provide the type of international coverage required. It is also evident that some of the PSI members are able to take on a greater role than others and operate a wide spanning anti-proliferation net.

The biggest challenge is to determine what results flow from the PSI, is it actually a useful mechanism? The USA has indicated its belief that the PSI has had a direct impact upon the objective of preventing proliferation, pointing towards a number of interdictions to exemplify this point.<sup>77</sup> Yet these claims come up against the very real difficulty of knowing whether these interdictions would have occurred prior to the PSI or are a direct result of it.<sup>78</sup> Counterfactual research could be a useful means in which to sidestep this problem and determine if the PSI has been of specific benefit to the anti-proliferation agenda, but unfortunately such studies are not possible because of the secrecy that most PSI members operate under.<sup>79</sup> In light of this secrecy the PSI’s success is dependent on the claims from the USA, which again are shrouded in mystery because of the

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73 Proliferation Security Initiative: Statement of Interdiction Principles (2003) Principle 1.

74 Ibid, Principle 2.

75 International climate law suffers free riders. For instance under the Kyoto Protocol both Russia and Australia offered very little effort, effectively allowing them to free ride at the expense of those states taking action.

76 Proliferation Security Initiative: Statement of Interdiction Principles (2003) Principle 4.

77 J Yoo, ‘The Proliferation Security Initiative: A Model for International Cooperation’ (2006) 35 Hofstra Law Review 405.

78 M Valencia, ‘The Proliferation Security Initiative: A Glass Half-Full’ (2007) 37 Social Science 17.

79 J Joseph, ‘The Proliferation Security Initiative: Can Interdiction Stop Proliferation?’ (2004) 34 Social Science 6.

lack of provable evidence made available to the public.<sup>80</sup> However, in 2002 the So San incident represented a problem that international law was unable to address. The introduction of the PSI means there is now a mechanism to solve this problem, as the below example exhibits.<sup>81</sup>

In October 2003, the ship *BBC China* was intercepted on course for Libya, with WMD development related materials on board, specifically a uranium enrichment gas centrifuge.<sup>82</sup> Following this discovery and the change of position on the development of its nuclear programme, the Libyan Government brought to light the startling extent to which a proliferation network was in operation under the leadership of A.Q. Khan, a Pakistani national.<sup>83</sup> Khan's network was responsible for the provision of WMD related materials over a two-decade period to Iran, Libya, the DPRK, and potentially more unknown states.<sup>84</sup> Therefore, although it is very difficult to quantify the impact of the PSI in terms of how much proliferation has not taken place, it is likely that it has helped to discourage and disrupt offenders such as Libya and Khan. As such there is room to argue the existence of the PSI is positive.<sup>85</sup>

To recap, the PSI was introduced as a means in which to create international cooperation on a problem of significant magnitude. Its structure is reflective of an international convention, and although it was created outside the usual rules of international law this does not preclude it being considered international law. The manner in which states choose to come to the PSI, absent negotiation and lengthy conferences, offers significant benefits. The PSI was introduced quickly; it is not subject to the lowest common denominator; and it has been able to accrue a membership that is able to address the problem positively. The following section will consider taking these advantages forward in the climate change context.

#### IV. A CLIMATE SECURITY INITIATIVE

There are significant parallels between the circumstances that led to the PSI and those that now surround international climate law. The stimulus for the PSI was the discovery that the NPT machinery was being subverted and proliferation was taking place. Breaking this down, on the one hand the threat came to the forefront and there could be no denying its existence. On the other hand there was a gap in the international legal structures that was being exploited. Applying these two elements to climate change, it is startling to see how closely reflected they appear to be.

First, the Mauna Loa Observatory's finding that there is now consistently 400PPM of carbon dioxide in the atmosphere is a stark realisation that the threat is exacerbating.<sup>86</sup> As extreme weather events take place it should also be clear that climatic impact poses a real and dangerous threat

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80 M Valencia, 'The Proliferation Security Initiative: A Glass Half-Full' (2007) 37 *Social Science* 17.

81 A Winner, 'The proliferation security initiative: The new face of interdiction' (2005) 28 *Washington Quarterly* 129.

82 D Albright, C Hinderstein, 'Unravelling the A.Q. Khan and future proliferation networks' (2005) 28 *Washington Quarterly* 109.

83 *Ibid.*

84 M Heupel, 'Surmounting the Obstacles to Implementing UN Security Council Resolution 1540' (2008) 15 *Non-Proliferation Review* 95.

85 A Winner, 'The proliferation security initiative: The new face of interdiction' (2005) 28 *Washington Quarterly* 129.

86 Mauna Loa Observatory, 'Daily CO<sub>2</sub>' (Mauna Loa Observatory Hawaii, 15th May 2019) <<https://www.co2.earth/daily-co2>> accessed 14th October 2019.

to the international community.<sup>87</sup> The developed states should not consider themselves exempt from these impacts, and as Hurricane Dorian recently exhibited even the USA is subject to severe climatic harm.<sup>88</sup> The indirect impacts of climate change will also have a massive economic impact and hit hard the developed and developing alike, which will have ramifications for development and societal progression.<sup>89</sup> Like the *So San* ship incident, these impacts should be characterised as the danger the world now faces from climatic harm.

Second, the reason for the exacerbation of climate change is because global emissions continue to increase. Through its over commitment to discretion the Paris Agreement has created a legal gap in the international climate response. This gap means states are masters of their own obligations and as such many choose not to adopt significant climate response action. Even states with the economic capacity to respond to climate change have been utilising the discretion of Paris to avoid real commitments to reduce emissions. There is no recourse to this because most if not all states are fulfilling their legal obligations under Paris through the submission of Intended Nationally Determined Contribution documents. Consequently, there is a serious gap within the international climate response.

Just like in the PSI instance there is no time in which to craft a response to this problem through the traditional channels of international law. The IPCC has made it clear that if we do not grasp the problem of rising emissions by 2030 then we will lose the ability to respond effectively in the very near future.<sup>90</sup> A convention that takes years to agree and is subject to the lowest common denominator problem cannot offer the speed and robustness of response that is required. An immediate international response to the problem is required and in this context the PSI offers a useful model to consider. A Climate Security Initiative (CSI) could be introduced in a matter of months, and could contain the provisions necessary to make a serious impact in terms of emission reductions. The lack of negotiation that was characteristic of the PSI would be of great use here and prevent the inevitable race to the bottom that the Paris Agreement has facilitated.<sup>91</sup>

Accepting these parallels is only the first step, and crucially a leader is required to take forward a CSI. In the context of the PSI the USA was central, taking on a leadership role in crafting and implementation. Unfortunately the USA has not put itself forward as a leader on climate change. The opposite is in fact more accurate and as we saw above it was a big instigator in the eventual failure of the Kyoto Protocol.<sup>92</sup> Moreover, the actions of the current U.S. Government are equally harmful to the international climate effort and its apparent withdrawal from the Paris Agreement means one of the world's biggest emitters and most powerful states will not be adopting positive internal provisions or taking a leading role.<sup>93</sup>

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87 UNEP, 'GEO 6: Healthy Planet Health people' (UN Environment, 2019).

88 S Gibbens, 'How warm oceans supercharge deadly hurricanes' (National Geographic, 4th September 2019) <<https://www.nationalgeographic.com/environment/2019/09/how-warm-water-fuels-a-hurricane/>> accessed 16th September 2019.

89 K Ricke, L Drouet, K Caldeira, M Tavoni, 'Country-level social cost of carbon' (2018) 8 *Nature Climate Change* 895.

90 IPCC Report, 'Global Warming of 1.5 °C: Summary for Policy Makers' (8th October 2018).

91 J Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 *Windsor Yearbook of Access to Justice* 129.

92 G Bush, White House Archives (White House Archives 16th April 2008) <<https://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080416-6.html>> last accessed 10th October 2018.

93 BBC, 'Paris Agreement: Trump confirms US will leave climate accord' (BBC, 24th October 2019) <<https://www.bbc.co.uk/news/world-us-canada-50165596>> accessed 29th October 2019.

The creation of a CSI will have to come from somewhere else. However there is scope to argue that it should still come from at least one of the permanent members to the UNSC because of the leadership role they adopt in the security apparatus and the influence they continue to have around the world.<sup>94</sup> There is zero chance that Russia will adopt such a role. Its position on climate change is detrimental to global efforts and it has stressed on more than one occasion that climate change is not a security issue but a development one.<sup>95</sup> China has become less resistant to the security apparatus adopting a role in climate change, though it centralises climatic impact and so would likely want to pursue adaptive policies and avoid mitigation efforts, such as a CSI.<sup>96</sup>

By process of elimination that leaves France and the UK, both of which have a much better record on climate change than the other permanent members. It was the UK that first brought climate change before the UNSC in 2007,<sup>97</sup> and has continually supported a greater role for the world's executive right up to the most recent discussion in January 2019.<sup>98</sup> France also advocated for a more involved role of the UNSC in the most recent debate on climate change.<sup>99</sup> Combined with the recently stated aspiration of France and the UK to become carbon neutral by 2050, these two states offer leadership potential on the climate threat.<sup>100</sup> They both have an economic capacity that will allow them to take on the administrative tasks of creating a CSI and they could easily extend this to the implementation of its provisions. Their position on the UNSC could also act as a way not only to help lead the international community forward, but as a foil to expose the restrictive stances of the other permanent members, inadvertently putting pressure on them to respond more urgently.<sup>101</sup>

In addition, all those states that wish to pursue carbon neutrality and have publically expressed this would be encouraged to participate. New Zealand offers one such example and has expressed significant carbon reduction plans.<sup>102</sup> New Zealand also comes with the added benefit of being identified as a relatively neutral state that does not seek to push colonial agendas or hegemonic relationships. This would create a strong foundation in which to project an element of legitimacy into a CSI. Similarly those Scandinavian states that are seeking to take a more robust role on

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94 S Scott, R Andrade, 'The Global Response to Climate Change: Can the Security Council Assume a Lead Role?' (2012) 18 (2) *Brown Journal of World Affairs* 215.

95 UNSC Verbatim Record (17th April 2007) UN Doc/S/PV/5663; UNSC Verbatim Record (20th July 2011) UN Doc/S/PV/6587.

96 UNSC Verbatim Record (25th January 2019) UN Doc/S/PV/8451.

97 F Sindico, 'Climate Change: A Security (Council) Issue?' (2007) 1 (1) *The Carbon and Climate Law Review* 29.

98 UNSC Verbatim Record (25th January 2019) UN Doc/S/PV/8451.

99 *Ibid.*

100 B Felix, 'France sets 2050 carbon-neutral target with new law' (Reuters 27th June 2019) <<https://www.reuters.com/article/us-france-energy/france-sets-2050-carbon-neutral-target-with-new-law-idUSKCN1TS30B>> accessed 30th October 2019; Gov UK, 'UK becomes first major economy to pass net zero emissions law' (Department for Business, Energy and Industrial Strategy, 27th June 2019) <<https://www.gov.uk/government/news/uk-becomes-first-major-economy-to-pass-net-zero-emissions-law>> accessed 29 October 2019.

101 This is based on a similar logic applied to the veto use, which suggests permanent members are encouraged by one another, E Luck, *UN Security Council Practise and Promise* (1st edition, Routledge, 2006).

102 Anon, 'About New Zealand's emissions reduction targets' (Ministry for the Environment, 2019) <<https://www.mfe.govt.nz/climate-change/climate-change-and-government/emissions-reduction-targets/about-our-emissions>> accessed 28th October 2019.

climate change should be encouraged to participate at the creation stage for the same reason.<sup>103</sup> This would again help to create a leadership team that spans the world and is seen as detached from the mainstay of hegemonic relations.<sup>104</sup> Moreover, any and all states that are inclined to join should be encouraged to do so, yet the extent to which a CSI will attract states will very much depend on its content.

The content of a CSI should reflect a limited number of principles that the members intend to achieve. Following the example of the PSI these do not need to be subject to lengthy negotiations. Instead these principles should be established according to the problem solving standard and reflect the will of those drafting states. Since France, the UK, New Zealand and Scandinavian states have all expressed an intention to become carbon neutral and this should be the predominant aspiration of the CSI.<sup>105</sup> In addition, the CSI should seek to plug the holes in the Paris Agreement by situating all members as dedicated to ensuring their emission reduction plans reflect a commitment that will see the 1.5°C objective of Paris achieved. Beyond this the CSI could pledge for members to cooperate towards the achievement of widespread carbon neutrality and the steady but tangible reduction of annual carbon emissions. An annual reduction target would be useful to illuminate to the world precisely what action is being taken by these leading states.

These principles could be drafted as follows:

1. Members of the CSI agree to aspire to carbon neutrality before the beginning of 2030
2. Members must undertake efforts to ensure domestic emissions do not exceed a level that would result in more than a 1.5 °C global temperature increase
3. Members will adopt annual measurement practises to document real time emission reductions and publish these widely
4. Members agree to review cooperative mechanisms to help ensure all members are working toward commitments 1 and 2
5. Members agree to promote capacity sharing mechanisms through the Paris Agreement, to support all those states seeking to reduce emissions
6. Members agree to participate in a carbon capacity response fund for developing nations reflective of their economic GDP

If a CSI were to adopt these principles it would offer a means in which to inject some life into the Paris Agreement. The intention of states to reduce emissions to achieve the Paris Agreement's overall objective would be extremely positive and offer an outside example to the rest of the world. The extra commitments within this framework would also provide a more robust approach to emissions that would see a number of powerful states take on a leadership role. This would help to reverse the race to the bottom ideology that engulfs the Paris Agreement. Also, it would

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103 Medium, 'Nordic Ministers: Declaration on Nordic Carbon Neutrality' (Medium, 25th January 2019) <<https://medium.com/wedonthavetime/declaration-on-nordic-carbon-neutrality-898be0a9722e>> accessed 30th October 2019.

104 Although the UK and France are permanent members and possess the same veto power as the USA, China and Russia, they both use it less and are not viewed in the same light. The relative power hierarchy of the permanent members also places the UK and France as distinct from the other three, Scott S, 'The attitude of the P5 towards a climate change role for the Council' in Scott S, Ku C (eds) *Climate Change and the UN Security Council* (1st edition, EE, 2018) 209.

105 New Zealand, 'New Zealand sets target of net zero emissions by 2050' (New Zealand Foreign Affairs and Trade, 14th November 2018) <<https://www.mfat.govt.nz/en/countries-and-regions/latin-america/mexico/embajada-de-nueva-zelandia/nueva-zelandia-establece-cero-emisiones-netas-para-2050/>> accessed 29th October 2019.

inadvertently highlight the inadequate efforts of all those states that are not taking serious action to confront climate change. Questions may be raised as to why states like Canada and Australia are not part of this movement to address climate change, potentially creating domestic pressure.

This domestic pressure is becoming more important and the wider global public are more aware of the danger posed by climate change than ever before. The Extinction Rebellion movement has shed light on the extent of the problem, and through their protests have brought the issue directly to the public.<sup>106</sup> Greta Thunberg has also made significant inroads in taking climate change to the people of the world and her efforts to galvanise a youth movement have been met with considerable success.<sup>107</sup> These movements have done an immense amount of good in terms of breaking the apathy that many experience towards climate change in their daily lives. There is perhaps now a sense of global urgency that might help to provoke states into more robust action. The creation of a CSI will help to take this momentum forward and the damage done by the legal effectiveness argument attached to the Paris Agreement may be reversed. Consequently there is room to believe that a CSI could have a huge impact on the apathy of the international community by capitalising on this momentum and helping to stimulate a fight back at the time when the world needs it most.

## V. CONCLUSION

There can be very little disagreement that the current mechanisms to address climate change have failed. The UNFCCC was a tentative beginning that was quickly undermined by global disagreement when the Kyoto Protocol was introduced. As a consequence to these disputes the Paris Agreement was premised entirely on state discretion and the intent to bring all state parties into the process. The result of this was a lowest common denominator agreement that through the INDC model has unequivocally failed to stem the problem of global emissions. As such it is reasonable and vital that we look for new ways to introduce international climate law.

This paper has been orientated towards this objective. Taking inspiration from the proliferation field it has been introduced that there is a possibility for the Proliferation Security Initiative to be used as a model for a climate change response. The PSI was able to avoid many of the creation obstacles of international law and as such have an impact on solving the problem. Its introduction was fast and its content uncompromising, meaning it was able to cut to the centre of proliferation.

Yet we are now facing the most pressing climate change circumstances. With every day that passes we push the earth closer to a tipping point that will see drastic and irreparable changes to the global climate. The impacts on humanity will be universally devastating. In such a context there is room to consider a Climate Security Initiative. Such an initiative would require global leadership, and some forward thinking states have the necessary attitude and capacity to take this on. The content of such a framework could be crafted to achieve carbon neutrality among members by 2030 and help to support the Paris Agreement more broadly. If a Climate Security Initiative can be agreed and its members take on this leadership role it will likely have a positive impact

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106 R McKie, D Gayle, 'Climate rebels open new fronts across capital as protests escalate' (The Guardian, 12th October 2019) <<https://www.theguardian.com/environment/2019/oct/12/extinction-rebellion-activists-open-new-fronts-across-london-as-protests-escalate>> accessed 28th October 2019.

107 M Belam, 'Greta Thunberg: teenager on a global mission to make a difference' (The Guardian, 26th September 2019) <<https://www.theguardian.com/environment/2019/sep/26/greta-thunberg-teenager-on-a-global-mission-to-make-a-difference>> accessed 27th October 2019.

on the global attitude towards climate change. The real benefit it could offer is to help reverse the race to the bottom philosophy that international climate law is currently premised upon. In such challenging times we must find innovative mechanisms to respond. A Climate Security Initiative offers an extra ordinary response, and a means to avoid the climatic cliff edge.

# GOODBYE INCOTERMS 2010, WELCOME INCOTERMS 2020: A BRIEF ANALYSIS

BY SHARIFAH SAEEDAH SYED-MOHAMED<sup>1</sup>

## I. INTRODUCTION

The study of international trade law can be said to entail the legal relationships between parties who sell and buy goods from each other – the contract of sale; their relationships with persons willing to carry the goods from one place to another – the contract of carriage; the arrangements they have with insurers to protect the goods – the contract of insurance, and any financing agreements with banks of financial institutions to facilitate payment for the goods in question.

The main features of international commercial law are, among others, to ensure certainty in the parties' rights and obligations by ensuring that the law is consistent and predictable; to provide sufficient flexibility to the parties' need to do business by permitting the recognition of trade custom and usage and also to recognise the international dimension of commerce by the application of specialised rules of conflict of laws, the admittance of practice and rules of international organisations as guiding the interpretation and application of commercial law.<sup>2</sup>

Bilateral and multilateral treaties play an important part in international trade law. For instance, a number of bilateral friendship treaties involve states granting each other advantages in relation to imports and exports, rights of establishment and free movement of services, trade in general and rights of carriage of goods by sea. Some multilateral treaties regulate trade between the contracting states in a general way. Many multilateral treaties grant trade regulatory powers to particular international organisations such as the United Nations or the World Bank while others seek to unify the law in order to facilitate international trade and financing.<sup>3</sup>

The purpose of some treaties is to liberalise trade between the contracting states whilst other treaties are aimed at economic integration. Another group of treaties further aims at unification of the law where they introduce common substantive rules for legal relationships between private persons and companies.<sup>4</sup> The provisions of a treaty or uniform law become part of the national law of the contracting states concerned. However, treaties and uniform laws are often interpreted differently in each country. Usually, there is no common forum that can give a consistent interpretation on the provisions of those treaties. A sale contract may be governed by different national laws depending on the court seized of the matter and its conflict of laws rules, which gives little legal certainty to

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2 Chuah, Jason, *Law of International Trade: Cross-Border Commercial Transactions* (6th ed London, Sweet & Maxwell 2019) at [2–3].

3 Houtte, HV, *The Law of International Trade*, (2nd ed London, Sweet & Maxwell 2002) at 2.

4 One of the most current successful regimes for international trade is the United Nations Convention on the International Sale of Goods (CISG), which is also known as the Vienna Convention. However, discussion on the application of CISG in international trade is outside the scope of this paper.



the seller and buyer in such contracts. It is upon these premises that early initiatives were taken by UNIDROIT<sup>5</sup> to develop uniform rules in respect of international sales.

## II. THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

### A. *The ICC's Origins*

The Incoterms rules devised by the International Chamber of Commerce (ICC) are rules that explain standard terms that are used in contracts for the international sale of goods. The ICC was founded in 1919 with an international secretariat based in Paris. Its overriding aim remains unchanged, namely to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital.<sup>6</sup>

ICC has evolved tremendously since those early post-war days when business leaders from the Allied Nations<sup>7</sup> met for the first time in Atlantic City, the United States of America. The original nucleus, representing the private sectors of Belgium, Britain, France, Italy and the United States, has expanded to become a world business organization with thousands of member companies and associations in and around 130 countries. Members include many of the world's most influential companies and represent every major industrial and service sector.<sup>8</sup>

#### 1. *The voice of international business*

Traditionally, ICC has acted on behalf of businesses in making representations to governments and intergovernmental organizations. Three prominent ICC members served on the Dawes Commission, which forged the international treaty on war reparations in 1924, seen as a breakthrough in international relations at the time. A year after the creation of the United Nations (UN) in San Francisco in 1945<sup>9</sup>, ICC was granted the highest level consultative status with the UN and its specialized agencies. Ever since, it has ensured that the international business view receives due

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5 The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds. <<https://www.unidroit.org/about-unidroit/overview>>.

6 <<http://www.iccwbo.org/id93/index.html>>.

7 The Allied Nations were Allies of World War II. The major allies consisted of France, Poland, the United Kingdom, the United States of America, the Union of Soviet Socialist Republics (USSR) and China. Other allies included Australia, Belgium, Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, Mexico, the Netherlands, New Zealand, Norway, the Philippine Commonwealth, Albania, the Union of South Africa and Yugoslavia. In December 1941, U.S. President Franklin Roosevelt devised the name "United Nations (UN)" for the Allies. The Declaration by United Nations, on 1 January 1942, was the basis of the modern UN. "Allies of World War II". <[http://en.wikipedia.org/wiki/Allies\\_of\\_World\\_War\\_II](http://en.wikipedia.org/wiki/Allies_of_World_War_II)>.

8 n 6.

9 The United Nations was established on 24 October 1945 with 51 member countries. <<http://www.un.org/en/aboutun/index.shtml>>.

weight within the UN system and before intergovernmental bodies and meetings such as the G8<sup>10</sup> where decisions affecting the conduct of business are made.<sup>11</sup>

## 2. *Defender of the multilateral trading system*

ICC's reaches – and the complexity of its work – have kept pace with the globalization of business and technology. In the 1920s, ICC focused on reparations and war debts. A decade later, it struggled vainly through the years of depression to hold back the tide of protectionism and economic nationalism. When war broke out in 1939, ICC assured continuity by transferring its operations to neutral Sweden.<sup>12</sup>

In the post-war years, ICC remained a diligent defender of the open multilateral trading system. As membership grew to include more and more countries of the developing world, the organization stepped up demands for the opening of world markets to the products of developing countries. ICC continues to argue that trade is better than aid. In the 1980s and the early 1990s, ICC resisted the resurgence of protectionism in new guises such as reciprocal trading arrangements, voluntary export restraints and curbs introduced under the euphemism of “managed trade”.<sup>13</sup>

## 3. *Challenges of the 21st century*

After the disintegration of communism in Eastern Europe and the former Soviet Union, ICC faced fresh challenges as the free market system won wider acceptance than ever before, and countries that had hitherto relied on state intervention switched to privatisation and economic liberalisation. As the world enters the 21st century, ICC is building a stronger presence in Asia, Africa, Latin America, the Middle East, and the emerging economies of eastern and central Europe. Today, ICC's commissions of experts from the private sector cover every specialised field of concern to international business. Subjects range from banking techniques to financial services and taxation, from competition law to intellectual property rights, telecommunications and information technology, from air and maritime transport to international investment regimes and trade policy.<sup>14</sup>

Self-regulation is a common thread running through the work of the commissions. The conviction that business operates most effectively with a minimum of government intervention inspired ICC's voluntary codes. Marketing codes cover sponsoring, advertising practice, sales promotion, marketing and social research, direct sales practice, and marketing on the Internet.<sup>15</sup>

## 4. *Practical Services to Business*

ICC communicates with members all over the world through its conferences and biennial congresses. As a member-driven organization, with national committees in 84 countries, it has adapted its structures to meet the changing needs of business. Many of them are practical services, like the ICC International Court of Arbitration, which is the longest established ICC institution. The

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10 The Group of Eight (G8, and formerly the G6 or Group of Six and also the G7 or Group of Seven) is a forum, created by France in 1975, for governments of six countries in the world, namely, France, Germany, Italy, Japan, the United Kingdom, and the United States. In 1976, Canada joined the group (thus creating the G7). In becoming the G8, the group added Russia in 1997. In addition, the European Union is represented within the G8, but cannot host or chair. “G8”. <<http://wikipedia.org/wiki/G8>>.

11 n 6.

12 n 6.

13 n 6.

14 n 6.

15 n 6.

Court is the world's leading body for resolving international commercial disputes by arbitration. The first Uniform Customs and Practice for Documentary Credits (UCP) was first introduced in 1933 and the current version is now the UCP 600, which came into effect in 1 July 2007. Bankers, lawyers, traders, transporters and even academics throughout the world use these rules and they serve as a useful tool in relation to the application of documentary credits. A supplement to UCP 600, called the eUCP, was added in 2002 to deal with the presentation of all electronic or part electronic documents.<sup>16</sup>

In 1936, the first nine Incoterms were published, providing standard definitions of universally employed terms like CIF<sup>17</sup> and FOB<sup>18</sup>, and they are constantly revised and updated by the ICC. The current version is the Incoterms 2010, which came into effect on 1 January 2011 is soon to be phased out and replaced with the Incoterms 2020, which will come into force on 1 January 2020. In 1951 the International Bureau of Chambers of Commerce (IBCC) was created. It rapidly became a focal point for cooperation between chambers of commerce in developing and industrial countries, and took on added importance as chambers of commerce of transition economies responding to the stimulus of the market economy. In 2001, on the occasion of the 2nd World Chambers Congress in Korea, IBCC was renamed the World Chambers Federation (WCF), clarifying WCF as the world business organization's department for chamber of commerce affairs. WCF also administers the ATA Carnet system<sup>19</sup> for temporary duty-free imports, a service delivered by the chambers of commerce, which began in 1958 and is now operating in over 57 countries. Another ICC service, the Institute for World Business Law was created in 1979, to study legal issues relating to international business.<sup>20</sup>

### III. THE INCOTERMS IN THE MODERN WORLD

The global economy has given businesses broader access than ever before to markets all over the world. Goods are sold in more countries, in larger quantities and in greater variety but as the volume and complexity of international sales increase, so do possibilities for misunderstandings and costly disputes when sales contract are not adequately drafted. Incoterms, the official ICC rules for the interpretation of trade terms facilitate the conduct of international trade. Reference to the Incoterms in a sales contract defines clearly the parties' respective obligations and reduces the risk of legal complications.<sup>21</sup> Incoterms rules explain standard terms that are used in contracts for the

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16 n 6.

17 "Cost, Insurance and Freight" means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. Definition obtained from Ramberg, J, ICC Guide to Incoterms 2010, (ICC Publications, Paris, 2011) at 199.

18 "Free on Board" means that the seller delivers when the goods on board the vessel nominated by the buyer at the named port of shipment or procure the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards. The FOB rule is to be used only for sea or inland waterway transport. Definition obtained from Ramberg, above n 16 at 171.

19 ATA Carnets are international customs documents permitting the duty-free and tax-free temporary export and import of goods for up to one year. Carnets are the easiest way to speed through Customs and to save money. <<https://iccwbo.org/resources-for-business/ata-carnet/>>.

20 n 6.

21 Foreword to Incoterms 2000 by Maria Livanos Cattai, former Secretary General of the ICC (July 1996 – June 2005).

sale of goods. They are essential ICC tools that help traders avoid misunderstandings by clarifying the costs, risks, and responsibilities of both buyers and sellers.

Since the introduction of Incoterms by the ICC in 1936, this it has been regularly updated to keep pace with the development of international trade. Incoterms 2000 take into account the spread of customs-free zones, the increased use of electronic communications in business transactions and changes in transport practices.<sup>22</sup> Since the last revision in 2000, much has changed in global trade. Cargo security is now at the forefront of the transportation agenda for many countries. In addition, the United States' Uniform Commercial Code was revised in 2004, resulting in a deletion of US shipment and delivery terms. The Incoterms 2010 reflects these changes and also others.<sup>23</sup>

#### IV. THE EVOLUTION OF THE INCOTERMS RULES

After their initial introduction in 1936, the Incoterms rules were revised for the first time in 1957 and thereafter in 1967, 1976, 1980, 1990 and 2000.<sup>24</sup> It is put forward that the main purpose of the Incoterms rules is to reflect international commercial practice. Further, a revision of the Incoterms rules indicates that something important has taken place in commercial practice. For example, the first version of the Incoterms rules was clearly focused on commodity trading and fixed the important delivery points at the ship's side or at the moment when the goods are taken on board the ship.<sup>25</sup>

When carriage of goods by rail had increased, it was therefore necessary to introduce the appropriate terms and it is for such purpose that the Incoterms rules 1957 introduced the FOR (Free on Rail) and the FOT (Free on Truck) terms. In 1967, the ICC felt that it was necessary to add terms for cases in which the seller undertakes to deliver the goods at destination. In such cases, the seller concludes a contract of carriage in order to fulfill his obligation to deliver the goods to the buyer at destination. In 1976, a specific term for air transport was added, namely FOB Airport. In the 1980 revision of the Incoterms rules, it was necessary to add CIP (Carriage and Insurance Paid To) for non-maritime transport as an equivalent to CIF, under which the seller undertakes to arrange and pay for the carriage and insurance. As a result, the terms CPT (Carriage Paid To) and CIP, corresponding to CFR (Cost and Freight) and CIF for maritime transport, were both added to the Incoterms rules? The 1990 revision of the Incoterms rules was partly triggered by the shift from paper documents to electronic communication. As a result, a paragraph was added in the clauses dealing with the seller's obligation to tender documents to the buyer stating that paper documents could be replaced by electronic messages if the parties had agreed to communicate electronically.<sup>26</sup>

What then is the reason for the revision of the Incoterms rules resulting in the Incoterms 2010 rules? It appears that the main problem with the Incoterms 2000 rules was not so much what they contained but rather that it was not sufficiently clear how they should be used in practice. In addition, it was felt that it is important to expand the use of the Incoterms rules, particularly in the United States, where a possibility to do so has arisen as a result of the removal of the 1941

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22 n 21.

23 <<http://www.iccwbo.org/Incoterms/index.html?id=3042>>.

24 The latest revision is the Incoterms 2020 which will be discussed later in this paper.

25 n 17 at 8.

26 n 17 at [8–9].

definitions of trade terms from the Uniform Commercial Code (UCC).<sup>27</sup> It is stated that there are limits to what can be done to increase the understanding of the Incoterms rules. In particular, merchants retain old habits and are not easily persuaded to depart from the traditional maritime terms, although this is clearly necessary when contemplating non-maritime transport. In order to promote a better understanding of the Incoterms rules, the 2010 version starts by presenting trade terms that can be used for any mode or modes of transport and only then presents trade terms that can be used for sea and inland waterway transport.<sup>28</sup>

Another frequent misunderstanding concerns the very purpose of the Incoterms rules. Although they are needed to determine key obligations of sellers and buyers with respect to the different modalities of delivery, transfer of risk and cost, the terms do not represent the whole contract. It is also necessary to determine what rules apply when the contract is not performed as expected, owing to various circumstances, and how disputes between the parties should be resolved. While the Incoterms enlighten the parties on what to do, they unfortunately do not explain what happens if the parties do not do so. For this purpose, the parties need to lay down applicable rules in a contract or by using a standard form contract as a supplement. In practice, disputes might nevertheless arise owing to unexpected events that the parties have failed to consider in their contract in a clear and conclusive manner. In such cases, the applicable law may provide a solution. Fortunately, the CISG has now become recognized worldwide, thus contributing significantly to transparency and effective dispute resolution in international trade.<sup>29</sup>

Furthermore, the 2010 version of the Incoterms rules, have been officially endorsed by the United Nations Commission on International Trade Law (UNCITRAL), confirming their position as the global standard for international business transactions. UNCITRAL, whose mandate is to remove legal obstacles for international trade, applauded ICC for its “valuable” contribution to facilitating the conduct of global trade by making the Incoterms 2010 rules simpler and clearer, reflecting recent developments in international trade.<sup>30</sup>

## V. THE INCOTERMS RULES, THEIR FUNCTIONS AND REFERENCING THE INCOTERMS RULES IN A CONTRACT OF SALE

As it is understood, the Incoterms is the abbreviation of the international commercial terms and the chosen Incoterms rule is a term of the contract of sale and not of the contract of carriage. Although the Incoterms rules are primarily intended for international sales, they can also be applied to domestic contracts by reference. Trade terms are, in fact, key elements of international contracts of sale, since they allocate the roles of the contracting parties with respect to carriage of the goods from the seller to the buyer; export, import and security-related clearance; and the division of costs and risks between the parties.<sup>31</sup>

Merchants tend to use short abbreviations such as FOB and CIF to clarify the distribution of functions; costs and risks relating to the transfer of goods from the seller to the buyer but misunderstandings frequently arise concerning the proper interpretation of these and similar

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27 n 17 at 9.

28 n 17 at 10.

29 n 28.

30 <<http://www.uscib.org/index.asp?documentID=4393>>.

31 n 17 at 16.

expressions. For this reason, it was considered important to develop rules for the interpretation of the trade terms that the parties to a contract of sale could agree to apply and the Incoterms rules constitute such rules of interpretation.<sup>32</sup>

Although the Incoterms rules, in so far as they reflect generally recognized principles and practices, may become part of the contract of sale without express reference, the contracting parties are strongly advised to include in their contract in conjunction with the trade term the words “the Incoterms 2010 rules” and to verify whether a standard contract used in their contract of sale contains such a reference. If that is not the case, then the standardized reference “the Incoterms 2010 rules” must be superimposed to avoid the application of any previous version of the Incoterms rules.<sup>33</sup>

## VI. WHAT THE INCOTERMS RULES ARE NOT INTENDED TO PERFORM

### A. *Incoterms 2010*

Although the Incoterms rules are incorporated into the contract of sale, it is imperative to take note that they are only rules for the interpretation of terms of delivery, and not of other terms of the contract of sale. The Incoterms rules do not, primarily, deal with the following:

#### 1. *Transfer of property in the goods*

In many jurisdictions, the transfer of property rights in the goods requires that the party take possession of the goods either directly or indirectly through the transfer of documents, such as the maritime bill of lading, controlling the disposition of the goods. However, in some jurisdictions, the transfer of property rights in the goods may depend solely on the intention of the contracting parties. Frequently, the contract of sale determines whether the buyer has become the owner of the goods. In some instances, the buyer may not become the owner when the seller, under a purported retention of title clause, may have decided to retain title to them until he has been paid. In such an instance, the applicable law will decide the extent to which such clauses are effective in protecting the seller when he has surrendered possession of the goods to the buyer.<sup>34</sup>

#### 2. *Relief from obligations and exemptions from liability in case of unexpected or unforeseen circumstances*

Although, according to the Incoterms rules, the parties undertake obligations to perform various tasks to the benefit of the other party, such as procuring carriage and clearing the goods for export and import, they may be relieved from such obligations or from the consequences of non-performance, if they can benefit from exemptions under the applicable law or terms of their contract other than those concerning the Incoterms rules. For instance, under Article 79 of the CISG, the parties may be relieved from their obligations if they are prevented from performing due to reasonably unforeseeable and unavoidable impediments beyond their control. It is noted that

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32 n 31.

33 n 31.

34 n 17 at [17–18].

standard contracts typically contain explicit *force majeure*, relief or exemption clauses essentially corresponding to the main principle of Article 79 of the CISG.<sup>35</sup>

### 3. *Consequences of breaches of contract*

The Incoterms 2010 rules, in the A5, B5 and A6 and B6 clauses,<sup>36</sup> deal with the transfer of risks and the division of costs between the parties. It follows from the A5 and B5 clauses that the risk may be transferred from the seller to the buyer before the goods have been delivered, if the buyer has failed to fulfill his obligation to take delivery as agreed, or to give appropriate notice to the seller when the buyer is to nominate the carrier under the F-terms.<sup>37</sup> In these cases, costs arising from the buyer's failure to fulfill his obligations would also fall upon him under the B6 clauses of the Incoterms rules. However, apart from these specific cases involving the buyer's breach, the Incoterms rules do not deal with other consequences following from breaches of the obligations under the contract of sale. Such consequences follow from the applicable law or other terms of the contract.<sup>38</sup> For instance, Article 50 of the CISG provides a remedy to the buyer should the seller delivered goods that do not conform to the contract.

## B. *Incoterms 2020*

Similar to the Incoterms 2010, the Incoterms 2020 rules are merely rules and therefore not a substitute for a contract of sale.<sup>39</sup> The rules are devised to reflect trade practice for no particular type of goods or any type of goods for that matter. They can be used as much for the trading of a bulk cargo of iron ore as for five containers of electric equipment or ten pallets of air freighted fresh flowers.<sup>40</sup> Specifically, the Incoterms 2020 do not deal with the following matters, namely, whether there is a contract of sale at all; the specifications of the goods sold; the time, place, method or currency of payment of the price; the remedies which can be sought for breach of the contract of sale; most consequences of delay and other breaches in the performance of contractual obligations; the effect of sanctions; the imposition of tariffs; export or import prohibitions; *force majeure* or hardship; intellectual property rights or the method, venue, or law of dispute resolution in case of such breach.<sup>41</sup> Perhaps most importantly it must be stressed that the Incoterms 2020, similar to the Incoterms 2010, do not deal with the transfer of property, title or ownership of the goods sold.<sup>42</sup>

Notwithstanding the above, this does not mean that the Incoterms rules have totally no impact on other contracts in international trade, such as the contract of sale, insurance or a letter of credit. Although the Incoterms rules do not form part of such contracts, goods are exported and imported through a network of contracts that, in an ideal world, should match one with the other. Thus, the

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35 n 34.

36 In the Incoterms 2010, the A terms refer to the seller's obligations and the B terms refer to the buyer's obligations.

37 The F-terms in the Incoterms rules 2010 are FCA (Free Carrier), FAS (Free Alongside Ship) and FOB (Free on Board). The letter "F" signifies that the seller must hand over the goods to a nominated carrier Free of risk and expense to the buyer. n 16 at 49.

38 n 17 at 19.

39 Incorporating the CISG into the contract of sale can accommodate the sale aspect.

40 Incoterms 2020 by the International Chamber of Commerce (ICC). ICC Rules For the Use of Domestic and International Trade Terms (ICC Publication, Paris, 2019) at 2.

41 n 40.

42 n 40 at 3.

sale contract, for example, will require the tender of a transport document issued by the carrier to the seller and/or the shipper under a contract of carriage against which the seller and/or the shipper/beneficiary might wish to be paid under a letter of credit. Where the three contracts match, problems are unlikely to arise. However, when they do not, problems will rapidly arise.<sup>43</sup>

It can be argued that it is very much in the interest of all the parties to the different contracts in the network to ensure that the carriage or insurance terms that they have agreed upon with the carrier or insurer, or the terms of the letter of credit, comply with what the contract of sale stipulated in relation to the ancillary contracts in terms of documents that need to be obtained or tendered. Such task does not fall on the carrier, insurer or the bank providing the letter of credit, none of whom are party to the contract of sale and none of them of whom are, therefore, a party to or bound by the Incoterms 2020 rules. It is, however, in the seller's and buyers best interest to try to ensure that the different parts of the network of contracts correspond with each other.<sup>44</sup>

## VII. WHAT DOES THE INCOTERMS RULES INTEND TO PERFORM?

The Incoterms 2020 rules explain a set of eleven of the most commonly used three-letter trade terms namely, EXW (Ex Works); FCA (Free Carrier); CPT (Carriage Paid To); CIP (Carriage and Insurance Paid To); DAP (Delivered At Place); DPU (Delivered At Place Unloaded); DDP (Delivered Duty Paid); FAS (Free Alongside Ship); FOB (Free On Board); CFR (Cost and Freight) and CIF (Cost Insurance and Freight), reflecting business to business practice in contracts for the sale and purchase of goods.<sup>45</sup>

In relation to the abovementioned terms, the Incoterms 2020 rules describe:

1. The obligations of the sellers and buyers, for instance, in relation to the carriage and insurance of goods, shipping documents and export and import licences;
2. When does the risk transfers from the seller to the buyer; and
3. The costs to be borne by the parties, for example, transport costs, packaging, loading and unloading costs and also security related costs.<sup>46</sup>

Similar to the Incoterms 2010 rules, the 'A' articles in the Incoterms 2020 rules represents the seller's obligations and the 'B' articles represent the buyer's obligations:

For instance, in a CIF term, 'The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.'<sup>47</sup> (A2). On the buyer's part, 'The buyer must take delivery of the goods when they have been delivered under A2 and receive them from the carrier at the named port of destination.'<sup>48</sup> (B2).

Taking the CIF terms as an illustration, the Explanatory Notes for Users in the 2020 rules explained in greater detail where delivery of the goods takes place and risk passes from the seller to the buyer;

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43 n 40 at 9.

44 n 43.

45 n 40.

46 n 40.

47 n 40 at 126.

48 n 40 at 127.



the mode of transport involved, namely for sea or inland waterway transport only; the meaning of ‘or procuring the goods so delivered in A2’;<sup>49</sup> the difference between ports of delivery and ports of destination;<sup>50</sup> whether the shipment port must be named; identifying the destination point at the discharge port; scenarios where multiple carriers are involved; contract of insurance; unloading costs and also export and import clearance.<sup>51</sup> Explanatory notes such as these were not in the Incoterms 2010 rules.

### VIII. THE DEMISE OF THE SHIP’S RAIL IN INCOTERMS 2010

One of the most significant changes made to the Incoterms rules 2010 is to the concept of the “ship’s rail” as was found in the previous editions of the Incoterms rules. The concept of the imaginary ship’s rail is synonymous with the FOB term and has caused considerable difficulties in the past, in particular where the division of risks between the seller and buyer is concerned. In *Pyrene & Co v Scindia Steam Navigation Co*,<sup>52</sup> the plaintiff was able to recover £200 from the defendant carrier, after the carrier was found to be negligent in loading the goods which caused damage prior to the goods crossing the ‘ship’s rail’. This case raises questions of liability if the damage occurs at any point other than after crossing the ‘ship’s rail’. Devlin J stated that if the goods are damaged during loading, whether that damage occurs on either side of the ‘ship’s rail’, then the carrier’s liability for negligence would have to extend to cover the damages.<sup>53</sup>

The Incoterms rules 2010, defined the FOB term as “the seller delivers the goods *on board the vessel* nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards”<sup>54</sup> as opposed to “the seller delivers when the goods *pass the ship’s rail* at the named port of shipment” in the Incoterms rules 2000. It is suggested that under the Incoterms rules 2010, for sea and inland waterway transport, the biggest change has been in the FOB term, and therefore CFR (Cost and Freight) and CIF (Cost, Insurance and Freight). The notion of the “ship’s rail” is dead. No longer will the parties have to concern themselves with the risk-in-transit swinging to and from the seller and the buyer across some imaginary line that extends perpendicularly from the ship’s rail into the stratosphere. What is put forward now is a different notion, and that is the risk passing when the goods are onboard the vessel, which means the whole consignment, has been loaded. Should half a consignment be loaded and the ship sinks, then complete loading presumably will not have occurred and risk will

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49 The reference to “procure” in this term caters for multiple sales down a chain (string sales) particularly common in the commodity trade. n 40 at 124.

50 In CIF, the two most important ports are the port where the goods are delivered on board the vessel and the port agreed as the destination of the goods. Risk transfers from seller to buyer when the goods are delivered to the buyer by placing them on board the vessel at the shipment port or by procuring the goods already so delivered. However, the seller must contract for the carriage of the goods from delivery to the agreed destination. Thus, for example, goods are placed on board the vessel in Shanghai (which is a port) for carriage to Southampton (also a port). Delivery here happens when the goods are on board in Shanghai, with risk transferring to the buyer at that time and the seller must make a contract of carriage from Shanghai to Southampton. n 40 at 124.

51 n 40 at [at 124–125].

52 *Pyrene & Co v Scindia Steam Navigation Co* [1954] 2 QB 402.

53 n 52 at 419.

54 n 17 at 171.

not have transferred to the buyer.<sup>55</sup> It is hoped that with the demise of the concept of the ship's rail, division of risks between the seller and buyer is now clearly defined and that the number of litigation in this area will be greatly reduced.

## IX. DIFFERENCES BETWEEN INCOTERMS RULES 2010 AND 2020

One of the most important initiatives behind the Incoterms 2020 rules has been to focus on how the presentation could be enhanced to steer users towards the right Incoterms rule for their sale contract. Thus, the Incoterms 2020 rules placed a greater emphasis on the Introduction to assist the parties in making the right choice of rules; a clearer explanation of the demarcation and connection between the sale contract and its ancillary contracts; upgraded the Guidance Notes presented in the 2020 rules as Explanatory Notes to each Incoterm rule and a re-ordering within the Incoterms rules giving delivery and risk more prominence. All these changes, though cosmetic in appearance, are in reality arguably substantial attempts on the part of ICC to assist the international trading community towards a smoother export and import transactions.<sup>56</sup>

Other changes made to the Incoterms 2010 in the 2020 rules are bills of lading with an onboard notation and the FCA (Free Carrier) rule; division of costs where they are listed; different levels of insurance cover in CIF (Cost Insurance and Freight) and CIP (Carriage and Insurance Paid To); arranging for carriage with the seller's or buyer's own means of transport in FCA (Free Carrier), DAP (Delivered At Place), DPU (Delivered At Place Unloaded) and DDP (Delivered Duty Paid) terms; change in the initials for DAT (Delivered At Terminal) to DPU (Delivered At Place Unloaded); inclusion of security related requirements within carriage obligations and costs and it also provides the important Explanatory Notes for Users.<sup>57</sup>

## X. THE INCOTERMS AND THE INTERNATIONAL SALE CONTRACTS

### A. *Variety of Contracts*

The Incoterms rules is but a part of a labyrinth of international sale contracts and it must be emphasised that the ways in which an overseas sale contract may be conducted are almost infinitely variable and that the applicable rules are almost always drawn from a construction of the contract.<sup>58</sup> Consequently, it is necessary to avoid dogmatism in dealing with overseas sales law. One cannot, for example, say that is always the FOB's buyer's responsibility to select and engage the carrier; sometimes the seller is explicitly, perhaps even implicitly, obliged under the contract to do this.<sup>59</sup>

As mentioned earlier, international sale contracts do not exist in a vacuum and they are frequently associated with other contracts such as contracts of carriage and insurance. Further, the

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55 Bergami, R, "The Ship's Rail is Dead: Incoterms 2010". <[http://www.ibt-articles.com/absnet/templates/trade\\_article.aspx?articleid=402&zoneid=2](http://www.ibt-articles.com/absnet/templates/trade_article.aspx?articleid=402&zoneid=2)>.

56 n 40 at 12.

57 n 40 at 13. A detailed discussion on the aforementioned changes made in the 2020 rules is outside the scope of this paper.

58 Bridge, Michael, *The International Sale of Goods, Law and Practice* (2nd ed, Oxford University Press, New York, 2007) at 9.

59 n 58.

significance of charter party contracts<sup>60</sup> also needs to be considered. Where goods are sold in bulk commodities, it is commonly the head seller (in string CIF contracts) and end buyer (in string FOB contracts) who will fix a charter party to carry the goods. Therefore, charter parties have a number of clauses in common with sale contracts and the interaction of the two types of contract is an important matter that cannot be undermined.<sup>61</sup>

## B. Interpretation of the Contract

### 1. A matter of law and harmonious interpretation

Until recent developments, it could have been said that the interpretation of a contract is a matter of law. Consequently, the views of experienced arbitrators as to the meaning of trade terms will be accorded respect but will not without more be adopted by the courts.<sup>62</sup> The treatment of interpretation as a matter of law also provides some degree of assurance to those conducting business on the basis of well-known standard forms that they can conduct their business and measure their risk according to an authoritative judicial view of the meaning of standard provisions. Backed up by judicial interpretation, such standard form contracts become something more than mere contractual documents; they become a species of private legislation binding those in the trade who have submitted to them.<sup>63</sup>

Particular standard terms acquire a standard meaning and in this respect, English law diminishes transaction costs and enables participants in the trade to build upon their own and others' experience. This feature of interpretation is of particular importance in international sale and related contracts, concluded by ship's brokers, agents and the like without the benefit of legal advisers. However, in recent years, as courts have insisted that contracts are to be construed within their factual matrices, the view has gained ground that interpretation is a matter of law and fact.<sup>64</sup> The danger of such development is that the interpretation of international commercial contracts may eventually lose its certainty.

In other instances, when faced with a complex document, the court will seek to interpret it in a harmonious way so as to avoid conflicts between its various provisions, though this does not mean that individual clauses will be interpreted in an artificial way in order to avoid conflict.<sup>65</sup> The contested clause is not interpreted in isolation but in its written context along with other clauses. This important rule of interpretation highlights the danger of superficial reading of documents by focusing only on the particular contentious clause in the search for meaning.<sup>66</sup>

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60 A charter party is a written contract between the owner of a vessel and the person desiring to employ the vessel (charterer); sets forth the terms of arrangement, such as duration of agreement, freight rate and ports involved in the trip. <[http://marad.dot.gov.documents/Glossary\\_final.pdf](http://marad.dot.gov.documents/Glossary_final.pdf)>.

61 n 58 at 10.

62 n 61. The courts referred to in this chapter are the English courts by reason of their vast judicial experience in international commercial matters.

63 n 58 at 41.

64 n 63. See *Sea Success Maritime Inc v African Maritime Carriers Ltd* [2005] 2 Lloyd's Rep 692 at 16.

65 n 58 at 41.

66 See *International Fina Services AG v Katrina Shipping Ltd (The Fina Samco)* [1995] 2 Lloyd's Rep 344, CA.

## 2. *Avoiding absurd results*

If contractual provisions are susceptible to more than one interpretation, and one of these interpretations yields an absurd or unreasonable result, then the other result is to be preferred.<sup>67</sup> In *The Alkeos*<sup>68</sup>, an FOB buyer had the right to call for the original shipment period to be extended. The buyer thereby incurred a duty to pay the seller's carrying charges. The contract went on to free the buyer from that duty if the ship was delayed on its way to berth by an event for which the buyer was not responsible, but only in the event of the ship being delayed in entering River Parana, on its way to the loading port of Rosario, by the actions of the Argentinean coastguard at Recalada, which is the first port in Argentina coastal waters. The Argentinean coastguard did indeed delay the ship not at Recalada but at the subsequent port of Interseccion, which lay between Recalada and Rosario. Staughton J held that the clause, properly interpreted, was designed to place on the seller the risk of carrying charges in all cases where the Argentinean coastguard delayed the ship within Argentinean coastal waters. It would make little sense for the seller to assume the risk of delay at Recalada but for that risk subsequently to swing back to the buyer within coastal waters, when the buyer had borne the various risks of marine delay prior to Recalada.<sup>69</sup>

## 3. *Upholding the validity of the contract*

It is a well known principle of contractual interpretation that, faced with two possible interpretations of the contract, one upholding and the other denying the validity of the contract or one of its clauses, the court will lean in favour of the former interpretation (*magis ut res valeat quam pereat*).<sup>70</sup>

## 4. *Typed and standard clauses*

In the event of consistency between clauses in a standard form applied to the present contractual adventure and special clauses typed in to meet the needs of the particular contract, the latter will prevail. The rule is brought to play after the inconsistency has been established, which is where the litigation battle takes place.<sup>71</sup>

## 5. *Ambiguity and extrinsic evidence*

The conventional approach to interpretation is that extrinsic evidence is available to interpret a contract only if the document is ambiguous or if it contains terms that have a customary meaning or are technical expressions. According to long established principle, the ambiguity must be patent and not discoverable only when extrinsic evidence is called into play. Merely because a document is difficult to construe will not open the door to extrinsic evidence in the absence of a range of possible meanings.<sup>72</sup>

In resolving ambiguity, a pertinent point to note is that evidence of the parties' negotiating positions is not admissible to determine the meaning of a contractual document. Negotiating positions are adopted and abandoned during the course of pre-contractual process. Nor can one readily refer to the aim of the transaction. The process of reaching an agreement is inherently

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67 n 58 at 42.

68 *Bunge AG v Sesostrad* [1984] 1 Lloyd's Rep 686. However, it is to be noted that this case was decided before the new definition of the FOB term in the Incoterms rules 2010.

69 n 68.

70 n 58 at 43.

71 n 70. See also *Naviera Amazonia Peruana SA v Cia Internacional de Seguros del Peru* [1987] 1 Lloyd's Rep 116.

72 n 58 at 44.

adversarial and the parties may have entered into the contract with different aims. Evidence of one party's aims is therefore unhelpful and potentially deceiving.<sup>73</sup>

#### 6. *Factual matrix*

The refusal to look at negotiating positions does not mean that contractual documents are to be interpreted in a vacuum. To that extent, statements made during the course of negotiations do have a part to play in the interpretation of a written document.<sup>74</sup> This stance by the courts is best summed up by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen*<sup>75</sup> where His Lordship stated that “In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating”.

#### 7. *The meaning of documents*

One of the major developments in contractual interpretation in recent times can be said to stem from Lord Hoffman's introduction of the ‘reasonable observer’ in *Investors Compensation Scheme v West Bromwich Building Society*<sup>76</sup> where His Lordship, in this case, introduces ‘the reasonable observer’ with all necessary background knowledge concerning the contract, into the process of interpretation. Through the eyes of the observer, His Lordship went on to say that the meaning of a document is not the same thing as the meaning of particular words in a document. It can be argued that the danger of this approach to interpretation is that, despite the invocation of the reasonable observer, it introduces a measure of subjective impressionism into the process of contractual interpretation. It is also unduly forgiving of lax draftsmanship.<sup>77</sup>

It can be observed that Lord Hoffman's approach has more to commend it for contracts between parties who are not regular participants in the same trade, but poses a risk to commercial certainty in those trades, like the shipping and commodities trade, where participants do not need the assistance of the outside reasonable observer to instruct them in what they are doing.<sup>78</sup>

#### 8. *Time of interpretation*

Just as evidence of negotiations does not bear directly on contractual interpretation, so a contract is to be construed at the moment of its formation. Subsequent behaviour is inadmissible as a guide to interpretation, for otherwise the meaning of a contract might change from day to day. In this respect, English law is probably in a minority amongst developed legal systems.<sup>79</sup> Yet, it is common for contracts to be varied and for rights to be waived. Under English law, so long as waivers and promissory estoppel exist, and with a requirement of consideration to effect a binding variation, it is plainly dangerous or imprecise to read contractual meaning into subsequent behaviour.<sup>80</sup>

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73 n 72.

74 n 72.

75 [1976] 1 WLR 989.

76 [1998] 1 WLR 896, HL.

77 n 58 at 47.

78 n 77.

79 n 58 at 48.

80 n 79.

Only Lord Denning, sitting in the Court of Appeal, in *LG Schuler AG v Wickman Machine Tool Sales Ltd*<sup>81</sup> had stated that subsequent behaviour could be looked at to evince contractual meaning because the parties themselves are the best guide to the way language was used, a view which was subsequently rejected by the House of Lords in the same case.<sup>82</sup>

## XI. CONCLUDING REMARKS

First published in 1936, the Incoterms rules are uniform rules defining costs, risks and obligations of sellers and buyers in international contracts of sale. Incoterms rules, if expressly provided for, will form part of the sales contract. Nevertheless, there are also other regimes, which apply to international sale transactions such as the CISG and domestic laws. When used correctly, Incoterms rules allow for prudent and efficient allocation of duties and risks between the contracting parties. However, incorrect use of Incoterms may bind the parties to obligations that they are not only beyond their understanding but also beyond their capabilities. The Incoterms rules have been updated at approximately ten-year intervals, the latest being the Incoterms rules 2020. It can also be observed that the Incoterms rules do not exist in isolation but they are part of the extensive international commercial transactions in the multifaceted world of international trade. Usage of the Incoterms rules in contracts of sale are often intertwined with contracts of carriage and insurance and it may not be possible at all times to avoid conflicts in such complex transactions. It is in these situations that the courts can be an indispensable institution in interpreting such contracts to resolve such disputes. In respect of the relationship between the CISG (or any other regime in relation to sale contracts in international trade) and the Incoterms, it is without a doubt that the CISG and the Incoterms rules complement each other in ensuring efficient transactions between sellers and buyers in international trade.

As the Incoterms 2020 is yet to be enforced, only time will tell if the changes introduced will bring about significant development in international trade.

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81 [1972] 1 WLR 840, CA.

82 [1974] AC 235 HL. There are other various methods of contractual interpretation adopted by the courts but which are outside the scope of this paper.

# WILLIAM LARNACH – VICTORIAN MASTERMIND, FRAUDSTER OR TRAGIC VICTIM?

BY JOHN H FARRAR<sup>1</sup>

## I. INTRODUCTION

William Larnach of the Camp or Larnach Castle as it became called, was born in Australia of Scots parentage and came to New Zealand as a banker in 1867.<sup>2</sup> He was later a promoter and director of many companies, a Member of Parliament, and a minister in the government. He committed suicide in Parliament in 1898. He was regarded by Richard Seddon as a mastermind.<sup>3</sup> He has been described by Lord Normanby as a wild speculator and setter-up of companies,<sup>4</sup> and accused of breach of duty as director and minister. He may have had all of these characteristics but may also have been a tragic victim.

New Zealand in the nineteenth century, like other colonies, was under-capitalised and to some extent exploited by the United Kingdom.<sup>5</sup>

Capital was short. People relied heavily on debt capital and many business and professional men faced bankruptcy.<sup>6</sup>

The gold rush was over by the 1870s and from the mid-1870s to the mid-1890s New Zealand was adversely affected by weak export prices and suffered net migration.<sup>7</sup>

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- 1 Emeritus Professor of Law, Bond University; Honorary Professor of Law, University of Auckland and University of Waikato; Adjunct Professor of Law, La Trobe University.
  - 2 See Fleur Snedden, *King of the Castle – A Biography of William Larnach*, David Bateman, Auckland 1997. Larnach was her great-great-grandfather and she had access to family papers. See also Hardwicke Knight, *The Ordeal of William Larnach*, University of Otago Printing Department 1990. See too the excellent unpublished BA Hons thesis by A W Goodall, “William James Mudie Larnach, 1833–1898”, University of Otago, 1981.
  - 3 See Snedden *op cit* 232, Knight *op cit* title page; Goodall 72.
  - 4 Snedden *op.cit.* 109; FRJ Sinclair in “High Street Quaking – A History of Dunedin’s ‘Inner Circle’”, a very interesting unpublished PhD of the University of Otago 1996 accuses Larnach of dishonesty by taking secret commissions during his time at the Bank of Otago, relying on the evidence of John McFarlane Ritchie (pp 23–25, 75, 79), and yet this only became a crime in New Zealand as a result of *The Secret Commissions Act 1910*. What is clear is that Larnach was acting in more than one capacity and probably in conflict of interest. At the same time, an avid collector of gossip, Ritchie was not an impartial witness as he was opposed to Larnach’s position and connection with the Bank of New Zealand. He obviously regarded Larnach as a rival.
  - 5 See V Lenin, *Imperialism, The Highest Stage of Capitalism* (1917). He based this on the writings of JA Hobson, the English Fabian writer, and Rudolf Hilferding, the Austrian economist.
  - 6 Stout, Driver, Ward and Firth were all financially embarrassed at this time. Dr Charles Foster, Canterbury’s first law teacher, also went bankrupt. See RCJ Stone, *Makers of Fortune: A Colonial Business Community and its Fall*, Auckland University Press, Auckland 1973, Chap.4.
  - 7 See Jim McAloon, Chapter 9 “The New Zealand Economy 1792–1914” *The New Oxford History of New Zealand*, ed by G Byrnes Oxford University Press, South Melbourne (2009), 206 *et.seq.*: Te Ara Encyclopaedia of New Zealand – Economic History, Boom and Bust 1870–1895.

The collapse of the City of Glasgow Bank in 1877 shattered confidence in the colonies.<sup>8</sup> Wool prices recovered by the 1890s and new exports of meat and dairy produce developed through refrigeration.<sup>9</sup> Larnach lived through some hard times.

This article traces his personal history and then considers his career as banker, director, a Member of Parliament and minister, and whether he acted in breach of duty, judged by the standards of the time and by modern standards.

## II. THE PERSONAL HISTORY OF WILLIAM LARNACH

William Larnach was born at Castle Forbes in the Hunter Valley, New South Wales in 1833. He was educated at Sydney College, the predecessor of Sydney Grammar School, and worked in farming and then banking.<sup>10</sup> He managed banks in the Victorian gold rush, and at Geelong. He came to Dunedin in 1867 to manage the Bank of Otago.<sup>11</sup> He seems to have been a competent, if self-interested; manager, and he resigned when the bank was taken over by the National Bank.<sup>12</sup>

He went into partnership with Walter Guthrie in 1873, and the partnership was later incorporated.<sup>13</sup> Larnach left most of the management to Guthrie who, in Larnach's absence in Wellington and overseas, over-expanded the business.<sup>14</sup>

Larnach was involved in the flotation of National Insurance, the Colonial Bank and the Agricultural Company, as well as other companies.<sup>15</sup> He also speculated in land transactions in Otago and Southland.<sup>16</sup>

To further or protect his investments he entered Parliament, representing Dunedin City, in 1875, and spoke openly about his interests.<sup>17</sup> He moved a vote of no confidence in the government and joined a new government led by Sir George Grey.<sup>18</sup> He became Treasurer and Minister of Railways in 1877. He was competent but only served for a short time before leaving for London to negotiate a loan from the Bank of England.<sup>19</sup>

He also was promoting the interests of the Agricultural Company and persuaded Sir Julius Vogel to become a director.<sup>20</sup> Vogel was then Agent-General of New Zealand. Both were criticised in the

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8 See Leo Rosenblum, "The Failure of the City of Glasgow Bank" (1933) 8 *The Accounting Review* 285.

9 *An Economic History of New Zealand in the Nineteenth and Twentieth Centuries* (<https://eh.net/encyclopedia/an-economic-history-of-new-zealand-in-the-nineteenth-and-twentieth-centuries/> downloaded 21/2/2017).

10 Snedden *op.cit.* 25 and Chapter III–VI.

11 Snedden Chapter VII–VIII.

12 Snedden 71.

13 Snedden 72.

14 Snedden 127–8.

15 Snedden Chapter X, XII. See D Hamer, "The Agricultural Company and New Zealand Politics, 1877-1886," (1962) 10 *Historical Studies, Australia and New Zealand*, No. 38, 144. Sinclair *op.cit.* Appendix 27.

16 Snedden Chapter X. See Sinclair *op.cit.* especially Appendix 33 with regard to the development of Portobello.

17 See NZPD Vol 21, 292-31, Snedden *op.cit.* 57.

18 Snedden *op.cit.* Chapter XI.

19 Snedden 115 *et seq*; Sinclair *op.cit.* 349 is critical of this, but Larnach seems to have been effective in the role.

20 Snedden 120 *et seq*; Hamer *op.cit.* 142 *et seq*; Goodall 34 *et seq*; Sinclair *op.cit.* Chapter 5.



Times for misleading investors over a plague of rabbits in the agricultural land.<sup>21</sup> Both managed to get letters in support from ministers in the New Zealand government.<sup>22</sup>

Larnach lost his seat, but was re-elected in 1882 representing the Peninsula but Larnach faced financial ruin over the liquidation of Guthrie and Larnach in respect of which he had given a personal guarantee, which he had not read properly.<sup>23</sup>

In 1885 he was Minister of Mines and Marine and seems to have been an energetic and effective minister.<sup>24</sup> In 1890 he lost his seat but was elected in 1894, representing Tuapeka, and was re-elected in 1896.

In 1891 he chaired a Royal Commission into the Public Trustee Office.<sup>25</sup> He did this efficiently, but was criticised for his aggressive and hostile questioning of officials including The Auditor-General James FitzGerald, a former premier.<sup>26</sup> His conduct seems to have been justified as the Commission revealed incompetence and conflict of interest.

By this time his investments had done badly. Like other substantial debtors, he had to meet mortgage repayments on real estate with inflated values, and calls of bubble companies in which he had taken a high number of shares. Even his debentures were not proving good investments. He was in difficult financial circumstances due to this situation and a marriage settlement he had made on his second marriage.<sup>27</sup> His children were hostile to his second wife who was the half sister of his first wife. After the death of his second wife, he tried to reverse the settlement.<sup>28</sup> This was successfully challenged after his death.<sup>29</sup> He was married a third time, this time to Constance Brandon,<sup>30</sup> and the family gossip was that his wife later had an affair with his younger son at Larnach Castle.<sup>31</sup> There was hostility to Constance in the family and his children were petulant when his ability to support them declined.<sup>32</sup> At the same time he might not have handled the situation all that well, particularly due to his absences in Wellington and Australia.

He committed suicide by shooting himself in a committee room of Parliament.<sup>33</sup>

It is noteworthy that there was some antipathy between Larnach and Justice Joshua Williams, the resident judge in Dunedin who decided a number of cases against Larnach, including the posthumous case involving the marriage settlement.<sup>34</sup> Williams had a good reputation as a judge

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21 The Times 31 Jan 1879. See Hamer *op.cit.* 145 *et. seq.*

22 Hamer *op.cit.* 145.

23 Snedden *op.cit.* 139; Sinclair *op.cit.* 436.

24 Snedden Chapter XV.

25 *Report of the Commissioners on the Condition and Working of the Public Trustee Office* 1891 (<https://paperspast.natlib.govt.nz/Parliamentary/AJHR1891-II.2.3.2.3> retrieved 27/3/2017).

26 Remarks on the Report of the Commissioners on the Public Trust Office by James Edward FitzGerald, Controller and Auditor-General, 1891 (<https://paperspast.natlib.govt.nz/Parliamentary/AJHR1891-II.2.3.2.4> retrieved 27/3/2017).

27 See *Inder v Sievwright and Others* (1900) 18 NZLR 348.

28 *Ibid* 353.

29 *Inder v Sievwright and Others* [supra]. See also *Larnach v Sievwright and Another* (1900) 18 NZLR 385.

30 See Snedden *op.cit.* 197.

31 Snedden *op.cit.* 235.

32 Snedden *op.cit.* 222 *et. seq.*

33 Snedden Chapter XXI.

34 See *Inder v Sievwright* [supra].

but was a former conservative politician in Canterbury,<sup>35</sup> and an active moneylender in Otago and Southland. This was not disclosed, but has been revealed by recent research.<sup>36</sup>

A proposal by the judiciary for a Register of Pecuniary Interests of Judges Bill in 2011 was opposed by the New Zealand Law Society, who argued that it could be abused. Recusal is a difficult area of law and practice, and it is ironic to leave it to the judges when they themselves favour legislation.

### III. LARNACH AS BANKER

Larnach was manager of the Geelong branch of the Bank of New South Wales and improved its financial position.<sup>37</sup> He came to Dunedin as manager of the Bank of Otago, which he found in difficult circumstances.<sup>38</sup> Again, he improved the bank's position but did not do enough to satisfy British investors, who wanted colonial banks to be cash cows.<sup>39</sup> He may have acted in conflict of interest from time to time, as he seems to have had many irons in the fire.<sup>40</sup> He later resigned after the bank was sold to the National Bank. There was friction between him and the new owners.<sup>41</sup> This seems to have been justified. He remained in the bank's accommodation while his new property was being built. He had acted in self-interested ways and also acted to the detriment of the National Bank.

He was later a promoter, substantial shareholder and director of the Colonial Bank, which was taken over by the Bank of New Zealand eventually and went into liquidation.<sup>42</sup> Justice Joshua Williams, who later refused to confirm him as a permanent liquidator, appointed Larnach a provisional liquidator.<sup>43</sup> Williams J also decided cases against Sir Joseph Ward when he had debt problems.<sup>44</sup> Guthrie and Larnach, of which he was partner and later shareholder and director when it was incorporated, borrowed much from the Bank of New Zealand and the Colonial Bank.<sup>45</sup> Larnach abstained from giving advice to Seddon on the merger of these two banks and the government bailout.<sup>46</sup> He felt that he was self-interested. This worked to his detriment as the ultimate arrangements designed by lawyers on the model of a reconstruction rather than a merger and carried out by the *Bank of New Zealand and Banking Act 1895* were to the detriment of

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35 See Judith Bassett, "Joshua Strange Williams" in (1993) Vol 2 *Dictionary of New Zealand Biography*.

36 Michael Bassett, *Sir Joseph Ward – A Political Biography*, Auckland University Press, 1993.

37 Snedden *op.cit.* Chapter VI.

38 Snedden *op.cit.* Chapter VIII.

39 Snedden *op.cit.* 70.

40 See FRJ Sinclair, "Williams James Mudie Larnach" in (1993) Vol 2 *Dictionary of New Zealand Biography*, 2. No evidence is cited but see his PhD thesis cited in footnote 3 above.

41 Snedden *op.cit.* 71 *et. seq.*; Sinclair *op.cit.*

42 See Snedden *op.cit.* Chapter XIX.

43 See *In Re the Colonial Bank of New Zealand* (1896) 14 NZLR 484.

44 See Bassett *op.cit.* footnote 34.

45 See Sinclair *op.cit.* footnote 38.

46 See Snedden *op.cit.* 215 *et. seq.* for extensive quotation from the correspondence with Richard Seddon.

the shareholders of the Colonial Bank.<sup>47</sup> Larnach did not safeguard his own interests, but had an exaggerated sense of duty to other shareholders.<sup>48</sup>

#### IV. LARNACH AS DIRECTOR, PROMOTER AND LIQUIDATOR

Larnach as director must be judged by the standards of the time. He was promoter and director of many companies,<sup>49</sup> probably too many in the sense that he had too many irons in the fire and not enough time to monitor management behaviour. This was true of Guthrie and Larnach and the Colonial Bank,<sup>50</sup> His conduct probably was in breach of duty in the case of the Agricultural Company as he had conflicting interests in land speculation and railways.<sup>51</sup> *Aberdeen Railway Co v Blaikie*<sup>52</sup> had laid down a strict no conflict rule for directors, although articles of association often contracted out of the rule and this was not made illegal until the 1930s in New Zealand. The standard of care of non-executive directors at this time was low,<sup>53</sup> so he was probably not liable for negligence in connection with Guthrie and Larnach and the Colonial Bank. The fiduciary duties of promoters only developed after *Erlanger v New Sombrero Phosphate Co*<sup>54</sup> in 1878.

Larnach, together with his co-directors, engaged in sharp practice in connection with the flotation of the Agricultural Company and arguably misused their government connections.<sup>55</sup> The land aspect was one thing, but the connection with railways was quite complex and involved the promotion of a separate company, The Waimea Plains Railway Company, which relied on rates to be levied on local landholders. There were impediments to the collection of the rates, which were only later removed. Larnach sold his shares in the Agricultural Company, leaving overseas investors in the lurch. The railway company was eventually taken over by the government, of which Larnach was a member. This was strongly criticised by Sir George Grey.

The whole saga of the Agricultural Company represented failure due to the rabbit pest, the deflation of land speculation after the City of Glasgow Bank collapse, the diminished returns for its produce, and the fact that the land had been overvalued in the first place.<sup>56</sup>

Larnach was appointed by Justice Joshua Williams a provisional liquidator of the Colonial Bank, but not confirmed as a permanent liquidator, and this angered Larnach, who published a sarcastic pamphlet criticising the judge who had ignored the facts that there were no creditors and his removal reduced the chance of greater recovery of assets for shareholders because of his detailed knowledge and investigation of the affairs of the bank on his return to New Zealand.<sup>57</sup>

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47 See the *Bank of New Zealand and Banking Act 1895* ss 36–42.

48 Snedden *op.cit.* 215.

49 See Sinclair *op.cit.* Appendix 27.

50 Snedden *op.cit.* 145–6; see Sinclair *op.cit.* 430 *et. seq.*

51 See Hamer *op.cit.* 141 *et. seq.*

52 (1854) 1 Macq 461 (HL). See J H Farrar and S Watson “Self-Dealing, Fair Dealing and Related Party Transactions – History, Pricing and Reform” (2011) 11 *Journal of Corporate Law Studies* 495.

53 See J H Farrar and P Hanrahan, *Corporate Governance* LexisNexis, Chatswood, 2016, 215.

54 (1878) 3 App Cas 1218.

55 See Hamer *op.cit.* generally; Sinclair *op.cit.* Chapter 5.

56 Sinclair *op.cit.* 362.

57 See W. J. M. Larnach, *The Colonial Bank of New Zealand in Liquidation*, Coulls, Culling & Co, Dunedin 1896.

Larnach seems to have been the victim of a number of corporate swindles during his business career.<sup>58</sup> He did not keep a close enough eye on Guthrie nor his fellow directors of the Royal Standard Investment Company in Victoria, in which he invested heavily.<sup>59</sup> He was defrauded by Roberts, a manager of the Bank of New Zealand, in respect of land transactions involving The New Zealand Loan and Mercantile Company.<sup>60</sup> Larnach put too much faith in gentlemen's agreements.

## V. LARNACH AS MEMBER OF THE HOUSE OF REPRESENTATIVES AND MINISTER

Larnach, like many 19th century colonial politicians, entered politics to safeguard and advance his interests and the interests of his region. He was open about this to electors and to Parliament.<sup>61</sup>

There were then no rules on disclosure of interest or avoiding conflict of interest.<sup>62</sup> In the United Kingdom there was a resolution of the House of Commons in 1695 aimed against William of Orange's attempt to bribe members.<sup>63</sup> The House of Lords in *Egerton v Brownlow*<sup>64</sup> in 1853 had laid down a strict rule of no conflict for peers and in 1858 there was another House of Commons resolution laying down a strict rule for members of the House of Commons.<sup>65</sup> It is unlikely that these would be general knowledge in New Zealand – although a copy of Erskine May, *Parliamentary Practice*<sup>66</sup> was first published in London in 1844, and it was in its seventh edition in 1873.

This discusses the question. A copy of Erskine May was purchased for the new Parliamentary Library in 1860. It is interesting to note that Richard Seddon contemplating a Parliamentary career learned a lot of Erskine May almost by heart.

Larnach was not in breach of duty as Treasurer, but arguably as agent for the government in respect of the loan when he was pursuing his interest as director of the Agricultural Company. Sir George Grey, who operated with a stricter ethical code, was angry at the conduct of his ministers and Vogel, and called for their resignation as directors.<sup>67</sup>

Larnach was later more scrupulous as Minister of Mines and also in his Parliamentary role in connection with railway companies<sup>68</sup> and later in connection with the banking legislation of 1895.

He was very rigorous in his chairmanship of the Royal Commission on the Public Trustee Office, and held officials to account.<sup>69</sup>

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58 Snedden *op.cit.* 192–6.

59 Snedden *op.cit.* 192.

60 Snedden *op.cit.* 194 *et. seq.*

61 Snedden *op.cit.* 97.

62 There is still no Code of Conduct, only standing orders and speakers' rulings.

63 See Thomas Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 2nd ed 1851, Hard Press Publishing Miami, 285 (reprint).

64 4 HLC 1; [1843 60 All ER Rep 970 – see Lord Lyndhurst at 980–981.

65 (1857-8) 113 Journals of the House of Commons 247-8 (22 June 1858).

66 See footnote 59 [supra].

67 See Hamer *op.cit.* 147; Goodall Chapter 3.

68 Snedden *op.cit.* 164.

69 See footnote 24 above.

In the nineteenth century in the United Kingdom and New Zealand, there were no ministerial codes of conduct or codes of conduct for members of Parliament. These have only recently been adopted, although as we saw, Erskine May had some discussion of these matters in the nineteenth century.

New Zealand now provides guidance for ministers in the Cabinet Manual, but there is currently no code of conduct for members of the House of Representatives.

The United Kingdom now has codes of conduct for both ministers and members, and a *Parliamentary Standards Act 2009*.

Most Australian Parliaments have ministerial and members codes of conduct.

## VI. LARNACH AS CHAIR OF THE ROYAL COMMISSION ON THE CONDITION AND WORKING OF THE PUBLIC TRUSTEE OFFICE

Larnach was chair of the Royal Commission into the Public Trustee Office from 16 March to 22 June 1891. He sat with Andrew Loughrey, an experienced solicitor from Christchurch and T K Macdonald, a Member of the House of Representatives and prominent Wellington businessman.<sup>70</sup>

The Public Trustee office was set up by statute in 1872 and the first public trustee was Jonas Woodward, who was an accountant in bankruptcy. It was a low budget operation. Woodward was succeeded by Robert Hamerton, who had worked in the public service. He had to deal personally with every question however trivial, and was grossly overworked as the work expanded. He had taken the matter up with the Premier, Sir Henry Atkinson, to no avail. John Richard Balance, as Premier with the support of Richard Seddon, was more energetic and proposed the Royal Commission.<sup>71</sup>

The Commission considered that it met with obstruction by public servants and found that they had displayed a total absence of capacity and knowledge of how estates should be managed. They had failed to keep intelligible books of account and had sometimes been rude and obstructive to beneficiaries, and officials sometimes acted in conflict of interest.<sup>72</sup>

To some extent, Hamerton was the scapegoat for neglect by successive governments and was forced to resign.<sup>73</sup> At least he received a pension.

The Commission found that the Auditor General had failed in his duty. Fitzgerald, a former Canterbury politician, who held the office for far too long, was a brilliant and difficult man and no accountant. He criticised the Commission in intemperate remarks, which occasioned a detailed seven-page formal response from the Commissioners.<sup>74</sup>

Both Fitzgerald and Larnach at this time suffered from heart trouble and this, together with political animosity, may have coloured their exchanges. One gets the impression that his declining

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70 *Ibid.*

71 See C W Vennell, *A Century of Trust – A History of the New Zealand Public Trust Office, 1873-1973*, Wilson & Horton Ltd, Auckland 1973, 46.

72 See footnote 24 above.

73 See Vennell *op.cit.* 50.

74 See footnote 25 above.

fortunes and family problems were affecting Larnach's temper. Also, he had sought the Office of Public Trustee and Auditor General from Seddon around this time.<sup>75</sup>

Hamerton was succeeded by J K Warburton, who did much to reform the Office and restore confidence. He succeeded J E Fitzgerald as Controller and Auditor General in 1896. Warburton was succeeded by James Martin, a former Crown Solicitor in Christchurch and Magistrate in Wellington. He was assured by Seddon that politics had nothing to do with the Public Trustee Office.<sup>76</sup> In fact, Seddon resisted Larnach's wish to be appointed.

## VII. LARNACH AND THE ELUSIVE CONCEPT OF FRAUD

To consider whether Larnach was in any sense a fraudster<sup>77</sup> requires some consideration of this elusive concept. The Court of Chancery had a wide conception. Lord Hardwicke, in a letter to Lord Kames of 30 June 1759 said:<sup>78</sup>

Fraud is infinite ... were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.

He attempted a fourfold classification in *Chesterfield v Janssen* in 1750.<sup>79</sup> He said:

...

This court has an undoubted jurisdiction to relieve against every species of fraud.

1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.
2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice ...

A 3d kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law; which is, that it must be proved, not presumed; but [156] it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.

A 4th kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement.

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75 See Snedden *op.cit.* 227.

76 Vennell *op.cit.* Chapters 5 and 6.

77 See FRJ Sinclair, William James Mudie Larnach in *Te Ara Encyclopaedia of New Zealand*. Sinclair, in his PhD thesis, relies substantially on the private correspondence of J M Ritchie and the report by John Bridges for the Bank of New Zealand. The latter led to a sensational incident at the Dunedin Club in July 1875. See Sinclair *op.cit.* footnote 3, 81 *et seq.*

78 Cited by John Glover, *Equity, Restitution and Fraud*, Lexis Nexis Chatswood 2004, 21.

79 (1750) 2 Ves. 125 at 155; 28 ER 82, 100.

Fraud at common law was either contractual – a fraudulent misrepresentation – or tortious – the tort of deceit.

Fraud as such was not a criminal offence in the nineteenth century in New Zealand or the United Kingdom.<sup>80</sup> It was only in the UK *Fraud Act 2006* that fraud itself became an offence replacing the previous offences of deception in the *Theft Act*. The Act divides criminal fraud into three types – false representation, failing to disclose information, and abuse of position. All three types require dishonesty and acting for gain or to inflict a loss. New Zealand still has only specific offences in which dishonesty is an element. It includes bribery, forgery, extortion, corruption, theft, conspiracy, embezzlement and misappropriation.

John McFarlane Ritchie<sup>81</sup> in his private correspondence accused Larnach of dishonesty, but Larnach was never charged with any offence nor accused of breach of duty in civil litigation.

As we have seen, he sometimes acted in self-interest and at times in conflict of interest, and as a consequence may have been guilty of equitable fraud, but his conduct improved as time went on. It may have been a heightened awareness of fiduciary duties in private and public life. He was a complex man operating in complex times.

In *Reddaway v Banham*,<sup>82</sup> Lord Macnaughten made an interesting remark when he said “sometimes [fraud] is audacious and unblushing, sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it”.

## VIII. CONCLUSION

How can we sum up such a complex man? Dr Samuel Johnson once wrote, “Reputation is ... a meteor which blazes a while and disappears forever ...”.<sup>83</sup>

Larnach came from a good family, although his father was criticised for cruelty to convict labour and he had two rogue relatives. His father died young and<sup>84</sup> it is not clear that Larnach inherited much wealth, although his uncle, Sir Donald Larnach, was a prominent banker.<sup>85</sup> Larnach married money<sup>86</sup> with his first wife, but the amount may be exaggerated.

He had good connections. He had mixed experience as a banker, but times were difficult. He had mixed experience as a speculator and investor, but again times were difficult and did not recover until the late 1890s.

He seems to have been an effective minister, but did not serve long as Treasurer. He was an energetic and effective Minister of Mines. He had a high reputation in Wellington, although he alienated some of the Dunedin business community and Justice Joshua Williams.<sup>87</sup>

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80 See James Taylor, *Boardroom Scandal – The Criminalisation of Company Fraud in Nineteenth Century Britain*, Oxford University Press, Oxford, 2013, 264.

81 Cited by Sinclair *op.cit.* 79.

82 [1896] AC 199 at 221.

83 *The Rambler*, 25 Feb. 1752, No. 203.

84 See Snedden *op.cit.* 222.

85 See Snedden Chapter V.

86 Snedden 50 *et. seq.*

87 See Sinclair *op.cit.* 53–54; 75 *et. seq.*; 430–443.

He had a keen intellect and was an ideas man, but seems to have been a poor monitor of management and had too many irons in the fire.

Seddon described him as a mastermind, used him but did little for him in the end.<sup>88</sup> Larnach craved a knighthood, which he never got.<sup>89</sup>

The circumstances of his death remain shrouded in family gossip and fiction.<sup>90</sup> It is possible that he was a tragic victim of circumstances and the times.

### **Acknowledgement**

I am grateful to Rebecca Styles of the New Zealand Parliamentary Service for information regarding the Parliamentary Library in the nineteenth century.

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88 Snedden *op.cit.* Chapter XX.

89 *Ibid* 227.

90 Snedden *op.cit.* Epilogue. See also Owen Marshall, *The Larnachs*, Vintage 2011 for a fictional account. See also Michelanne Forster's play *Larnach – Castle of Lies* in *Downfall – Three New Zealand History Plays*.



## BOOK REVIEW

HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, DIGNITY AND GEOGRAPHY by James R May and Erin Daly (Editors), Edward Elgar Publishing, Cheltenham, 2019, 585pp, recommended retail price US\$330.

*Human Rights and the Environment: Legality, Dignity and Geography* edited by James R May and Erin Daly from the Delaware Law School at Widener University is a tour de force. It surveys environmental law from the human rights perspective through a distinctive analytical lens focused on the legal foundations for protecting human rights and the environment, recognising that such rights are indivisible and require holistic application and interpretation, acknowledging human dignity as the objective underpinning these rights, and celebrating the geographic differences in approach between jurisdictions and global regions that enrich both our understanding of the relationship between human rights and the environment and provide a dynamic catalyst for developing the law.

The book brings together a stellar cast of 59 global academics who develop these themes beautifully through 44 chapters. The quality of the work and its contribution to knowledge is clear and was underpinned by a rigorous peer review process by the Editorial Advisory Board populated by the megastars of international environmental law including (inter alia) John E Bonnie, Carmen G Gonzales, Louis J Kotze, Michel Prieur, and Dinah Shelton.

Part 1 of the book articulates the importance of the rule of law as the basis for human rights. It views legal rights as a bundle of principles and substantive and procedural rules. The development of a human right to a healthy environment is essayed by John Knox and critically examined by Michel Prieur from an implementation perspective in terms of the need for a third international covenant regarding the environment to sit alongside the UN Covenants on Civil and Political Rights and Economic and Social Rights. Rosemary Mwanza and others examine the role of constitutional provisions and constitutionalism in giving practical effect to the right to a healthy environment. This part of the book concludes with the critical analysis of Paul Martin who exposes the implementation gap between rhetoric and practice, Sam Adelman who addresses the tension between sovereignty and protecting the global commons, and a review of the importance procedural rights (e.g. freedom of information, public participation, and access to justice) in giving effect to human rights.

Part 2 of the book argues that human rights are based on the indivisible amalgam of dignity, life, liberty, health, education, family, and wellbeing. This conceptual approach to human rights and the environment is then explored through the context of climate change, food security, human displacement, gender, and the limits imposed on the exercise of property rights by moral society. This part of the book concludes neatly by turning the property rights dialogue into a discourse about nature and legal personality.

Part 3 of the book focuses on human dignity by examining the interactions between humans and the world around them, including, water and landscape. Other chapters then focus on the rights of children and indigenous peoples exploring vulnerability in terms of children without directly enforceable rights and the fragile ecosystems valued by indigenous peoples. These chapters draw insightful connections between guardianship, the environment, and sustainability. This part of the book then concludes with a critical discussion about environmental litigation and the barriers that can sometimes frustrate effective environmental protection.

Finally, Part 4 of the book explores the geographically distinctive approaches to protecting the human right to a healthy environment currently articulated across jurisdictions and regions that provide a wealth of practical experience based on pragmatic experimentation. It concludes with a further analysis of the rights of nature and how giving legal personality to natural objects (e.g. mountains and rivers) can assist in advancing the human right to a healthy environment.

Overall, this book demonstrates the rapidly changing nature of law and the environment in the new millennium and the dynamic capacity for moulding and reshaping legal concepts to enhance environmental protection. It provides an authoritative collection of scholarship that offers new perspectives on human rights and the environment, and is worthy of the critical acclaim that it has received to date. This book is quite simply a work that postgraduate students, seasoned academics, judges and jurists will return to as a source of information and imagination.

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