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The United Nations as a source of legal authority

Abstract
What are the connections between the United Nations and The Samuel Griffith Society? One is that Australian constitutional lawyers are now examining the relationship between international law and constitutional law. Justice Kirby of the High Court of Australia first argued for the relevance of international law in construing the federal constitutional requirement of "just terms" in compensation for compulsorily acquired property (s. 51(xxxi)). In Newcrest Mining v. Commonwealth in 1997, he stated that in cases of ambiguity in the federal Constitution, "international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights". The argument for the relevance of international law to constitutional interpretation was pressed in judgments by his Honour again in Kartinyeri v. Commonwealth in 1998, concerning interpretation of the power to legislate in relation to race (s. 51(xv)), and again almost each year subsequently. The argument has generated controversy and has been viewed critically by other High Court Justices. Justices Gummow and Hayne in Kartinyeri, Justices Gleeson, McHugh and Gummow in AMS v. AIF in 1999, and Justice Callinan in Western Australia v. Ward in 2002, each stated that it is inappropriate to apply the principles of international law to constitutional interpretation. In Al-Kateb v. Godwin in 2004, Justice McHugh described the argument as "heretical". Controversy concerning the relevance of international law to constitutional law is erupting also in other constitutionally and democratically governed States. In the USA, Justice Ruth Bader Ginsburg of the federal Supreme Court aroused public criticism for her 2003 address to the American Constitutional Law Society, which advocated a similar deference to international law in constitutional interpretation. However, her argument has since been supported by at least two other Supreme Court justices in the USA. Back in Australia, in legal fields beyond constitutional law, such as human rights law, environmental law and commercial law, questions concerning the role of international law are evident. They range from questions concerning the predominance of the Executive in treaty-making, to the wide legislative powers that treaties vest in Parliament, to the latitude available to judges when employing international law in the application of legislation and common law.

Keywords
international law, United Nations, democratic deficit, international law - transformation

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Chapter Eleven: The United Nations as a Source of International Legal Authority

Professor Gregory Rose

What are the connections between the United Nations and The Samuel Griffith Society? One is that Australian constitutional lawyers are now examining the relationship between international law and constitutional law.

Justice Kirby of the High Court of Australia first argued for the relevance of international law in construing the federal constitutional requirement of "just terms" in compensation for compulsorily acquired property (s. 51(xxxi)). In *Newcrest Mining v. Commonwealth* in 1997, he stated that in cases of ambiguity in the federal Constitution, "international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights".[1] The argument for the relevance of international law to constitutional interpretation was pressed in judgments by his Honour again in *Kartinyeri v. Commonwealth* in 1998,[2] concerning interpretation of the power to legislate in relation to race (s. 51(xv)), and again almost each year subsequently.[3]

The argument has generated controversy and has been viewed critically by other High Court Justices. Justices Gummow and Hayne in *Kartinyeri*, Justices Gleeson, McHugh and Gummow in *AMS v. AIF* in 1999,[4] and Justice Callinan in *Western Australia v. Ward* in 2002,[5] each stated that it is inappropriate to apply the principles of international law to constitutional interpretation. In *Al-Kateb v. Godwin* in 2004, Justice McHugh described the argument as "heretical".[6]

Controversy concerning the relevance of international law to constitutional law is erupting also in other constitutionally and democratically governed States. In the USA, Justice Ruth Bader Ginsburg of the federal Supreme Court aroused public criticism for her 2003 address to the American Constitutional Law Society, which advocated a similar deference to international law in constitutional interpretation. However, her argument has since been supported by at least two other Supreme Court justices in the USA. [7]

Back in Australia, in legal fields beyond constitutional law, such as human rights law, environmental law and commercial law, questions concerning the role of international law are evident. They range from questions concerning the predominance of the Executive in treaty-making, to the wide legislative powers that treaties vest in Parliament, to the latitude available to judges when employing international law in the application of legislation and common law.[8]

Competing Australian and international law

Some Australian legal academics have begun to describe the prevailing Australian attitude to international law as anxious, worrying and defensive. It has been viewed as a legal expression of the insular politics of Australian fundamentalism.[9] However, skepticism concerning the roles of international law within Australian laws is achieving higher profile and taking on a sense of immediacy for several more plausible reasons.

These include the rapid expansion of the scope, volume and prescriptive detail of international norms, and the fact that these norms increasingly impact on matters that concern the internal governance of countries, rather than merely aspects of their international relations. These norms are sometimes made by means of procedures that do not require the direct consent of an affected State, or that attenuate the requirement of individual State consent, where the norm is formed by the broader will of the "international community". International mechanisms to monitor, promote or coerce State compliance are emerging, lending to these norms new and substantial consequences.[10]

Consequently, there is growing concern in some quarters over perceived conflicts between national interests, set out in domestic laws and policies, and international laws. For example, concern has been articulated by some members of the current Australian Government, especially about international human rights norms that address aspects of Australian domestic governance.

Of course, not all Australians express such concern. Some members of Australian civil society support those same international norms, and see in government unease advantageous opportunities to exert influence. Indeed, the tension between international and domestic rules is often the product of a political struggle between domestic players projected onto an international stage. For example, in the human rights field, the domestic players might be generalised as lobby groups leveraging international norms against national governments.

While majoritarian governments see the engagement of international institutions against them as an international interference in their democratically legitimated domestic mandate, the lobby groups see it as international legitimation of their rights.

This brings us directly to the question of whether the legal position articulated by an international institution about a State's domestic obligations should take precedence over a conflicting political position held by that State. In other words, should the State consider itself bound by an international norm in the absence of its specific sovereign consent to it, especially an international norm concerning its internal governance?

Sovereign consent to international laws

According to the traditional paradigm, international laws derived their legitimacy from the consent of sovereign States. The idea that a sovereign's consent is required as a precondition to it being legally bound in its international relations is as old as the idea of the State itself. This international principle reflected the reality in Italy when the legal notion of the State evolved during the Renaissance. Italian city States found it convenient to recognise each other as equals and to respect the immunities of each other's ambassadors. The doctrine of sovereign equality that they developed was later applied to the geographically wider modern State.

In 1648, the Peace of Westphalia shaped much of Europe as we know it today, defining some contemporary borders and formalising sovereigns and national polities. The Treaties certify the birth of the modern State, and recognise the respective secular sovereigns' rights to make alliances among themselves and with foreign powers.[11] Thus, the notion of sovereign equality, meaning that one sovereign State may not legally impose on another an obligation without the other's consent, became a fundamental feature of both the main sources of international law: treaties and customs.

The development of international law at the global level continues to be premised on the traditional theory of sovereign State consent. Nevertheless, in contemporary practice, direct consent is becoming less important. The increasing globalisation of all aspects of human life---economic, technological, social, cultural and political---has required increased levels of legal cooperation and coordination across national borders. International law has developed in range, depth and complexity, and international institutions have developed procedures to make it easier to adopt and apply international laws. Modern States have effectively ceded aspects of their sovereignty, in the sense of their absolute internal legal independence, to facilitate greater international cooperation and coordination.

Concerning the formation, application and interpretation of treaties, the *Vienna Convention on the Law of Treaties* is an authoritative statement of traditional principles. It provides that no agreement may impose obligations on a third party without its consent.[12] Conversely, every treaty obligation is premised on the consent of the parties to it. Nevertheless, the prerequisite of consent by States before they may be bound by treaty provisions is becoming attenuated as a result of the adoption of new procedures for negotiation, amendment, interpretation and enforcement of treaties.

In the negotiation of multilateral treaties in which many States participate, the use of "package deal" texts to which no reservation can be made, and of consensus or majority voting procedures for adoption of texts, reduce State negotiators' opportunities to incorporate national goals in an international text. Nevertheless, the State might find itself compelled to adopt the package deal because of the major disadvantages of exclusion from the multilateral regime.

In relation to amendments, non-objection and majority voting procedures are used to expedite entry into force without the requirement that States ratify amendments. For example, under the "tacit consent" procedure, if a Party does not object within 90 days after adoption of amendments to technical annexes of some International Maritime Organisation conventions, the amendments enter into force without the State's ratification or explicit consent. Under the *Montreal Protocol on Substances that Deplete the Ozone Layer*, certain amendments (called "adjustments") to the Protocol can be adopted by two-thirds majority vote, and will then enter into force automatically for all parties as specified in the adjustment.

Concerning the interpretation of treaties, independent experts committees and compulsory dispute resolution provisions have reduced State influence over the interpretation of some treaty texts. Trends that attenuate the prerequisite of consent are also evident in the imposition of obligations on non-parties to comply with communal resource regimes. For example, parties to the *High Seas Fish Stocks Agreement* are bound by subsequent related regional high seas fisheries agreements, even though not parties to them.

Concerning the formation of international legal custom, called customary international law, sovereign consent is also a traditional feature. The theory is that custom is formed by the concurrence of two complementary components: a particular pattern of practice by States in their international relations ("State practice"), together with the opinion of those States that their practice is a legal obligation ("*opinio juris*"). Both State practice and *opinio juris* are required to be near universal and uniform.[13] Examples of customary international laws include the recognition of sovereign equality, honouring of treaties and protection of foreign diplomatic envoys. The consent of the sovereign State to the legal norm is implicit in the component of *opinio juris*. Disagreement, i.e., lack of consent, that a particular practice is a legal obligation, would undermine the near universal and uniform consent necessary to empirically prove the presence of *opinio juris*.

There are conceptual problems in the traditional theory of customary international law that manifest themselves in the myriad practical difficulties concerning state consent. In relation to both practice and *opinio juris* there is now controversy over whether mere statements (not linked with other positive action) can be considered to amount to State practice and can thereby produce "instant custom". United

Nations resolutions would take on a legislative aspect if mere conference and meeting resolutions themselves were formative of customary international law.

There is also a diversity of opinions as to which bodies have the authority to pronounce that there is sufficient empirical evidence to prove the existence of a customary international law at a point in time. Candidate bodies include the judgments of the International Court of Justice and other international tribunals and national courts, and the opinions of international committees, meetings and academic researchers.[14]

The conclusion that must be drawn from this brief survey of contemporary developments in treaty and customary international law formation is that, in a variety of ways, the requirement of sovereign consent as a precondition to being legally bound is eroding.

In the absence of the direct consent of a sovereign State to be bound by a particular international law, whether treaty or custom, some other source of legitimacy needs to be found if the international law is to bind that State. This requirement for an alternative source of legitimacy is most acute where international laws address how a State must conduct its internal affairs. Claims of superiority for international law *vis á vis* national law need to be assessed by criteria that indicate their relative legitimacy.

Democratic criteria for international legitimacy

Despite critiques of its Euro-centric, masculinist and/or post-colonial aspects, many scholars presume an inherent authority in international laws over national laws. On this view, at least certain international laws are superior because they manifest "natural law". They are the basic laws of human experience, dictated by reason, universal and binding over all other laws.[15] This perspective is most evident in discourse concerning international peremptory norms, or "*jus cogens*", that prevail over all other international laws. However, it also extends to the wider fields of universal or *erga omnes* laws, concerning human rights or humanitarian rights and international environmental or natural resources obligations.[16] Governments and advocacy groups utilising the authority of international law for instrumental purposes reinforce this presumption of superiority with powerful rhetoric, especially in the field of human rights.[17]

Nevertheless, it is not a simple matter to identify natural laws or to determine who should be entrusted to identify them. Different religious and cultural systems would tend often to disagree on specific formulations. Great uncertainty surrounds even which international laws might be considered "*jus cogens*", and negotiators of the *Vienna Convention on the Law of Treaties*, which codified the concept, could not agree on any.[18] Nor might an identified general principle of natural law be straightforward to apply to a complex and unique situation in a particular place and time. Therefore, the natural law seems a structure too poorly defined to clearly overshadow specific national laws.

Nor can the search for legitimacy conclude that it is simply the physical power to enforce international laws that forms a satisfactory legal criterion. National regimes can often exert greater physical force than can multilateral legal regimes, and there is no certainty as to this until after coalitions are formed and battle is done. Relative physical force is *realpolitik* but not a legal formula. Any claim to superior legal legitimacy must therefore rest on a more jurisprudential basis than brute power to enforce compliance.

That jurisprudential basis is the concept of relative justice. Two categories of justice criteria---procedural justice and substantive justice---form the indicators suggested here to prove the relative legitimacy of international law.[19] It would be necessary to demonstrate that the international law is superior in terms of both its qualities of procedural and substantive justice.

Procedural justice requires that a law be adopted in accordance with the appropriate legislative or judicial processes, as set out in some constitutional order. Substantive justice requires that the law conform to the moral, social, economic and cultural values of those persons it addresses.

The contemporary history of states demonstrates that the various values of a polity are most reliably determined by polls of its members. These are conducted regularly in the form of elections to government of persons who represent their values, or sometimes by *ad hoc* referenda on particular issues. Thus, democratic government has emerged as a reliable system to deliver substantive justice, which could synonymously be called democratic justice. Its democratic accountability mechanisms concurrently make it a more reliable deliverer of procedural justice also.

For an international law to have greater legitimacy than the national law of a liberal democratic state, then, it would need to be demonstrable that the international law is at least as just. To demonstrate that, first, the international law needs to be adopted under constitutional procedures, as guided by liberal principles, to promote democratic values. Second, it needs to be demonstrated that the international law promotes those values more effectively than the conflicting national law. The latter demonstration is a comparative utilitarian calculation of how many people are benefited, how much, and over how long.[20] For example, the value to a State X of cheap oil that produces air pollution might be less than the value to all other states of mitigating the damage to them caused by the drift of that air pollution. In this case, the international law could be more legitimate than the law of State X.

If it were demonstrated that functional democratic processes inform international law-making, then the greater legitimacy of international over national law-making might be premised on its greater democratic authority. By drawing on every voter in the world, albeit in

appropriately qualified, weighted and indirect ways, it would identify substantive values more widely and thoroughly than do national law-making processes that draw on national communities only.

This simplistic account of substantive justice does not pretend to evaluate various models of democracy (representative, participatory, pluralist, deliberative, etc) or the various views of liberal principles (utilitarian, rights-based, redistributive, etc) that guide democratic governance. For example, it does not address the strengths and weaknesses of the ways that a nuanced rights-based approach to democracy might affect the balance of conflicting interests between oppressive democratic majorities and sub-national minorities in need of protection. It merely illustrates the claim that liberal democracies can and do make for the legitimacy of their domestic laws.

As an alternative source of legitimacy to direct sovereign consent, has international law-making developed such constitutional procedures---ones that employ democratic processes guided by liberal principles?

United Nations constitutional processes

The bulk of contemporary international law at the global level is formed by the adoption of treaties and resolutions, primarily through United Nations fora. An examination of the liberal democratic qualities of these legal norms requires study of their formal adoption processes, which are set out in United Nations constitutional documents, and a survey of the implementation of those adoption processes in practice. That is, law-making is examined for its adherence to constitutionality, democratic authenticity and liberal principles.

Although the United Nations is not one monolithic organisation but several institutions, generically called organs, agencies and programs, their decision-making processes are similar and inter-related. The chief constitutional document is the *United Nations Charter*. It prevails over all other treaties.[21] The Charter sets out the purposes and principles of the United Nations, its organs, and their functions and decision-making procedures. The principal organs are the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice and the Secretariat. The Assembly and Councils can be likened to the legislative arm of government, and the Court and Secretariat to the judiciary and executive arms, respectively.

Only the Security Council has the authority to make binding decisions that all United Nations members must carry out, while the Assembly and other Councils are empowered merely to make recommendations.[22] For the binding decisions of the Security Council to have procedural legitimacy or constitutionality, they need to conform to procedures set out in the Charter. Yet the history of Security Council decision-making is coloured by departures from its constitutional procedures. Article 27 provides that each member of the Security Council shall have one vote, and that decisions on substantive matters shall be made by affirmative vote of nine of the fifteen members, including the concurring votes of the five permanent members. Nevertheless, the practice of adopting substantive decisions despite abstentions (instead of concurring affirmative votes) of permanent members of the Security Council has become regular.

The General Assembly also departs readily from other constitutional constraints. Article 12 provides that the General Assembly shall not make any recommendation with regard to a dispute or a peace and security situation that the Security Council is currently engaged by, unless the Security Council requests it to. Yet, the General Assembly commonly adopts such recommendations.

Delivery of procedural justice is not assisted by the parlous relationship of the Security Council and General Assembly to the judicial arm of the United Nations. The Court's decisions indicate that the majority of its judiciary have considered it to be subordinate to both the General Assembly and the Security Council,[23] despite occasional rhetoric concerning judicial independence. Thus, the Court does not address itself to scrutiny of the constitutionality of decisions taken by either body.

These cursory observations of United Nations decision-making procedures identify significant shortcomings in procedural legitimacy that are common under its own constitutional processes. It does not have a robust separation of judicial powers, and its fundamental constitutional procedures for decision-making are not adhered to. Thus, not all international laws made by the United Nations enjoy procedural legitimacy.

To assess the legitimacy of United Nations decisions it is also necessary to consider whether they are substantively just, by examining the democratic qualities of its decision-making processes. Are they adequately designed and employed to identify and conform to the moral, social, economic and cultural values of those persons they address?

The major players drafting the *United Nations Charter* designed most decision-making procedures premised on the notion that all States are sovereign equals. Accordingly, all members of the United Nations General Assembly and two of its Councils have equal voting rights. Of course, this design is not inherently democratic. China and India, with over a third of the world's population (2 billion people), each have one vote, in common with Nauru (12,000 people).

Nor is there any procedural requirement that a state's vote conform to the values of its populace as identified by democratic polls. India is a reasonably functional democracy while China is not, yet there is no distinction between the votes that each exercises in these organs. Thus, the "one size fits all" institutional decision-making processes are designed too poorly to be able to reflect the moral, social, economic and cultural values of "the peoples of the United Nations" that the Assembly and Councils purport to serve.

Even a decision-making process that actually was based principally on indicators of democratic quality might need to be formulated to additionally reflect inherent differences in state interests in particular subject matters. For example, a United Nations institution adopting

international laws concerning polar region management might better formulate its decision-making procedures to give special weight to the affected interests of polar countries. Weighting mechanisms in the decision-making procedure could include extra or chambered votes, vetos or monopoly over initiatives. Global decision-making on many other subjects---health, environment, human rights, fiscal, etc---could be distributed as votes weighted by relevant indicators, such as population, human development, economy, geography, natural resources, etc.

In summary, in our time of micro- and failed States, and of middle, great and super-power States, it is fantasy to believe that all 191 United Nations Member States must have identical voting weights and procedural status. Recommendations of organs based on equal votes often reflect the bizarre unreality of this legal fiction. The minority of truly capable and powerful States can be dictated to by overwhelming numbers of small States who lack the capacity to act on their own recommendations.

The chasm between notional equality and actual capacity was recognised by the drafters of the Charter in one respect. Recommendations and decisions in the UN Security Council were subjected to permanent veto rights allocated only to the then five Great Powers (China, France, USSR, UK, USA), who formed the majority of its then nine members. The remaining four Security Council members were elected by the General Assembly for biennial terms. To reflect the broader membership of the United Nations in the wake of decolonisation, the number of non-permanent members was increased from four to ten by means of a Charter amendment in 1965.[24]

The ten non-permanent members are now elected on a geographically representative basis, in accordance with the regionalisation of United Nations membership into five geographic blocs formalised in 1968.[25] Since the drafting of the Charter, the powers of Brazil, Germany, India and Japan have risen, while China and the USA have risen further and the USSR, the UK and France have declined in relative economic, military and technological resources.

As discussed below, models for further expansion of Security Council membership to 25 are now proposed by the United Nations Secretary-General. However, any amendment of the Charter can come into force only on ratification by all five current permanent members,[26] who are unlikely to agree to significantly dilute their own procedural rights. Thus, the pattern of power from a passing moment in history has been frozen into present and future Security Council decision-making. It is not democratically representative or reflective of special interests.

Finally, do United Nations decisions follow liberal principles comparable to those that a liberal democratic state should adhere to? Liberalism has many disputed meanings, but included among its core principles are adherence to the rule of law and equal treatment before the law. These principles are strongly promoted in United Nations human rights instruments and statements. Yet they frequently do not find their way into United Nations practice.

Concerning the rule of law, some institutional departures from constitutional procedures were noted above, but other substantive examples are abundant. Concerning equal treatment of states in United Nations law, notorious departures are legion. The General Assembly cannot agree on a comprehensive condemnation of terrorism because many members support terrorism against Israel. The Security Council failed to act when it could have prevented genocide in Rwanda, although it did act in the former Yugoslavia. The Commission on Human Rights has engineered its own demise for its denials of equal treatment for states to which it applies human rights norms. Examples include its current reluctance to condemn genocide in Sudan. The malfeasance of the Commission and its sub-commissions, treaty committees and rapporteurs in applying human rights laws to all equally, leads to the inexorable conclusion that liberal principles at the heart of the human rights project are not applied by the United Nations itself.

Examination of the liberal and democratic qualities of United Nations decision-making formative of its legal norms is an unhappy process. It is apparent that formal decision-making procedures are not adhered to, that decision-making procedures employed are poorly designed to produce democratic quality, and that basic liberal principles are often flouted. United Nations constitutional processes are therefore inadequate to give its laws greater legitimacy than the national laws of a liberal democratic State, in the absence of that State's consent to the specific international law. The familiar observation that, although the United Nations is flawed, "if we didn't have it, we would have to invent it", tritely avoids considering whether we might invent better international legal decision-making processes.

Enhancing constitutional legitimacy

Presuming that globalisation continues to require an increasing range, depth and complexity in international legal cooperation and coordination, new international legal decision-making processes are still sorely needed. The precondition of a state's sovereign consent being directly addressed to each new legal decision, in order that it bind the state, currently inhibits the delivery of the required legal standards (much as the prerequisite that each attendee at this conference must agree to the menu of a common meal would inhibit the rapid delivery of the meal). Therefore, alternatives to specific consent need to be developed to streamline processes for adopting international legal decisions and, to be legitimate, they need to be premised on constitutional procedures delivering democratic justice.

There appear to be three ways forward. One is a program to reform the United Nations from within, in accordance with the provisions of the Charter. The second is progressively to negotiate treaties that alter the processes for adopting legal decisions, incrementally altering decision-making procedures for particular subject matters under each treaty. The third is to develop alternative law-making institutions outside of the United Nations.

First, reforming the United Nations from within is the project that the current Secretary-General, Kofi Annan, would like to leave as his legacy. On 21 March, 2005 he proposed the organisation's most ambitious project for constitutional reform since its inception.[27] The most discussed proposal is to expand the Security Council by nine members, from 15 to 24, including either six new permanent members without veto powers, or eight new renewable positions. The other substantial proposal is to abolish the defunct Trusteeship Council and replace it with a Human Rights Council, smaller and more authoritative than the current Human Rights Commission. Each of these changes requires a Charter amendment. The Human Rights Commission would be dissolved, and a Peace Building Commission established under the Economic and Security Council by resolution.

The difficulty with the reform proposals is that they do not address the fundamental lack of democratic justice embedded within the Charter's foundations. They do not alter the entrenched veto powers of the permanent five members of the Security Council, or the fiction of sovereign equality in other decision-making organs. In fact, it is impossible to reform these from within the framework of the Charter, as the majority of United Nations members are not democracies and would oppose reforms premised on democratic justice. Therefore, efforts to reform from within, in accordance with the Charter, will be forever fruitless.

The second approach, which is to incrementally alter decision-making procedures for particular subject matters by means of *ad hoc* treaties, is already in progress. United Nations treaties concerning tropical timber, atmospheric ozone depletion, climate change and nuclear safety each differentiate the obligations of various categories of their parties.[28] They and others also set their entry into force provisions according to criteria related to the treaty subject matter, rather than according to the number of ratifications by sovereign equals. Outside the United Nations, institutions concerned with financial and trade matters have long qualified sovereign equality in decision-making procedures by applying economic criteria. Nevertheless, treaties are negotiated on the fictitious premise of sovereign equality and are *ad hoc*. They form a meandering path that wanders without a destination.

The third approach, which is to develop alternative law-making institutions outside of the United Nations, is the only one that offers any potential. It is likely that other political alignments outside the UN, such as the G8, NATO or the "coalition of the willing", will develop international law-making roles independent of and overlapping the mandate of the United Nations. Weighted voting, direct democratic representation, chambered decision-making and strengthened judicial oversight of procedural integrity might ultimately evolve as new international institutional structures are built. This would seem to be the only hope to develop democratic justice in international law-making. The process of adoption of an international political model along these complex lines would be a fraught process requiring resolute leadership. However, it is not impossible.

Useful insights are available from the experience of the European Union, which has jettisoned the one-State-one-vote principle. It has qualified voting procedures that vary with the topic, three inter-dependent decision-making bodies that represent sovereign and popular concerns, counter-balancing of interests through chambered procedures, and a robust Court of Justice, and it is constantly seeking to improve the quality of its decision-making procedures by means of constitutional reform.

Yet one need not look so far as Europe. The Australian Constitution provides a federal legislative procedure that qualifies popular votes with regional votes that have differentiated *per capita* weights. The effect on Australian law-making of the Senate's differentiated *per capita* voting is moderated by the House of Representatives, and the combination of both Chambers seeks to set a balance between regional and popular values.

Conclusion

We have found that Australians have good reasons to be skeptical about the United Nations as a source of legal authority in Australian law. United Nations law-making often lacks procedural rigour and is not premised on democratic justice. All liberal democratic societies must be skeptical concerning the legitimacy of laws adopted and applied to them by the United Nations that conflict with their own valid laws.

Nevertheless, a modern globalised world needs international laws and a legitimate system for international law-making. The current United Nations model will not last forever. It was built on the ruins of the League of Nations (1920-1946). The primary objective for its core organs, as set out in Article 1 of the Charter, is to maintain international peace and security, yet there are 35 armed conflicts raging at the moment and many more have gone before, while evidence of any conflagrations that the United Nations has prevented is scarce.

The Iraq oil-for-food US$10 billion scandal, and its alleged influence on Security Council decision-making, is symptomatic of a fundamental state of crisis. The Trusteeship Council that oversaw decolonisation is already defunct, and the General Assembly and Security Council are chronically dysfunctional. Currently, the central institutions of the United Nations are in terminal decline, and it is probable that alternative institutions will begin to evolve in two or three decades.

Therefore, the time has come to look to the future and to think about the fundamentals of a global political architecture better adapted to the weighty international law-making needs of the emerging 21st Century. A democratically and procedurally robust constitutional basis for international law-making is essential---one that could produce norms considered legitimately applicable within Australia even in the absence of specific sovereign consent.

Endnotes:

1. *Newcrest Mining (WA) Ltd v. Commonwealth* [1997] HCA 38. See also Kirby, Michael, *Popular Sovereignty and the True Foundation of the Australian Constitution*, in the 1997 Deakin Law School Public Oration, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_deakin2.htm. Parts of the following discussion draw on a useful survey in Charlesworth H, Chiam M, Hovel D, Williams G, *Deep Anxieties: Australia and the International Legal Order*, 25 *Sydney Law Review* (2003), 424.

2. *Kartinyeri v. Commonwealth* [1998] HCA 22.

3. See the cases cited below and *Austin v. Commonwealth* [2003] HCA 3.

4. *AMS v. AIF* and *AIF v. AMS* [1999] HCA 26.

5. *Western Australia v. Ward; Attorney-General (NT) v. Ward; Ningarmara v. Northern Territory* [2002] HCA 28.

6. *Al-Kateb v. Godwin* [2004] HCA 37.

7. See Kirby, *op. cit*., and *O'Connor praises international law*, WorldNetDaily, 27 October, 2004, available at http://www.wnd.com/news/article.asp?ARTICLE_ID=41143.

8. Charlesworth *et al*, *op. cit*..

9. *ibid*..

10. Kumm, Matthias, *The Legitimacy of International Law: A Constitutionalist Framework*, 15.5 *European Journal of International Law* (2004), 907 at 913.

11. Van Creveld, Martin, *The Rise and Decline of the State* (Cambridge University Press, 1999), 86.

12. *Vienna Convention on the Law of Treaties*, Art. 34.

13. *North Sea Continental Shelf Cases* [1969] ICJ Reports 3.

14. Thus, theoretical difficulties beset the list of human rights that comprise "customary international human rights law", identified by the expert members of the United Nations Human Rights Committee under the *International Covenant on Civil and Political Rights* in their General Comment 24 (1994). See Murphy, John F, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), 23.

15. The association between international law and natural law was made by the "father of international law", Hugo Grotius, in *De Jure Belli Ac Pacis* in 1625.

16. Goldsmith, Jack L, Posner E A, *The Limits of International Law* (2005), 24.

17. Discussed in Ignatieff, Michael, *Human Rights as Politics and Idolatry* (Princeton University Press, NJ, 2001).

18. Murphy, *op. cit*., p. 20.

19. Drawn from Bodansky, Daniel, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 *American Journal of International Law* (1999), 596.

20. "An action may be said to be conformable to the principle of utility ... when the tendency it has to augment the happiness of the community is greater than any it has to diminish it". Bentham, Jeremy, *An introduction to the principles of morals and legislation*, in Bowring, John, *The works of Jeremy Bentham* (Edinburgh, 1943), vol. I, p. 1.

21. Charter Article 103 provides that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

22. Charter Article 25 provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. Recommendations of the General Assembly, however, can carry legal weight as *indicia* of customary international law.

23. Decisions of the Court open to such interpretation include its 1998 decision on *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United States of America*), and its 2004 advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*

24. Charter, Article 23.

25. General Assembly XVIII (1968), Resolution 1991.

26. Charter, Article 109.

27. *In Larger Freedom: Towards Development, Security and Human Rights for All*, UNGA Report of the Secretary General, A/59/2005, 21 March, 2005 (incorporating recommendations from United Nations *Report of the High Level Panel on Threats Challenges and Change, A more secure world: Our Shared Responsibility*, 2004).

28. Cullet, Philippe, *Differential Treatment in International Law: Towards a New Paradigm of International Relations*, 10.3 *European Journal Of International Law* (1999), 549.

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