LAWYERS AND PEACE BUILDING

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All politicians have a masochistic streak, to go with their megalomania (and occasional touch of idealism) - and you have certainly brought out mine tonight. To revisit a portfolio area that gave me some of my most traumatic moments as a Minister, and to do in a State which has given my Party (not to mention our Opponents') some of its most traumatic moments, just goes to show you that my affection for law students knows no rational bounds.

To keep my morale intact, and proceedings on a suitably elevated plane, I thought it would be sensible to choose a law-related topic that sat comfortably within my own present portfolio: so my theme tonight is the role of law, the rule of law and lawyers in international relations - especially in the preservation of peace and security, and especially in what I like to call 'peace building'.

While the rule of law has probably been more honoured in the breach than the observance in international relations over the centuries, the conduct of international affairs in accordance with it is an objective to which any state - except perhaps a very confident superpower - ought rationally to aspire. Internationally, just as domestically, the basic idea of the rule of law is to have a set of understood and generally observed norms which bring some balance to the relations between weak and strong, and provide an avenue for resolving disputes and to assist in preventing conflict. That has a particular resonance for small and medium sized powers like Australia, for whom the existence of international law, and of international treaties and cooperative institutions, is vital as a means by which our voice can be heard and our national interests protected and taken into account in global affairs.

The body of international law, and the machinery by which it is implemented, is an essential element in the preservation of international order, and Australia has long been committed to its development. Quite apart from great matters of war and peace, the development and application of the wider framework of rules and regulations to moderate interactions between states and their peoples - covering

everything from health to satellites, migratory birds to fleeing criminals, trading rules to terrorism, air traffic rights to human rights - is the grist of international law in practice for most Australian lawyers who dabble in it.

But what I want to focus on a little more specifically is the role of law and lawyers in the search for peace - in tackling the great issues, still very much with us despite the end of the Cold War, of resolving, and above all, preventing, deadly conflict.

Preventing Conflict

Most of the peace and security activity that captures public attention is reactive rather than proactive. Whether talking bilaterally, regionally or at global/UN level - or talking militarily or diplomatically - it is the reactions or responses to unfolding crises and conflicts that dominate the headlines:

- what do we do next in the former Yugoslavia?

- how should we respond to Chinese territorial claims in the South China Sea?

- how do we stop the French proceeding with their nuclear tests?

- how do we get Syria and Israel to bed down an agreement on the Golan?

- what will we do if genocidal violence breaks out again in Rwanda or Burundi?

It has long seemed to me that the world would be a lot saner and safer place if the international community - the governments and organisations that make it up - could be persuaded to think and act much more proactively, to focus on prevention rather than after the event responses and reaction.

Of course preventive strategies - however successful - are never going to be the whole answer. Disputes between and within states are going to continue to arise and, some of them are bound to be unable to be resolved before they spill over the threshold of violence, and become armed conflicts. We are always going to

need peace restoration strategies, i.e. peace making (the use of diplomatic and related non-military means to resolve conflicts) and peace keeping (the deployment of personnel to assist in the implementation of agreements reached between those who have been engaged in conflict). And we are going to need peace enforcement strategies to deal with conflicts where no diplomatic solution can be reached - i.e. sanctions, and peace enforcement by military means.

Most of these activities - particularly peace making and peace keeping - are likely to involve roles for lawyers in one way or another, but where I think this profession really has its major role to play is at the preventive end of the peace and security spectrum - i.e. in preventive diplomacy, and in what I call peace building.

Preventive diplomacy refers to the full range of methods subscribed in Article 33 of the UN Charter viz. "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means", when applied before a dispute has crossed the threshold into armed conflict.

Australia has been arguing vigorously for some time now for much more attention to be devoted, particularly within the UN system, to developing preventive diplomacy skills and resources. We have argued, for example, that to create half a dozen centres of preventive diplomacy expertise around the world, staffed by a total of about 100 experts (and there are only about 40 in the entire UN system devoted to this kind of function at the moment), would cost not much more than about $US20 million annually - as compared with the over $US3 billion annually peace keeping activities are presently costing, and the $US70 billion that it cost the UN coalition countries to wage the Gulf War!

It's not easy to mobilise political support for any kind of preventive activity, whether of the immediate dispute settling kind that is involved in preventive diplomacy, or longer-term attempt to address the underlying causes of conflict, which I'll come to in a moment in talking about peace building. Part of the problem is that prevention, by its nature, is successful when nothing happens: if it works nobody notices. And it is an iron law of politics - national or international - that everyone likes to be seen to be doing something: the notion of taking action behind the scenes that might be inherently worth doing, or worth doing as an insurance premium to avoid a larger pay-out later, tends to be foreign to the political psyche. But we must get more people to see the point of that splendid

observation attributed to Jean-Mare Lehn, who won the Nobel Prize for Chemistry in 1987: "Only those who can see the invisible can do the impossible".

Peace building is the most important preventive strategy because it goes to the fundamental underlying causes of disputes and conflicts - to ensure that they don't occur in the first place, or if they do arise, that they won't recur. I have always thought it a waste of a good phrase to confine the idea of peace building to situations of post-conflict reconstruction, as the Secretary-General has been inclined to: the idea has much wider potential reach, and it's intuitively easy to understand.

Multilateral Peace Building and the International Court of Justice

At the international level, peace building strategies centre on building or strengthening a range of international structures or regimes aimed at minimising threats to security, building confidence and trust and operating as forums for dialogue and cooperation. Multilateral arms control and disarmament regimes; treaties governing issues like the Law of the Sea; forums like the International Court of Justice and other international bodies for resolving disputes; and multilateral dialogue and cooperation forums (like the ASEAN Regional Forum) are all examples of these structures. To take just one of those areas, arms control, there are not many more important contributions to international peace and security than the recently extended Nuclear Non-Proliferation Treaty, the recently negotiated Chemical Weapons Convention, or the currently being negotiated Comprehensive Nuclear Text Ban Treaty.

A particularly important element in providing for the peaceful settlement of disputes is the international judicial system, with the International Court of Justice the principal judicial organ in this respect (although it has now been supplemented by more recently established bodies like the War Crimes Tribunal). Like the rest of the UN system, the International Court was constrained in its first years by the effects of the Cold War. From its inception in 1946 until 1994, the Court had just 72 contentious cases and 21 advisory cases before it. During the Cold War years, it usually dealt with no more than one or two cases per year. Since the end of the Cold War, however, use of the Court has grown dramatically. As of last month, the Court had a record 13 cases before it. As use of the Court grows, it will be important for its procedures to be streamlined and made increasingly responsive to the needs of Member States.

One vital issue that will be considered is how to expand the jurisdiction of the Court through treaty provisions, mutual agreement of States through *compromis* or more importantly by expanding the number of Member States who have agreed to the Court's compulsory jurisdiction. Currently less than one-third of the Member States (only 58 of the 185 Member States of the United Nations) have agreed to accept the Court's jurisdiction. Of these, less than half have accepted that jurisdiction unconditionally, or on the sole condition of reciprocity, or (as in the case of Australia) with comparatively minor procedural reservations. Fully 31 countries have accepted with substantial reservations (of the kind which meant, for example, that Nauru could not sue the UK or New Zealand - only Australia - in its recent case claiming compensation for environmental damage from phosphate mining). Since Secretary-General Boutros-Ghali in An Agenda for Peace has called on all Member States to agree to compulsory jurisdiction by the year 2000, one of the major issues to be considered will be how Member States can be persuaded to do so, and what obstacles stand in the way of this goal.

Australia has been a strong supporter of the International Court throughout its history, with our best known use of it being the 1973 Nuclear Test Case brought, with New Zealand, against France - which was suspended in 1974 when France bowed to the international pressure (of which the ICJ case was the centrepiece) and ceased atmospheric testing. You will be aware that a current lively issue is whether the Court can be utilised again in the current fight against France's resumption of underground testing at Mururoa. Most of the possible causes of action that are being suggested - for example in reliance on France's obligations under various environmental protection treaties - founders on the rock of France's non-acceptance of the ICJ's compulsory jurisdiction.

What we and New Zealand have been looking at, however, is the reopening of the 1973 case, which was never finally determined by the Court. In this respect, our own legal advice has been that there has been no chance of reviving our own Australian 1973 application, which was framed entirely in terms of the dangers of atmospheric testing. But there is some chance of New Zealand's application being held to be still relevant, because it was drafted more broadly, relating to nuclear testing generally. There still remain formidable procedural and substantive hurdles for New Zealand's case to jump, but we have made clear that we stand prepared to intervene in support of New Zealand's action if there is a legal opportunity to do so. Beyond that, we will certainly be mounting oral argument on test issues in the International Court hearing already scheduled later this year on the Advisory Opinion relating to the legality of nuclear weapons, that has been

sought by the World Health Organisation and the UN General Assembly.

I should add that not all contentious matters lend themselves readily to resolution in the International Court - particularly in present circumstances where many countries are resisting the Court's jurisdiction. It is difficult to see, for example, how Portugal's recent court action against Australia challenging our right to enter into the Timor Gap Treaty with Indonesia, even had it survived its procedural problems, could have assisted the East Timorese people. The Indonesian Government, which is in control of the territory, would not have been bound by the Court's judgement. Very often negotiation, mediation, conciliation are going to provide a more satisfactory outcome for all the parties concerned. And in the case of East Timor, the way forward lies in the Indonesian Government accepting both the desirability and inevitability of coming up at last with a long overdue package of reconciliation measures - involving a massive drawdown of the presently oppressive military presence in East Timor, more sensitive development and cultural recognition strategies, and a significant measure of local political autonomy.

Peace Building within States

Peace building within States seeks to encourage equitable economic development and to facilitate good governance - in both cases to enhance human rights, broadly defined. These are goals we should pursue for their own sakes, but also because advancing them contributes directly to national and international security. Policies which enhance economic development and distributive justice, encourage the rule of law, protect fundamental human rights and foster the growth of democratic institutions are also security policies. They should be recognised as such, and receive a share of current security budgets and future peace dividends.

One of the principal underpinnings of a strong democracy, which in turn is one of the best guarantors of political stability, is an effective system of law and order and a viable legal system. One of the biggest problems in dealing with failed states like Somalia, or in trying to guide back to stability countries like Cambodia, has been to create, or recreate, a working system of criminal justice. In the case of Cambodia, I readily acknowledge that in retrospect this was one aspect of the UN peace plan that we didn't sufficiently address. In a recent submission to the Parliamentary Foreign Affairs and Defence Committee, the Brisbane lawyer Mark Plunkett, who had been UN Special Prosecutor in

Cambodia during the UNTAC transitional process, put the problem as he found it in 1992 this way:

> Cambodia was a country in a state of anarchy where there was wholesale execution of suspected offenders, arbitrary and indefinite detention without trial, torture of prisoners. Freedom of movement [was] inhibited by the extortion of money by the military and the police in the guise of illegal road tolls. Murder, abduction and arson of political opponents [was] commonplace. Large scale armed conflicts involving cattle thefts were frequent occurrences.

Furthermore there was:

> no functioning judiciary, no rule of law, no operative criminal code, no powers of arrest, few jails of an acceptable standard; the population was heavily armed; and the resolution of disputes was easily affected by people simply shooting each other.

Although there have been some significant improvements since then, not least through the indefatigable efforts of another Australian, Justice Michael Kirby, who is the Special Representative of the UN Secretary-General for Human Rights in Cambodia - much remains to be done as part of the post-conflict reconstruction process to build a functioning, independent justice system. In this context, the Australian Government has been talking to the Cambodian Government over the last year about what assistance we can give to help these issues forward. We have been looking at possibilities for providing practical assistance in various areas including the dissemination of human rights information and assisting with legislative drafting, as well as helping to improve the performance of the police, courts and gaols. We are hoping, in effect, to develop a 'justice package' for Cambodia which will provide very real, tangible and practical assistance.

The idea of a "justice package" being an integral part of future UN peace operations is one that was first articulated by Mr Plunkett, and it has a lot of merit. He has argued for the preparation of a resource package, generic in character but capable of modification for specific situations, taking the form of a set of policy documents for incorporation in UN mandates, and a series of field manuals, resources and materials for UN mission operatives. On the ground, this would mean all or any of the following:

· the supply of serving or retired judges to preside alone or with local judges over criminal trials where courts do not exist;

· the supply of defenders and prosecutors capable of operating in the system in the short term and training locals for the longer term;

· a contingent of police capable of training local police in the processes of investigation, evidence gathering, arrest procedures and the preparation of prosecutions;

· the temporary institution of a simple criminal code covering basic, universally accepted offences such as murder, abduction, torture and theft; and

· the construction of jails of acceptable standards so that prisoners can be kept safe from attack and assassination.

Lawyers and Peace Building

So how exactly do you - as future lawyers - fit into this picture? It may seem to many of you that your international or criminal law lectures are far removed from this realm of international relations, and of all the different elements I have described of international peace building, with all its compromises and its failures and shortcomings. But many of the skills you are developing here are very relevant and indeed desperately needed in that wider, less-than perfect world. Though you could be forgiven for not having noticed, we are in fact half way through the United Nations Decade of International Law. The General Assembly designated the period 1990 to 1999 as a decade:

- to promote acceptance of and respect for the principles of international law;

- to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;

- to encourage the progressive development of international law and its codification; and

- to encourage the teaching, study, dissemination and wider appreciation of international law.

There is something here for every lawyer and every law student. It may simply be a matter of becoming personally better informed about the international human rights conventions which apply in Australia. Or it might be that, like Justice Michael Kirby, you take the whole list on board and dedicate a large part of your life to carrying that commitment into practice.

My own Department has also taken up the call of the Decade of International Law domestically. We have been working closely with practitioners and academics to organise two major regional conferences on international law. The first, on Humanitarian Law in Armed Conflict, attracted about 150 people to Canberra in December 1994. The second, on Environmental Law, saw 130 participants gather in Darwin last month. Both were outstanding successes and on that basis we look forward to helping arrange further conferences in relevant fields in the years ahead.

We are also focusing on international law internally, given its integral role in foreign relations. All graduate entrants to the Department of Foreign Affairs and Trade are required to undertake course work in international law (a course in which we also sponsor members of Foreign Ministries from other countries to participate). The Department provides financial assistance, moreover, to officers who wish to undertake higher degrees in international law. Raising awareness and putting into practice the principles of international law are high on my and my Department's agenda. In collaboration with the Attorney-General's Department and AusAID we have also established an international law scholarship to assist in the training of government lawyers from Pacific Island countries. The Department is working together with non-government organisations, such as the Law Association for Asia and the Pacific, to provide international law texts and treaty documentation to developing countries. We actively organise, support and provide speakers for conferences which spread the rule of law message.

For Australian lawyers and law students, becoming active in this whole area may mean becoming a member of organisations such as the International Commission of Jurists, the Australian and New Zealand Society of International Law or Amnesty International. And it may be that, at least upon graduation, you can contribute more directly to the development of effective legal systems and

institutions in countries which are struggling towards the rule of law by becoming involved in one or more of a range of government or non-government initiatives of the kind I have already mentioned, designed to assist in training police, judges and lawyers and establishing human rights institutions for example.

I should also acknowledge that there is a great deal of important and useful work being done in the academic field which both analyses and informs our work. Universities - and increasingly these days schools as well - are busy teaching, studying and promoting a wider appreciation of international law. There are lawyers everywhere working for governments and international institutions building and developing the international legal order and applying it as a tool of international relations.

It is easy to criticise the failures of the international order, and critical analysis is always needed and always useful. But what we should also be doing is applying our creative energy to the task of coming up with new and creative solutions to the old problems of peace and security, economic and social development, and respect for human rights. Doing anything preventive, or at any level of abstraction, designed to create respect for the rule of law internationally and within states, and simply to create stable and viable state structures rather than addressing more specific disputes and conflicts, tends to generate glazed eyes and cynicism. There are a lot more immediately sexy jobs to be doing, and political causes to fight. But I am strongly committed to the task, as a central plank of international peace and security strategy. And I would certainly welcome all the help I can get.

Constructive idealism is something most people are not too readily prepared to associate with this profession. But let's do our bit to prove the sceptics wrong. The need for a better, more secure and more just world order has never been greater. When you think about what courses to do next semester and what you hope to do after law school, I urge you to keep that very big picture very much in mind.