

'Disequilibrium' ¹

1. When James II secured the British throne in 1685, Parliament was prorogued and never summoned again during King James' reign. The Parliament was antagonised by King James' attempts to set aside, misuse, and otherwise suspend laws which the Parliament had passed. In June 1688, a group of leading citizens invited William of Orange to bring an army to Britain and secure the 'infringed liberties' of the country. James fled, and the result was the bloodless revolution of 1688.
2. The so-called 'Bill of Rights' adopted by the Parliament as a statute in 1689 was more a list of the ways in which James II was deemed to have abused his powers. The Bill of Rights declared the various attempts by James to usurp Parliament to be unlawful. Relevantly, the Bill of Rights declared the pretended royal power of suspending, misusing, or dispensing of laws, the arbitrary creation of Royal Commissions meant to serve a purpose rather than that of the proper role of Parliament to be illegal and pernicious. The Bill affirmed the rights of subjects to petition the King in terms that would allow those petitioners full liberty of speech and debate, meaning liberty to criticise, and, liberty to declare in the Parliament any misuse of the King's remaining executive powers.
3. Does the effective post-9/11 suspension of the inherent powers of our courts to control their own processes by use of the *National Security Information (Criminal and Civil Proceedings) Act 2004* sound familiar? The Hansard tells us the NSI Act was passed in 2004 in the context of terrorism where witnesses, particularly those engaged in anti-terrorist operations

¹ Occasional paper delivered at Melbourne on the Anniversary of the Unilateral Declaration of Independence by Timor-Leste on 28 November 1975.

Bernard Collaery

were at risk, and, to prevent terrorists using the court to learn techniques or to proselytise. We recall that when my Law School classmate Philip Ruddock introduced the NSI Bill into Parliament he quoted the view of the then Director-General of Security, Dennis Richardson. Namely, '*Sooner or later, the protection of classified and security sensitive information will be a critical issue in a terrorism trial in this country.*' In informing the parliament that the terrorist threat was central to the Bill he was introducing, Philip Ruddock said, '*The existing rules of evidence and procedure do not provide adequate protection **for such information** where it may be disclosed during the course of criminal proceedings.*' (emphasis added). I have no doubt that Philip was genuine in his assurance.

4. The growth of parliamentary democracy is recorded in detail by the authors of *The Annotated Constitution of the Australian Parliament*, John Quick and Robert Garran. In their introduction, the authors start with the role of the citizens in Hellenic city-states before noting the constitutional history of England and the United States. They record that:

*At the time when the American Constitution was framed, Montesquieu was a great oracle of political philosophy, and he drew attention to the tripartite division of political power as existing in England. Montesquieu took the constitutional development of England as his model, ascribing great merit to the division of legislative, executive and judicial functions, the system of checks-and-balances, whereby the equilibrium of the tripartite system is preserved.*²

5. This was the light on the hill our founders and subsequent leaders set for us. Sir Robert Garran spent thirty-one years as Secretary of the Federal Attorney-General's Department. The role of Australian government lawyers

² John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Parliament*, (Angus & Robertson, 1st ed., 1901), 315.

Bernard Collaery

has expanded greatly since then. Sir Robert's current successor, Chris Moriatis, was the team's DFAT senior legal adviser during negotiations with Timor-Leste at Dili in 2004. Mr Moriatis is the head of a Department that now 'appears' for the Liberal Attorney Mr Porter who, though not a party, and claiming that he acts on the advice of the Commonwealth Director of Public Prosecutions, has imposed the NSI Act on proceedings, remote from terrorism, that relate directly to the legality of the Liberal Party's 2004 treaty negotiations with Timor-Leste.

6. The legal beacon that Sir Robert Garran set with the support of eminent leaders of the Australian legal profession shined bright during the Curtin, Chifley, Menzies years. The descent into *'loose with the truth'* gamemanship in Canberra accelerated during the crafty years of the Howard/Downer Liberal Government. What now confronts us is, as Bernard Keane writes,³ the mess we are in.

SEPARATION OF POWERS

7. Tonight, I shall focus on the current loss of equilibrium within the division of powers between the Executive, the Judiciary and the Legislature. The principle cause of this imbalance is the failure of representative democracy in Australia. Our founders assumed there would be a healthy tension between those members of parliament who seek to make laws while they hold Executive power and those members of parliament whose role is to ensure that those laws meet the wishes of the people.
8. The balance is broken in Australia by the duopoly of a single ruling class of career politicians, many with little experience of life outside party politics, preoccupied with sharing power between themselves, without sufficient

³ Bernard Keane, *The Mess We're In*, (Allen & Unwin, Sydney, 2018)

Bernard Collaery

regard for the wishes of the people. I speak of the Liberal/Labor duopoly, and to the extent that the National Party empowers the Liberal Party, those good members who are reluctant to rein in their Liberal colleagues. The Australian Parliament's descent into authoritarian law-making post-9/11, the misuse of those laws, and the appointment of perceived allies to office, particularly the Administrative Appeals Tribunals, is the behaviour that William of Orange was brought to England more than 400 years ago to deal with and restore the Parliament to its representative function. Where now is our William?

9. Executive power is more often tested by administrative tribunals, and not in superior court proceedings. The range of contentious issues is now so vast that the superior courts could not cope with challenges to a massive underlay of administrative tribunal decision-making. In the Federal sphere recently, the then Federal Attorney-General George Brandis, in questionable circumstances, failed to renew the appointment of tribunal members and appointed more than 20 persons with perceived past and present Liberal Party connections. I spoke of this at the opening of the Law Year in the Northern Territory in 2017 noting that this highly significant conduct passed without contention by a similarly disposed Australian Labor Party.

10. I also spoke in Darwin of the erosion of one of the great twentieth century reforms in criminal law. Namely, the establishment in the common-law jurisdictions, following appalling mis-trials in the United Kingdom, of the independent office of Director of Public Prosecutions. It started well in the late 80's and 90's with the appointment of eminent Silk of wide experience on both sides of the Bar Table. Today there remain many such eminent Silk available, but sadly, there is a disinclination in some quarters to appoint them. Lessons of the past have been forgotten. Prosecutors with little or no experience in advocacy for the accused are now, sometimes after a cameo

Bernard Collaery

time at the private Bar, being promoted to lead the office of DPP. We all recognise our own tendency to brief those we know so the malaise spreads, perhaps unintentionally, to the retaining within a coterie of not so distinguished ex-prosecutors so-called 'external counsel' who, surprise surprise, have had a singular speciality as prosecutors.

GOVERNMENT LAWYERS

11. I wish to narrow my comments further, to focus on the vital role of government lawyers in supporting the Courts and in the provision of advice to the Executive, particularly the drafting of laws and the negotiation of treaties.

12. Last year in the Australian Capital Territory, more than 43% of the lawyers holding practising certificates issued by the Law Society of the ACT were in government or government agency employment. At the current rate lawyers are being licensed in the ACT, the ACT branch of the profession may soon be the only branch in Australia where government lawyers outnumber the private profession.

13. Rules of conduct for lawyers developed over centuries through the common law following the almost volcanic eruption of the ideals of ordinary citizens by Sir Edward Coke, Bacon and Shakespeare all born between 1552 and 1564. English lawyers discovered from the sixteenth century onwards both the unsurpassed adaptability of the common law and as Dickens illustrated in *Bleak House* the need for the Judges in common law and equity to regulate the conduct of the legal profession. Where lies nowadays the primary obligation of lawyers in government employ? Is it to their political masters?

Bernard Collaery

14. A starting premise is to say that government lawyers are as bound by both the common law and statutory rules of conduct as are private practitioners. To give an example from the *Legal Profession (Solicitors) Conduct Rules* (ACT);

Rule 3.1

*A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*⁴

Rule 5.1

A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

*5.1.2 bring the profession into disrepute.*⁵

15. As Commonwealth Government employees, lawyers subject to the *Public Service Act* must abide by the Public Service Code of Conduct. Relevantly, the code includes the following provisions;

(1) An APS employee must behave honestly and with integrity in connection with APS employment.

(4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, **Australian law** means:

(a) any Act (including this Act), or any instrument made under an Act; or

(b) any law of a State or Territory, including any instrument made under such a law.

(10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:

⁴ ACT Law Society, *ACT Legal Profession (Solicitors) Conduct Rules 2015: Commentary and Guidelines*. Retrieved at: <https://www.actlawsociety.asn.au/documents/item/1921>, 8.

⁵ *Ibid*, 10.

Bernard Collaery

- (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
- (b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.

(11) An APS employee must at all times behave in a way that upholds:

the APS Values and APS Employment Principles; and
the integrity and good reputation of the employee's Agency and the APS

(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.

16. Few treaty negotiations conducted by the Department of Foreign Affairs and Trade, usually accompanied by an agency department involved with, for example, national development, energy or fisheries, take place without the inclusion of government lawyers. Some hold practising certificates. Others do not, but all are as bound by the common law of legal conduct, as are those who are proscriptively bound by virtue of their being holders of practising certificates.

17. How then should a government lawyer react if instructed to participate in the perusal and analysis of information secured by interception and clandestine eavesdropping of the internal deliberations of States with whom Australia is conducting treaty negotiations? How should a government lawyer react if instructed to participate in measures to conceal such conduct?

18. As Jack Waterford laments, modern history shows, unlike the workings of democracy in Washington, we can expect little from the parliamentary duopoly and the AFP Commissioner,⁶ when Government impropriety is alleged. I should add also that the Law Council of Australia is only now

⁶ Jack Waterford, *Leaking Through the AFP Sieve*, Canberra Times, 28 October 2017.

Bernard Collaery

moving to challenge the authoritarian misuse of post 9/11 laws. Much more must be done if the Council is to accurately reflect the views of the practising profession.

19. In the United Kingdom the Attorney-General may be a member of the House of Commons and may be a member of the Ministry, but not a member of the Cabinet. Where an Attorney-General exercises a power to commence or stop a prosecution, the attorney would not, in the United Kingdom, allow the Cabinet any role that could be construed as having a political dimension as distinct from decision-making based purely on questions of law and declared prosecution policy.

20. There are strong arguments for this process to be adopted in this country. In the small world of the Australian Capital Territory, I found it potentially embarrassing and ultimately an issue that led to our Government's downfall for me to be in Cabinet when questionable planning decisions were being made.

21. In a representative democracy, the role of the First Law Officer and his or her legal officers is not merely important, it must be exemplary. The Legal Service Directions issued pursuant to the *Judiciary Act 1903* make this clear.

22. The Rule of Law in Australia must be zealously guarded. UK Attorneys General have a distinguished record of stepping away from Executive excesses. In Australia, while the Attorney-General may sit on the National Security Committee of Cabinet, particularly in relation to operational matters, the Attorney-General as First Law Officer has an obligation to ensure that the functions of our intelligence agencies are conducted lawfully. This is of great significance if an Attorney or a Finance Minister

Bernard Collaery

becomes aware of non-National Security Committee approved conduct including the alleged misuse of assets.

23. Few would dispute the fact that as Timor-Leste emerged from under the yoke of Indonesian occupation Australia acted opportunistically to continue exploitation of the Timor Sea petroleum resources and to give away to commercial interests without Parliamentary approval the equally valuable helium resources. The abiding resentment of the Timorese at not securing post-liberation their full sovereignty was palpable and for geo-strategic reasons not in Australia's long-term national interest. Dealing with this issue in foreign policy terms required more than foreign-aid and defence support. We have seen how, for generations, Australian foreign policy has often failed to weigh the total national security implications of relations with Australia's northern neighbours. I refer in particular to Professor Clinton Fernandes' book that Professor Michael Leach is to launch tonight.⁷

24. Australia, in securing windfall treaties in 2002 and 2003 from the Timorese, failed to weigh the need to adhere to our strategic Defence policies with the ephemeral political benefit of obtaining for mostly foreign corporate shareholders ill-gotten resources barely to the material benefit of the Australian people. As part of this failed foreign export trade policy the Howard-Downer Government with absolutely no effective parliamentary oversight became involved in what is now widely regarded in Australia as unacceptable behaviour towards the impoverished Timorese. If Australia continues to act as it has this may influence other States thereby undermining respect for international law.

⁷ Clinton Fernandes, *Island Off the Coast of Asia: Instruments of Statecraft in Australian Foreign Policy*, (Monash UP, 2018).

Bernard Collaery

25. Lawyers with practising certificates are as duty bound as are those in the private profession to be vigilant in detecting signs of deceit in their instructions. The tell-tale signs of improper access to communications, that has its variant occasionally in municipal courts, cannot be ignored by government law practitioners.

26. I now wish to draw from the text of a book that evolved in Cambridge in a country I greatly admire, whose citizenship I cherish. The British people by and large have an effective Parliament and a law-abiding Parliamentary Executive. Unless we, Australians, are to abandon our heritage we are entitled to the same.

TREATY NEGOTIATIONS

27. How sure may government treaty advisers be that their instructions are not based on unlawful interception of the internal deliberations of the other party? This may be particularly important if the treaty negotiations concern existing treaty obligations that import fiduciary duties and the negotiations are with that treaty partner. Article 26 of the Vienna Convention on the Law of Treaties (VCLT) to which Australia subscribes says:

Article 23 - Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

28. Government lawyers, particularly members of the Bar, would do well to recall that Villager says:

Pacta sunt servanda lies at the heart of the Convention. It applies without exception to every treaty including its annexes and appendices. The rule holds good at all stages in a treaty's life...⁸

⁸ Mark E Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden, 2009) 365.

Bernard Collaery

‘ALL COUNTRIES SPY’

29. A common refrain by commentators is that in their sovereign international dealings, ‘all countries spy’. Clearly, not the same may be said in respect of commercial dealings by corporations in the City, so where may the line be drawn? May government lawyers, particularly those holding practising certificates issued by professional bodies that enforce ethical standards have one rule at home and another abroad? Is there, for instance, a qualitative difference in law, as distinct from moral turpitude, between bugging a Japanese delegation negotiating treaty issues concerned with limitations on whaling, and, bugging the internal deliberations of a State fiduciary during joint-venture revenue treaty negotiations?

30. Both customary municipal law, and, international law, suggests not. In his authoritative *General Principles*, Professor Bin Cheng identified ‘good-faith’ as being one of the, ‘general principles of law recognised by civilized nations’ and as such a principle to be applied by the International Court pursuant to Article 38 (1)(c) of the Statute of the International Court of Justice. Cheng says:

Fraud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effects of fraud could be recognised by law.⁹

GOOD FAITH AND *PACTA SUNT SERVANDA*

31. ‘Good faith’, as a principle, is bed-rock in international law. Though the principle is found deep in early jurisprudence it is not outmoded, as implied by those who appear to accept that all countries spy during negotiations. Sir Robert Jennings and Sir Arthur Watts, effectively the current authors of *Oppenheim’s International Law*, state:

⁹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications, Cambridge University Press, 2006) 158.

Bernard Collaery

A principle which has...been invoked by the Court and is of overriding importance is that of good faith. It is incorporated in Article 2 (2) of The UN Charter...The significance of this principle touches every aspect of international law.¹⁰

32. More to point for those lawyers who may defend the use of espionage in treaty negotiations are the salutary words of Professor Virally:

...we cannot escape recognising that good faith is really a principle of international law, and that all actors in the international legal order are subjected to it and must endure its consequences, since good faith will serve to determine both the legal effects of their declarations and behaviour and the extent of their duties.¹¹

33. Thirlway commenced his two-volume review of fifty years of jurisprudence at the International Court of Justice with the principle of good-faith.¹² As Fitzmaurice observed, inextricably linked with the principle of good-faith is the '*postulate*', *pacta sunt servanda* (agreements must be kept).¹³ A corollary of the postulate is the act of consenting to be bound that makes the agreement. Consent to an agreement, must be informed and freely given, and as such, is therefore, fundamental. Securing an agreement by fraud in breach of the principle of good faith is no agreement at all and a duped party may not be bound by the agreement.

34. Good faith is the binding substance to the willingness of the parties to enter and keep to an agreement. Thirlway says succinctly, '...good faith requires respect not only for the words but also for the spirit; but to negotiate otherwise in good faith is surely not to negotiate at all'.¹⁴

¹⁰ Robert Jennings and Arthur Watts (Eds), *Oppenheim's International Law* (Vol 1, 9th Ed., Longman, London, 2008) 38.

¹¹ Michel Virally, *Good Faith in Public International Law* (1983) 77(1) *American Journal of International Law* 130, 133.

¹² Hugh Thirlway, *The Law and Procedure of the International Court of Justice* (OUP, 2013) 9.

¹³ *Ibid*, 10-11.

¹⁴ *Ibid*, 23.

Bernard Collaery

LEGAL IMPACT

35. The principle of good faith underlies not only treaty making but the conclusion of contractual engagements universally. In his commentary on Article 49, Niyungeko observed that, ‘...it is generally recognised that in setting forth sanctions for fraud, the Vienna Convention only reaffirmed a principle that already forms part and parcel of positive international law’.¹⁵

36. The proscription against clandestine eavesdropping on the deliberative functions of another treaty party is absolute. There are no shades to ethical conduct. Whether or not agreement is reached at a bugged negotiation the offending party has the benefit of the internal deliberations of the other such that the offender might adjust its tactics accordingly. Nor is it relevant, necessarily, and ultimately, whether corruptly, or, collaterally procured transcripts of the internal deliberations of the other party, may assist the offender’s negotiations, or, subsequent negotiations, or, not at all. Firstly, how may any level of admissible evidence of the effect of the eavesdropping be adjudicated? How may either party, perhaps with an entirely different government, argue *ex post facto* how it may or may not have negotiated if aware or exposed?

37. Both the United States, the United Kingdom and the Swiss delegations proposed during the drafting stage of Article 49 of the Vienna Convention that alleged fraud should be independently adjudicated. Namely, that the alleged fraudulent conduct should be tested, as a threshold issue.¹⁶ Ultimately, Article 49 was accepted unanimously by all delegations. There

¹⁵ Olivier Corten and Pierre Klein (Eds), *The Vienna Conventions on the Law of Treaties*, (Oxford University Press, 2011, Vol II) 1145.

¹⁶ *Report of the International Law Commission to the General Assembly*, Second Part, 17th & 18th Sess. UN Doc, A/6309/Rev.1 (1966); 1966 ILC Year Book Vol. 2, 10; OR 1968 CoW 262, [32].

Bernard Collaery

is, as yet, no States practice with respect to the application of Article 49. The development of procedures to introduce a threshold evidentiary step may be appropriate.

38. An offending State's response to neither confirm nor deny (NCND) accusations of clandestine eavesdropping on internal treaty deliberations of another State party particularly in international litigation is, as much as it is an admission, an affront verging on contempt of the international law processes be it the International Court of Justice, or, a breach of the Rules of Procedure of the Permanent Court of Arbitration that enjoin all States to cooperate.
39. Article 49 followed acceptance by the ILC that fraud should not be defined, and the concept should evolve in practice. Clandestine eavesdropping on the deliberations of a treaty party, let alone joint venture partner would constitute a particularly repugnant breach of the principle of good faith. It appears open to assert, with reason, that proven clandestine eavesdropping on the internal deliberations of the other party, vitiates, *ab initio*, the entire negotiation irrespective of the content of the conversations captured. In which case, the victim State should not have to establish injury and nor, for reasons of public policy, should the perpetrator State be permitted to argue lack of injury to the victim State and/or some other objective. Once the eavesdropping is established, both the negotiations and the outcome are irremediably tainted, and any enquiry into effect, moot.
40. Villager cites, '*Fraus Omnia corrumpit*. Fraud vitiates everything. Fraud leads to a mistaken impression of reality, but unlike error...it is the

Bernard Collaery

consequence of a deception by another treaty party'.¹⁷ Villager, again, citing Aust, Reuter, and, Oraison, says that, 'Article 49 requires that, without the fraud, the other State would not have given its consent'.¹⁸ It stands to reason that no State would conclude a treaty in the knowledge that its internal deliberations had been captured by the other State. The distinguished contributors to Dorr and Schmalenbach's commentary, observe that:

The fraudulent conduct and the concomitant error must have induced the other State to conclude the treaty. Similar to Art 48 the error must accordingly have constituted an 'essential basis' of the defrauded State's consent...The error is essential if the defrauded State would not have entered into the treaty had it known the real fact **or situation** ...The essential character of the error must be assessed against the objective yardstick of whether a third State in a similar situation would have refrained from giving its consent.¹⁹ (emphasis added)

41. Worldwide, in most common and civil law jurisdictions, duties, obligations and limits have been imposed on the parties to a wide category of commercial and private relationships. Within the common law, and, civil law jurisdictions, notions of good-faith, equitable conduct and fiduciary duty have been transposed in whole or part into statutory form. For example, legislation dealing with inside trading creating new categories of criminal offences. There was a time in the mid to late twentieth century when international law and municipal (or domestic) law were regarded as somewhat separate developments. Nowadays, the remarkable infusion of international law precepts into municipal law and *vice versa* is an ongoing process.

¹⁷ Mark E Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden, 2009) 615.

¹⁸ Mark E Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden, 2009) 617, footnote 20.

¹⁹ Oliver Dorr and Kirsten Schmalenbach (Eds), *Vienna Convention on the Law of Treaties - A Commentary* (Springer, Heidelberg, 2012) 846.

Bernard Collaery

42. Accepting the notion that fraud is a breach of good faith howsoever perpetrated, a starting point is to observe that the law generally is declaratory of both the nature and the effect of fraud. Hence, orders for compensation, reversals of transactions, specific performance, and, pecuniary and other criminal penalties. In international law, sovereign States have traditionally not been amenable to the exercise within their own jurisdiction of foreign laws, but this is changing. For example, controversial foreign law enforcement measures in the, as yet, non-ratified Trans-Pacific Partnership (TPP).²⁰

43. Nevertheless, the proscription of fraud, corruption of a representative, and, coercion in the VCLT²¹ is part of *ordre public international*. The provisions regulate the conduct of civilised nations upon which international order depends. In international law, fraud in treaty making is seen, with good reason, as at the top of the offence-book-a 'capital' offence, and in that sense, in a different category from municipal proscriptions of individual and corporate misconduct. In this context Niyungeko's observation resonates:

It must be said that ideological considerations were not absent in all the discourse on the desirability of incorporating in the Convention specific provisions on fraud. Some delegations, in particular, were of the view that incorporating such provisions was absolutely necessary, especially to protect the Third World countries likely to fall victim to fraud on the part of western countries that have greater mastery of technology as well as more experience and expertise in diplomacy and the art of negotiation.²²

44. During the drafting work of the International Law Commission (ILC) some countries, notably, Sweden and the United States, while not opposed in

²⁰ *Trans-Pacific Partnership Agreement*, signed 4 February 2016 at Auckland, New Zealand (not yet in force).

²¹ Timor Sea Treaty, Arts 49 (Fraud), 50 (Corruption) and 51 (Coercion).

²² Olivier Corten and Pierre Klein (Eds), *The Vienna Conventions on the Law of Treaties* (Vol. II, Oxford University Press, 2011) 1144.

Bernard Collaery

principle, noted that fraud in treaty making was likely to be so rare as to question whether there needed to be separate provision in a Convention. Nevertheless, the majority of States were in favour of the provision and in the event all delegations followed suit.²³ In his report, Sir Humphrey Waldock, Special Rapporteur, had cited the Commission's earlier views, namely:

Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties.²⁴

45. Evidently, Waldock was in favour of a separate provision dealing with fraud, observing:

... "Fraud" is, as it were, an "aggravated" ground of invalidity more akin to coercion than to innocent forms of misrepresentation and mistake.²⁵

THE VIENNA CONVENTION ON THE LAW OF TREATIES

46. The work of drafting and settling the VCLT commenced in 1949, the year I entered primary school. In 1969, some months before I was called to the Bar at Sydney, the VCLT was, to the delight of our Professor Julius Stone, laid open in Vienna for signature. The draft papers prepared over the years by the four eminent special *rapporteurs* to the International Law Commission²⁶ were so voluminous and illuminating that practitioners and

²³ *Report of the International Law Commission to the General Assembly*, Second Part, 17th & 18th Sess. UN Doc, A/6309/Rev.1 (1966); *Yearbook of the International Law Commission* (Vol. 2, United Nations, 1966) 10.

²⁴ *Report of the International Law Commission to the General Assembly*, Second Part, 17th & 18th Sess. UN Doc, A/6309/Rev.1 (1966); *Yearbook of the International Law Commission* (Vol. 2, United Nations, 1966) 245, cited in Arthur Watts (Ed.), *The International Law Commission 1949-1998* (Vol. 2, Clarendon Press, Oxford, 2000) 734-735.

²⁵ *Report of the International Law Commission to the General Assembly*, Second Part, 17th & 18th Sess. UN Doc, A/6309/Rev.1 (1966); *Yearbook of the International Law Commission* (Vol. 2, United Nations, 1966) 9.

²⁶ Humphrey Waldock, Hersch Lauterpacht, James Brierly and Gerald Fitzmaurice.

Bernard Collaery

teachers of that era, including Professor Julius Stone, adopted them as substantive statements of customary international law. In consequence, few international instruments derived from customary law, have such a body of extrinsic interpretive guidance as to the intention and meaning of the text than the VCLT.

47. Article 49 says;

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.²⁷

48. The Commission explained why a precise definition of fraud was not attempted:

Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. In international law, the paucity of precedents means there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept. In these circumstances, the Commission considered whether it should attempt to define fraud in the law of treaties., the Commission concluded, however, that it would suffice to formulate the general concept of fraud applicable in the law of treaties and to leave its precise scope to be worked out in practice and in the decisions of international tribunals.²⁸

49. Eminent Australian lawyers have participated in the exposition and development of international law. Successive governments in Canberra endorsed, in a wide variety of statements and instruments, Australia's adherence to customary international law principles. Australia also participated in, and at times assumed a key role in the preparatory work of international treaty law. This role is so well recognised that there is no need

²⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art. 49.

²⁸ *Report of the International Law Commission to the General Assembly*, Second Part, 17th & 18th Sess. UN Doc, A/6309/Rev.1 (1966); *Yearbook of the International Law Commission* (Vol. 2, United Nations, 1966) 244.

Bernard Collaery

to traverse that involvement. Relevantly, Australia endorsed principles of law and conduct enshrined in the VCLT, the Vienna Convention on Diplomatic Relations (VCDR) and UNCLOS.

50. On 16 December 1963, pursuant to Article 13 of the UN Charter, Australia was appointed by the UN Secretary-General to a Special Committee representative of 'the principal legal systems of the world' that would draw up a statement of principles of international law concerning friendly relations and co-operation between States.²⁹ The Secretary-General asked States to appoint eminent jurists.

51. A team of Australian lawyers from both the Australian Attorney-General's Department and the Department of External Affairs led in part by Sir Kenneth Bailey QC played a prominent role in the development of the statement which in 1970 was adopted by the General Assembly as a Charter of principles, namely;

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

52. Under the rubric that States should fulfil in good faith the obligations assumed by them, the General Assembly further proclaimed the following principles:

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

²⁹ *Consideration of the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 1966 (XVIII), 18th sess, 1281st plen mtg, (16 December 1963).

Bernard Collaery

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.³⁰

53. The Assembly further declared that the principles so embodied, 'constitute basic principles of international law' and that States should, 'develop mutual relations on the basis of strict observance of these principles'.

54. In the *Nuclear Tests Case*, Australia's Attorney-General Lionel Murphy QC, Solicitor-General Sir Maurice Byers QC and Sir Eli Lauterpacht QC saw fit to agitate the principle of good faith in international affairs. The judgement of the Court reflected this:

One basic principle governing the creation and performance of legal obligations, whatever their source, is the principle of good-faith. Trust and confidence are inherent in international co-operation, in particular in an age where this co-operation in many fields is becoming essential.³¹

55. Ethical conduct and the treatment of all as equals before the law is fundamental, and the standard bearer must be the First Law Officer of Australia, the Attorney-General.

56. The *Intelligence Services Act 2001 (C'th)* has not delivered public trust in an agency that should act within the rule of law in the vital interests of all Australians. The *Intelligence Services Act* must be rewritten with lessons learned from the United Kingdom, and, effective operational oversight mechanisms implemented as in the United States, United Kingdom, Germany, Holland and Denmark.

³⁰ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GOAR, 25th sess 1883rd plen mtg (24 October 1970).

³¹ *Nuclear Tests Case (Australia v France) (Judgement)* [1974] ICJ Rep 253, 268.

Bernard Collaery

57. All eyes should now be on the review of Australia's laws relating to the control and oversight of Australia's intelligence agencies being conducted by Dennis Richardson. I was pleased to learn that at least one of Australia's distinguished human rights agencies, namely, the *Victorian Human Rights Law Centre* whose Director Hugh de Kretser is here tonight received an early request for contribution from Dennis Richardson.

58. The *Intelligence Services Act 2001 (C'th)* may be of little use in preventing maverick activity unless it is backed, as is similar legislation in the UK, by embedded human rights and privacy instruments. Some years ago, I appeared as Counsel in a very sensitive UK Inquest into the loss of an RAF Special Force aircraft and crew in Iraq. The case involved ongoing operational issues and was governed by Article 2 of the UK Human Rights Act 1998, namely, the State's obligation to protect human life. Although it was wartime, the UK Judge used the inherent powers of the Court to regulate proceedings. National security issues including the identity of witnesses requiring great secrecy were protected without the need to have in the courtroom government lawyers representing an unlisted party, namely a British politician, waving a piece of anti-terrorist legislation so as to declare unpalatable matters, 'sensitive'. The UK had legislation similar to the NSI Act to prevent terrorists exploiting their trial. I am confident in saying that our distinguished UK Judge would have given any such an intervention in a court-room, where all parties were seeking the truth, short shrift.

59. Laws governing intelligence agencies are black letters in the wind unless agencies are subjected to objective operational Parliamentary oversight by non-Cabinet controlled politicians regarded inside and outside of the Parliament as persons of integrity who understand that rule of law comes first in a Parliamentary democracy.

Bernard Collaery

60. In their recent book³², widely hailed on both sides of the Atlantic, Sir David Omand who spent many years at the highest levels of UK intelligence operations, and, Professor Mark Phythian, political scientist and renowned commentator on intelligence issues, pose ethical issues missing from open debate in Australia concerning the management of Australian intelligence agencies. The authors traverse the string of adverse judgements in UK and EU courts over more than 30 years that led to ground-breaking legislative controls, and, adoption of ethical rules in planning and executing intelligence operations. Relevantly, s7 of the *Intelligence Services Act 1994 (UK)*, was drafted in acknowledgement that British officers planning an operation that involved breaking a law overseas could also be guilty of conspiracy in the United Kingdom. Such accountability was seen as fundamental to ensure that British intelligence officers comply with domestic law.³³

61. In Australia the *Intelligence Services Act 2001* avoided the specifics in UK legislation. Gifted with a vague and imprecise charter and free of the inhibitions imposed in the United Kingdom by court review backed by hard-biting EU and UK human rights and privacy legislation ASIS has failed to secure public confidence. Speaking of UK legislation, a forerunner to Australian legislation, Sir David Omand observed that it, ‘...limits the work of the agencies to only three statutory functions: upholding national security, detecting and preventing serious crime, and, safeguarding economic well-being (the latter is qualified as having to originate from outside the nation and be of national security concern). These three purposes provide for the UK agencies an outer ethical limit for their work,

³² David Omand & Mark Phythian, *Principled Spying-The Ethics of Secret Intelligence*, (OUP, 2018)

³³ *Ibid*, 61-62.

Bernard Collaery

as part of a statutory *jus ad intelligentiam*. The use of national intelligence for any other purpose would be unjust (and unlawful).'³⁴

62. In another comment, so apposite today, Omand says that the UK provision for national intelligence to be deployed for safeguarding economic well-being should be seen as part of the broad national security area of responsibility. He then observes that the 'economic well-being' empowerment, '...excludes commercial espionage for the competitive advantage of national companies'. Significantly, Omand, a former Director of Britain's legendary GCHQ (the UK's *Signals Intelligence and Cyber Security Agency*) reasserts the embargo in the Five Eyes Agreement (the *UK/USA Agreement*) on commercial espionage.³⁵ In the United States, the test has been seen as, '...a serious evaluation of the importance of the activity to our total national security and foreign policies'.³⁶

CONCLUSION

63. The 1689 Bill of Rights started the contentious argument about freedom of expression. In that respect, it was the vital right of being able to keep one's neck in criticising abuse of Executive power of the Crown. In Australia, we are back in that dangerous country.

64. Madeleine Albright's recent book, *Fascism A Warning*³⁷ is a quick read. The former US Secretary of State reminds us of parallels in the early moves to undermine the justice system and the media in pre-fascist Italy and pre-fascist Germany. Images of Benito Mussolini warning Italians about the

³⁴ *Ibid*, 75-76.

³⁵ *Ibid*, 78.

³⁶ *Ibid* 132.

³⁷ Madeline Albright, *Fascism A Warning*, (William Collins, London, 2018)

Bernard Collaery

need to suspend laws so as to combat anarchists seem chillingly familiar. History tells us we need strength from within. We need to fortify our government legal brethren recognising that they have, in these difficult times a role which they perform, overwhelmingly, with unimpeachable integrity. We need the leadership of our private practising profession to make clear to any government-employed lawyers who are, in rare instances not so inclined, that they are to be bound by ethical codes of conduct or cease to purport that they belong, as lawyers, in our ranks.

65. It is too easily forgotten that after the military tribunals in 1945, the 12 Nuremberg successor trials embraced corporate executives, judges and lawyers, and Foreign Ministry diplomats. In particular, recalling the terrible fate that awaited so many Timorese who died and were dispossessed soon after 28 November 1975 we should recall the trials before the International Military Tribunal of the German public servants who directed the expropriation of Jewish assets in occupied territories. There has to be a moral reckoning if we are to clear our national conscience over our exploitation of the Timorese. Until we put law-breaking politicians and their accessories to their trial we never will.

Bernard Collaery

28 November 2018

Bernard Collaery