ANZSIL

PERSPECTIVE

DECEMBER 2021 **EDITION 26**

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EDITORIAL

Many of our readers are winding down for the year with their summer reading. We hope that this edition's Perspectives will become valued additions to your lists. This month we have Monique Cormier, John Morss and Alberto Alvarez-Jimenez.

ANZSIL Perspectives has grown this year with the able support of the editorial team and with encouragement of the ANZSIL Council. We also moved to an external facing online platform with all previous editions archived.

In 2021, we published 14 Perspectives on topics as broad as fisheries, artificial intelligence, and lethal autonomous weapons systems.

After a well-earned break, we aim to return fresh-faced in the new year to approach our membership and the wider international legal community for your expert thoughts on the complex world of international law. I look forward to receiving submissions from a diverse range of scholars who have previously contributed to ANZSIL Perspective, and welcoming new and emerging authors at every level of postgraduate scholarship and legal practice.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 25 February 2022. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

PERSPECTIVES

The International Legal Implications of AUKUS: A Poor Precedent for Non-Proliferation

By Monique Cormier

We don't yet know very much about the AUKUS trilateral security partnership beyond the announcement that its 'first major initiative… will be to deliver a nuclear-powered submarine fleet for Australia'. This news triggered a wave of commentary on the diplomatic, security and technical implications of Australia's planned acquisition of nuclear-powered submarines, but the legal implications of this development have yet to be fully explored. In this short piece I will consider the potential ramifications for the international nuclear non-proliferation regime, focusing on the Nuclear Non-Proliferation Treaty of 1968 (NPT) and related agreements.

Nuclear Non-Proliferation Treaty

At the time of the AUKUS announcement, Prime Minister Scott Morrison took pains to assure the world that Australia has no plans to develop or otherwise acquire nuclear weapons, nor does it intend to develop a civilian nuclear industry. The submarines would be conventionally armed and powered by naval nuclear propulsion technology shared with Australia by the US and the UK. This, Morrison asserted, means that the acquisition of nuclear-powered submarines will not fall foul of Australia's nuclear non-proliferation obligations under the NPT. What are these obligations?

Australia is a party to the NPT which is the principal international agreement for the non-proliferation of nuclear weapons. It contains different obligations and responsibilities for those states that possess nuclear weapons and those that do not. Under the NPT, non-nuclear weapon states have promised not to manufacture or acquire nuclear weapons or nuclear explosive devices. Non-nuclear weapon states are allowed to develop and use nuclear energy for 'peaceful purposes', with the caveat that they allow the independent International Atomic Energy Agency (IAEA) to verify that any nuclear material is not diverted to the development or manufacture of nuclear weapons. There is no definition or explanation of what constitutes 'peaceful purposes' in the NPT. While nuclear propulsion technology is clearly not the equivalent of a nuclear weapon or a nuclear explosive device, it is not as if these submarines will be used to conduct peaceful scientific exploration.

A legal grey area

This question of non-peaceful nuclear activities that do not involve nuclear weapons takes on greater significance when we consider the legal grey area in the NPT-IAEA safeguards system. This grey area falls between the NPT's prohibition on non-nuclear weapon states manufacturing and acquiring nuclear weapons on the one hand, and the NPT's requirement that non-nuclear weapons states accept IAEA safeguards on fissionable material to be used in peaceful nuclear activities on the other. The NPT is silent on the use of nuclear material by non-nuclear weapon states in military activities not specifically banned by the treaty, which means there is no requirement that any nuclear material used for such non-peaceful, non-proscribed military purposes be subject to the IAEA verification regime.

The comprehensive safeguards agreements between the IAEA and non-nuclear weapon states make this apparent gap in the NPT more explicit. The NPT requires non-nuclear weapon states to conclude comprehensive safeguards agreements with the IAEA, the

majority of which are based on a 1972 document referred to as INFCIRC/153. Paragraph 14 of this document—and the equivalent Article 14 of most concluded safeguards agreements—allows a state party intending to use nuclear material for 'non-peaceful', 'non-proscribed military activities' to make an arrangement with the IAEA under which that nuclear material will be 'unsafeguarded'. Such material may be withdrawn from the IAEA verification regime only for the period in which it is being used in said non-peaceful activities. There are complex technical considerations that dictate when the material should be reinstated under the safeguards system, but it is left to the states withdrawing the material to be honest and transparent about when the safeguards should be reactivated. The purpose of this loophole in the verification regime is so that states are not obliged to share information about classified military technology with the IAEA. But once nuclear material is withdrawn from the verification regime, it effectively goes into a black hole as far as the safeguards system is concerned and there is nothing other than a promise from the state in question that the material is safe from diversion to nuclear weapons.

The NPT's silence on the use of nuclear material for non-peaceful, non-proscribed military purposes was not an oversight. At the time of the treaty's drafting, some non-nuclear weapon states were contemplating nuclear-propelled vessels for their navies and wanted to ensure that such activities would not be prohibited. Non-nuclear weapon states were also resistant to the prospect that they would be obliged to subject any non-proscribed military use of nuclear material to IAEA safeguards, but nuclear weapon states would not. In the end, this loophole was allowed into the treaty so that a consensus could be reached on the text of the NPT. The implicit exemption of non-peaceful, non-proscribed military activity from IAEA safeguards in the NPT was then made explicit in INFCIRC/153.

Past precedent

Early plans of some non-nuclear weapon states for nuclear-propelled vessels did not eventuate, and very few such states have pursued this technology since. In 1987 Canada announced that it would be purchasing a fleet of nuclear-powered submarines which, at the time, raised similar analysis and consternations to those stimulated by the recent AUKUS news. Had the Canadian plan to acquire the submarines progressed, Canada would have been the first non-nuclear weapon state to invoke Article 14 of its comprehensive safeguards agreement. Ultimately, public opinion turned against the nuclearization of Canada's navy and Canada did not have the support of the US, and so the plan was quietly scrapped.

The only other non-nuclear weapon state that has publicly acknowledged that it is pursuing a nuclear-powered submarine fleet is Brazil. Brazil has been working toward this goal since the 1970s and has developed its own uranium enrichment capacity and is working on designing and building its own naval propulsion reactor. Interestingly, Brazil considers nuclear propulsion in submarines to be 'a peaceful application of nuclear energy', largely so it aligns semantically with the regional obligation for nuclear energy to be used 'exclusively for peaceful purposes' under the Tlatelolco Treaty. To this end, Brazil has also negotiated a slightly different Comprehensive Safeguards Agreement with the IAEA to recognize its perception of nuclear propulsion as a peaceful activity. There remains a clause that allows Brazil to negotiate with the IAEA to limit the Agency's access to any nuclear material being used for nuclear propulsion, but this clause has not yet been invoked by Brazil. Current estimates are that Brazil will not have a fully operational nuclear-powered submarine until the mid-2030s. Given the fact that AUKUS is in its very preliminary stages, if the nuclear submarine plan goes ahead, it is unlikely that any Australian submarines will be in the water until the mid-to-late 2030s, so it may very well be a race between Australia and Brazil as to which non-nuclear weapon state reaches their goal first.

Poor precedent

One of the key issues with Australia acquiring nuclear submarine material and technology from the UK and the US is that it will likely involve the use of Highly Enriched Uranium in their nuclear reactors. Brazil, on the other hand, is predicted to use Low-Enriched Uranium for its submarines. The important difference between the two enrichment levels is that Highly Enriched Uranium is weapons-grade, meaning it can much more easily be diverted for use in nuclear weapons. There is no real danger that Australia will divert nuclear material to use in weapons, or that it will otherwise lose track of unsafeguarded material. The three AUKUS states immediately notified the IAEA which plans to engage with them 'in accordance with their respective safeguards agreements'. The main concern is that acquisition of nuclear-powered submarines will undermine the long-held norm against withdrawing material from the IAEA verification regime and set a poor precedent for other non-nuclear weapon states. If Australia can withdraw Highly Enriched Uranium from IAEA safeguards, why can't others?

While the US and the UK are unlikely to share their nuclear-propulsion technology with any other allies, Russia also has a fully developed nuclear submarine fleet powered by Highly Enriched Uranium. AUKUS has already raised speculations that Russia might decide to 'market its nuclear-powered submarines to other nations'. It should also be borne in mind that twenty-two countries have at least 1kg of Highly Enriched Uranium in their civilian stores, with eight countries possessing more than 1000kg. Aside from nuclear-powered submarines, other non-proscribed military activity for which safeguards could conceivably be withdrawn include the actual or feigned development of military research reactors and nuclear propulsion for space vessels.

A lot can happen in fifteen years…

The above brief discussion of some of the issues with the NPT and its verification grey area is really just the tip of the iceberg for the legal and political ramifications of

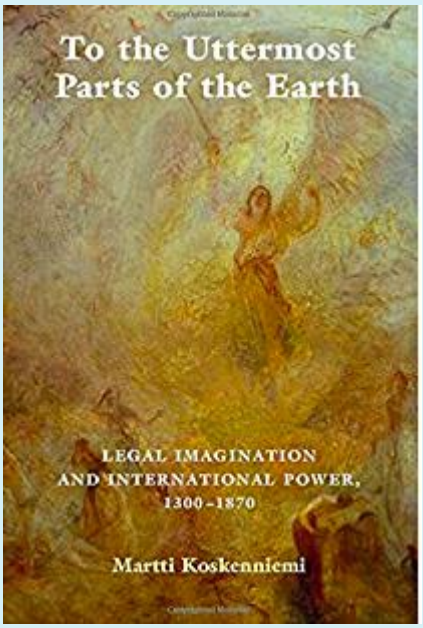
Australia's plan to acquire nuclear-powered submarines. There are complex bilateral nuclear cooperation agreements that need to be factored in (and possibly renegotiated); Australia will need to assure its allies in the South Pacific that the regional nuclear-free zone will be respected; and there are concerns that AUKUS will also undermine the norms relating to the regulation of missile trade. Australia's plan to acquire Tomahawk cruise missiles as part of the AUKUS arrangement has not received quite as much media attention, and yet raises other questions about Australia's commitment to non-proliferation more broadly.

Australia's rationale for acquiring nuclear-powered submarines is that they are needed for national and regional security. But the global security environment is continually evolving, and fifteen years is a long time in international and domestic politics. Whether or not the AUKUS submarine plan goes ahead remains to be seen. In the interim, however, the fact that Australia will even be considering invoking loopholes and technicalities in the legal frameworks will only serve to undermine the international non-proliferation regime.

About the Author: Monique Cormier is a Senior Lecturer at the University of New England School of Law in Armidale, New South Wales. Her main research interests are jurisdiction in international criminal law and legal issues relating to nuclear non-proliferation. Recent publications include *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press, 2020) and 'Can Australia Join the Nuclear Ban Treaty without Undermining ANZUS?' (co-authored with Anna Hood, *Melbourne University Law Review,* 2020).

A Review of 'To the Uttermost Parts of the World' by Martti Koskenniemi

By John Morss



At some 1100 pages plus, *Uttermost Parts* is a heavyweight contribution in several senses of the word. This review will broach the following questions: What is Koskenniemi trying to achieve, and has he succeeded? What do writers and teachers of international law have to re-think, if anything, as a consequence of the publication of this work?

Koskenniemi is disarming as to his aspirations: his first sentence is 'This is not a history of international law.' The book then is prehistory, or context, of what we now call international law. It spans most of six centuries and with a focus in turn on developments in what we would now call France, Spain, and Britain, and in the German speaking heart of Europe, it leaves us poised at the brink of the modern international legal system of *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960.*

Koskenniemi's magisterial survey takes in the Salamanca struggles over the status of Spain's conquered 'Indians'; colonial France, with slavery blithely overlooked by the revolutionary constitution-makers of the metropole; the institutionalized bad faith of

British politicians pretending not to dominate India or China; the rigour of German articulations of statehood; and much, much beside. Contributions from philosophy and from political theory over these centuries are reviewed with great insight, and always with an eye to the humdrum realities of governance and of accountability even when the latter is 'only' to the deity[JM1] . As far as methodology is concerned Koskenniemi's key term is *bricolage*, by which he means (more or less) the just-in-time assembling of arguments, always for a purpose.

Towards the end of the book Koskenniemi says that his topic has been 'legal imagination in its relationship to power abroad.' 'Abroad' is a word with several meanings, one of which is 'out and about' or 'on the loose' or even 'on the prowl.' While wider than Koskenniemi's meaning, it is a suitably elastic term. The many examples in the book are not readily characterised as being about 'home versus away', or 'municipal versus international', or 'us versus them' - 'foreign relations' so to say. Perhaps Koskenniemi is our anti-Schmitt[JM2] .

In this context however, the claim at p800 that 'squar[ing] the circle of the simultaneous validity of imperial and territorial laws [within the Holy Roman Empire] is the international law problem *par excellence'* seems a little unreconstructed.

It seems to me that the first of Koskenniemi's major achievements is, in demonstrating the immensely greater importance of civilian legal traditions as compared to English speakers' vaunted common law, in the prehistory or 'origin story' of international law.

Second, the intertwining of political understandings of authority and of property, of sovereign power and private rights, the story of which is Koskenniemi's golden thread, were immensely more complex and consequential than the parallel or even insulated development sometimes portrayed by other writers. Rather than princes and merchants operating in different worlds with the occasional fellow travelling, as with Elizabethan

privateers, it is the moments of autonomy of one or the other that are the exception. For example, the significance of private property rights in the clash between Pope Boniface VIII and Philip of France, dealt with at the very beginning of the book, is both illuminating of larger processes and at the same time a vital component of a deeply legal and text-based contestation. And it is this writing-based nexus that provides the platform for Koskenniemi's whole project, so that demonstrating the immense significance of written authority and written argumentation, and hence of book-based legal training, is itself a third achievement.

In terms of our familiar origin stories, the Treaty of Westphalia is, thank goodness, contextualized almost out of existence. Its treatment here reminds us how very primitive is the account of the prehistory of international law presented in the average textbook. Relatedly, the powers and limitations of the Papacy are traced by Koskenniemi in various periods from the late 13th century onwards. At no time did the Papal aspirations and the political actualities ever converge in the cartoon manner that our students cannot be blamed for interiorizing. Looked at in this way, the centrality of power as theme in *Uttermost Parts* is worked out in Foucauldian ways, with the capillaries of power being traced and indeed anatomized through discourse and through discourses. As Koskenniemi says at p12, this is 'a history "of the present."'

Does Koskenniemi successfully eschew grand narratives? In many ways he strenuously attempts to, anthropologically disdaining big picture formulae, instead adopting an inductive approach by which no common substantive connection need be found between examples that can all be categorized as the law of power abroad. Nonetheless, insistently reading everything through *bricolage* is itself a kind of grand narrative, especially when the legal training of participants is given so much explanatory heft amongst their materials at hand (where 'materials at hand' refers to available resources). The application of the term *bricolage* is perhaps no more rigorous than was the

application of other structuralist vocabulary in *From Apology to Utopia* and as in that iconic work, the main function of the vocabulary may be just to[JM4] get the ball rolling.

On practical matters, the bibliographical detail does seem excessive. Much of the content of the footnotes could have been located online, together with most of the 100 page Bibliography, original versions of translated materials, and English translations of passages in Latin. A slimmed down volume, perhaps trimmed to the modest 700 page length of *From Apology to Utopia,* would suffice to convey the text. In terms of the limitations Koskenniemi has imposed on himself in focusing his attention on Christian male writers, the rationale that he gives at p13 is very similar to that presented at the beginning of *Gentle Civilizer*, namely that to do so is in some way a gesture of protest at the discipline's limitations; but this claim may be to protest too much. These are minor quibbles however. So long as too much oxygen is not taken from other writers in this age of the attention economy, the limelight accorded Koskenniemi is well deserved and this book will become part of the landscape for international legal scholars, and indeed part of the furniture for teachers of the discipline. How its contents and its claims will be appropriated, it remains to be seen.

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The New Zealand Supreme Court and the UN International Law Commission: A Dialogue on Subsequent Conduct in the Interpretation of Contracts and Treaties

Alberto Alvarez-Jimenez

"The written word is unalterable". F. Kafka. *The Trial*

The New Zealand Supreme Court (NZSC) in *Bathurst Resources Limited v L & M Coal Holdings Limited* recently explored the issue of evidence of subsequent conduct in the interpretation of contracts. Generally, the role of subsequent conduct is limited. In 2018, the United Nations International Law Commission (ILC) examined in detail the use of subsequent agreements and practice in the interpretation of international treaties under art 31(3)(a) & (b) and art 32 of the Vienna Convention on the Law of Treaties. The role of these subsequent agreements and practices can be significant. Despite the contrast between contracts and treaties, the ILC's work can be valuable to the NZSC. This Perspective explores how.

Treaties & Contracts

Unquestionably, treaties and contracts differ. As Sir Kenneth Keith showed, treaties are exercises of state sovereignty pursuing general goals, whilst contracts are generally expressions of free will for private purposes. Their interpretation also varies. Contracts must be interpreted at the time the parties entered into them, but treaties may also be interpreted in an evolutionary way. However, contracts and treaties create rights and obligations, which require interpretation and the interpretative processes have common grounds.

Bathurst v L & M

The NZSC has embraced the objective approach to contract interpretation. It said in this decision:

> the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

The application of the objective approach may also involve assessments of the parties' subsequent conduct for it can constitute evidence of the meaning of the given contract. The NZSC offered some examples of subsequent conduct relevant for the purpose of interpretation: mutual conduct, or non-mutual conduct particularly that which is more likely to be pertinent to a claim of estoppel.

To be admissible in the context of contractual interpretation, evidence of subsequent conduct must not needlessly extend the proceedings. Otherwise, the evidence will be excluded pursuant to Section 8 of the Evidence Act. No similar requirement exists in international law.

From the ILC to the NZSC

The ILC's work could add layers to the NZSC's dimensions of subsequent conduct:

1. The ILC recognises that subsequent practice does not need to be joint conduct. Parallel conduct by the parties may be enough, although it must be a sufficient common understanding as to the interpretation of the treaty. A common understanding requires mutual awareness of such understanding.

2. What if there is equivocal conduct? It will sometimes preclude the existence of an agreement, but interpreters should delve deeper into the analysis and evaluate if the treaty provision (or contract clause) accords discretion to the parties. If this is the case, what appears as equivocal conduct is not a conflict of perspectives on the content of the given provision but different exercises of the discretion the precept grants. Moreover, temporary differences of opinion do not mean that the difference is permanent and that no agreement exists.
3. The ILC also explores the issue of a difference of opinion which arises after a subsequent agreement on interpretation has been established under art 31. In the event of a common understanding based on subsequent practice, the ILC is of the view that the rejection by one party undermines the weight attached to the practice, but only after the beginning of the disagreement.
4. The ILC also deals with the weight conferred to subsequent practice in the interpretation process, a topic *Bathurst v L & M* touches upon. The ILC states that weight depends on clarity, specificity, and repetition. Furthermore, the ILC uses the expression "whether and how" the practice is repeated. The ILC finds two standards regarding repetition. One is supported by the WTO Appellate Body, which demands a concordant, common and consistent subsequent practice. A second, more flexible standard is applied by the ICJ. The ILC prefers the latter, for there is no evidence that the Appellate Body's approach is a well-established minimum threshold for a subsequent practice to be used under art 31.3(b). The NZSC could explore the criteria concerning weight and the standards on repetition.
5. Finally, the ILC assesses the possible effects of subsequent practices under art 31. The first is to help interpreters identify the ordinary meaning of a particular term. The term might have different possible meanings with broader or narrower implications. An international court or tribunal may have preliminarily chosen one, and the use of subsequent agreements and practices under art 31 may confirm

the choice made. Secondly, treaties may have a variety of objects and purposes. Additionally, there may be general objects and purposes of a treaty, but certain provisions may have also a specific object and purpose. The use of subsequent agreements and subsequent practice can help courts and tribunals clarify the object and purpose that is more relevant to the precept being interpreted. This analysis can equally apply to the assessment of the background knowledge in contract interpretation.

From the NZSC to the ILC

Subsequent conduct contradicting the party's interpretation in judicial proceedings merits a comment. This class of non-mutual subsequent conduct was relevant in *Bathurst v L & M* but is rarely mentioned by the ILC, though it should have been. It is not subsequent practice under art 31(3)(a) or (b) but could only be so under art 32, which is not the appropriate fit for this practice. International courts and tribunals routinely assess it under art 31(1).

In summary, the ILC has made an important contribution to the conceptualization of subsequent practice within the interpretation of treaties, on which the NZSC and other domestic courts could draw on for the interpretation of contracts.

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