

**DAVID HICKS, STERN HU, SCOTT RUSH, JOCK
PALFREEMAN AND THE LEGAL PARAMETERS OF
AUSTRALIA’S PROTECTION OF ITS CITIZENS ABROAD**

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[The arrest and detention of Australians overseas continues to make headline news. What Australia is able and willing to do to assist one of its nationals imprisoned abroad is a complex issue steeped in legal questions and political considerations. Legal avenues for assisting Australians imprisoned abroad are explored in this article through an examination of the relatively high profile cases of David Hicks, Stern Hu, Scott Rush and Jock Palfreeman. In navigating the legal framework, three broad themes emerge: the bond of nationality, the protection of human rights, and the importance of reciprocity. It is argued here that, from both a legal and political perspective, greatest emphasis should be placed on reciprocity in order to best understand the decisions the Commonwealth government may make and the options available to the individuals concerned.]

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I INTRODUCTION

When Australians travel overseas, they are increasingly likely to seek the aid of their government.¹ The reasons for doing so range from lost passports and minor theft, to being caught in the midst of an armed conflict or a major natural disaster. One situation that often receives media attention is the arrest or

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¹ For a discussion of the increased demand of Australian nationals abroad for consular assistance, see Hugh White, ‘Looking after Australians Overseas’ (Policy Brief, Lowy Institute for International Policy, October 2007) <<http://www.lowyinstitute.org/Publication.asp?pid=695>>.

detention of Australian nationals abroad.² The media scrutiny might arise because the crime is not one recognised in Australia,³ or because the penalty is viewed in Australia as disproportionate to the offence committed.⁴ This latter aspect has particularly featured in relation to Australians who have been sentenced to death for drug trafficking offences.⁵ The public pressure on the Australian government to 'do something' to assist these Australians has become significant in relation to some individuals who are detained, arrested, convicted and sentenced in foreign criminal justice systems.⁶

This article explores the international law avenues open to Australia to protect its nationals when they are imprisoned abroad. Critical in this regard is Australia's right of diplomatic protection, which is the right of a state to take up the claim of one of its nationals and assert his or her rights against another state.⁷ The content of this right has shifted slightly in recent years,⁸ and additional rights and duties inhere to the state by virtue of different treaties that may be available to provide further protection to Australians overseas. These treaties

² The arrest of Julian Assange, the director of the controversial WikiLeaks organisation, for sexual misconduct, has most recently thrust Australia's assistance of its nationals abroad into media headlines. See, eg, 'Open Letter Calls for Gillard to Defend Assange', *ABC News* (online), 7 December 2010 <<http://www.abc.net.au/news/stories/2010/12/07/3087189.htm>>; Annie Guest, 'Hundreds Rally in Support of Assange', *ABC News* (online), 11 December 2010 <<http://www.abc.net.au/news/stories/2010/12/10/3090312.htm>>. Assange was arrested in the United Kingdom ('UK') for charges filed in Sweden, and may also face an extradition request to the United States ('US') following the release of US government diplomatic cables on the WikiLeaks website: Tony Eastley, 'Assange to Meet with British Police', *ABC News* (online), 7 December 2010 <<http://www.abc.net.au/news/stories/2010/12/07/3086417.htm>>.

³ One such example is the case of Harry Nicolaides' conviction for *lèse majesté* for insulting the Thai monarchy: 'Nicolaides in Line for Royal Pardon', *ABC News* (online), 16 February 2009 <<http://www.abc.net.au/news/stories/2009/02/16/2493073.htm>>.

⁴ A pertinent example is the Australian mother jailed for stealing a bar mat in Thailand: see below nn 178–179 and accompanying text.

⁵ The execution of Australian Tuong Van Nguyen in Singapore, following the imposition of a mandatory death sentence for drug trafficking, is a relevant example: 'Australian Executed in Singapore', *BBC News* (online), 2 December 2005 <<http://news.bbc.co.uk/2/hi/asia-pacific/4487366.stm>>. See generally Michael Hor, 'The Death Penalty in Singapore and International Law' (2004) 8 *Singapore Year Book of International Law* 105.

⁶ For ease of reference, these individuals are referred to collectively as 'prisoners', even though the circumstances of someone detained compared to someone convicted or sentenced may be different.

⁷ In *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 12, the Permanent Court of International Justice articulated this right of diplomatic protection as follows:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

⁸ The International Law Commission, which is a United Nations body with responsibility for the progressive development and codification of international law, adopted a set of draft articles on diplomatic protection in International Law Commission, *Report of the International Law Commission*, UN GAOR, 58th sess, Supp No 10, UN Doc A/61/10 (1 May 2006) 13–100 ('*ILC Articles on Diplomatic Protection*').

include consular agreements, mutual legal assistance treaties and prisoner transfer agreements. The plights of four particular Australian prisoners are examined in this article as a means of demonstrating the parameters of government action in the realm of international law. Governmental rights and duties, as well as the rights of the individuals concerned, will be addressed. The critique provided seeks to highlight the gaps and inadequacies in relation to matters of law, as well as to demonstrate the pervasive influence of political concerns when issues of protecting Australian prisoners abroad arise.

In analysing the international law avenues available and government decision-making in relation to these avenues, three distinct themes emerge: the bond of nationality, concerns for human rights or humanitarian considerations, and the importance of reciprocity. The bond of nationality is clearly fundamental in this area, as the government's right to take up the claim of an individual is most commonly predicated on the link of nationality.⁹ There has been an increasing appreciation that legal principles need to account for multiple nationalities,¹⁰ or situations where ties of residence are greater than ties of nationality.¹¹ Yet there have also been instances where states have sought to rely on ambiguities of nationality as a means of denying any need to offer legal protection.¹² Thus, while nationality is an important tool for protecting prisoners abroad, there are undoubtedly restrictions.

As the bond of nationality has its limits, there instead needs to be an alternative unifying force or concept that should be the fulcrum for decision-making in this area. The second key theme explored here in assessing the legal protection of Australians abroad is concern for human rights or humanitarian considerations. One clear lesson we learn in examining the legal avenues for Australia's protection of its nationals imprisoned overseas is that a more rigorous approach to the legal framework is required if human rights violations and humanitarian concerns are to be redressed. Australia's human rights obligations are potentially at stake in light of its commitment to established rights like due process, freedom from arbitrary arrest or detention, and the prohibition of torture

⁹ See generally Natalie Klein and Lise Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality' (2007) 13(1) *Australian Journal of Human Rights* 1, 4–5; *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466.

¹⁰ For discussion of this issue in an Australian context, see Kim Rubenstein, 'From Supranational to Dual to Alien Citizen: Australia's Ambivalent Journey' in Simon Bronitt and Kim Rubenstein (eds), *Citizenship in a Post-National World* (Federation Press, 2008) 38. For discussion in an international context, see Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 *Indiana Journal of Global Legal Studies* 519.

¹¹ *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 41–7. See also Craig Forcece, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law' (2005) 37 *George Washington International Law Review* 469; Kim Rubenstein, 'Rethinking Nationality in International Humanitarian Law' in Ustina Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff, 2006) 89, 92–3.

¹² A key example here is the UK's efforts to deny David Hicks his British nationality. See Klein and Barry, above n 9.

or other cruel, inhuman or degrading treatment or punishment.¹³ There are thus a variety of both individual rights¹⁴ and human rights that may be brought into play when considering the plight of an Australian imprisoned overseas. The individual concerned may seek to enforce these rights through national courts, but the violation of human rights may also warrant Australia exercising its right of diplomatic protection. Yet, as will be discussed, political considerations appear to influence the extent that these rights are pursued on an inter-state level. Without strong adherence to the rights enshrined in different legal principles, the risk is that we endorse an approach that allows political interests to trump humanitarian interests in a manner that is anathema to the rule of law.

The third, and most critical, theme that may be discerned from the legal parameters for protection of Australian prisoners overseas is reciprocity. Reciprocity, it is argued here, is the most useful tool to rely on in seeking to improve government decision-making in such a way that the rights of prisoners will be enhanced. Reciprocity has considerable resonance within international law, as it has long been accepted as a key component of compliance in international law.¹⁵ It is especially pertinent to questions relating to diplomatic and consular relations.¹⁶ As one illustration, a state will be careful in calculating what amount of delay is acceptable in advising a consulate of the arrest or detention of one of its nationals, cognisant that a comparable delay may be imposed in relation to its own nationals.¹⁷

Reciprocity is also relevant in assessing the political dynamics arising when a state imprisons a national of another state. The bilateral relationship between the countries concerned may result in issue-linkage between the case of the national imprisoned and another separate aspect of the bilateral relationship. Violations of

¹³ Australia is bound by these obligations because it is a party to treaties such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). Rights of due process are protected under *ICCPR* art 14, freedom from arbitrary arrest is enshrined in art 9 and the prohibition against torture is stated in art 7.

¹⁴ See, eg, below n 81.

¹⁵ Bruno Simma, 'Reciprocity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, online ed, 2008) [19], where Simma commented that '[a]s a horizontal legal system, international law rests upon the logic of reciprocity in its entirety'. See also the discussion in Antonio Cassese and Joseph H H Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988) 10–12; René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 123. A seminal assessment of reciprocity in international relations scholarship is Robert O Keohane, 'Reciprocity in International Relations' (1986) 40 *International Organization* 1.

¹⁶ For example, reciprocity underpins art 47(2) of the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), which allows states to differentiate their application of the treaty, either more restrictively or more favourably, on a reciprocal basis.

¹⁷ This was a position that the US needed to consider in interpreting art 36(1)(b) of the *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), with regard to the detention of Mexican nationals on capital offences. See 'Counter-Memorial of the United States of America', *Avena and Other Mexican Nationals (Mexico v United States of America)* [2003] ICJ Pleadings 1, 78–98. The US argued that 'without delay' in art 36(1)(b) should be interpreted as meaning 'in the ordinary course of business' and without 'procrastination or deliberate inaction'.

standards for protection of foreign nationals will also have detrimental consequences for the ongoing relationship between the states. Iterative behaviour, or the extent that a particular practice will be continuously applied, will also shape determinations as to what steps are appropriate in seeking to protect the rights of prisoners abroad.

Each of these themes is assessed in this article in relation to the treatment of four particular Australian prisoners: David Hicks, Stern Hu, Scott Rush and Jock Palfreeman. These individuals have been selected because their circumstances showcase what legal avenues are available to Australia to seek to protect its nationals' rights and how the political dynamic between Australia and the country concerned has been brought to bear on the decisions taken. After demonstrating the legal parameters, each of the themes is explored to show their (potential or actual) relevance in government decision-making. The article concludes by emphasising the importance of reciprocity as the key dimension to ensuring appropriate protection for Australian prisoners overseas.

II TESTING THE PARAMETERS

As a basic matter, the Australian government offers the following services to its nationals arrested and imprisoned abroad:

- visiting a detained national;
- assisting in obtaining information about visitor procedures or accessing money or telephones;
- providing a list of local English-speaking lawyers;
- if authorised, arranging for family to be contacted;
- discussing 'justified and serious complaints about ill-treatment or discrimination with the local authorities';
- raising medical issues with local authorities, once an individual's own efforts have failed;
- potentially arranging a small loan from the Australian government under the Prisoner Loan Scheme;
- monitoring court trials and possibly attending as an observer;
- providing any relevant information on the transfer of prisoners; and
- supporting an application for a pardon, if allowed.¹⁸

These are the essential services offered as part of Australia's consular assistance. Beyond this assistance, Australia may take further steps pursuant to international treaties, as well as the customary international law right of

¹⁸ Department of Foreign Affairs and Trade (Cth), *Arrested or Jailed Overseas*, Smartraveller <<http://www.smartraveller.gov.au/tips/gaolos.html>>. A brochure has also been produced outlining what the Australian government may do, and what it will not do, to assist nationals imprisoned abroad: Department of Foreign Affairs and Trade (Cth), *Arrested or Jailed Overseas* (2010) 9–18 <<http://www.smartraveller.gov.au/tips/arrested-overseas.pdf>>.

diplomatic protection. These legal avenues are the particular focus in this article, and address not only the scope of Australia's right of diplomatic protection, but also options available through bilateral consular agreements, prisoner transfer agreements and regional human rights courts.

The different legal options available to Australia to offer assistance to nationals imprisoned abroad may be illustrated through recent and, mostly, high profile cases. David Hicks was detained by the United States ('US') in Guantánamo Bay for six years and was ultimately convicted of providing material support for terrorism. His situation is of particular relevance here because of the different ways that Australia's right of diplomatic protection was exercised and challenged before national courts. Stern Hu, an executive for the mining company Rio Tinto, was charged with and convicted of bribery and stealing commercial secrets in China. His case brought under scrutiny, inter alia, Australia's consular agreement with China. Scott Rush was one of the members of the 'Bali Nine' to be held under sentence of death for his role in drug trafficking in Indonesia. Rush's case has been in the spotlight because of Australia's opposition to the death penalty. His case also highlights the protracted negotiations ensuing between Australia and Indonesia over a prisoner transfer agreement. Finally, Jock Palfreeman's conviction for murder with hooliganism in Bulgaria, although less prominent in the general media than the other cases, provides a further study of interest because of Australia's lack of ties with Bulgaria compared to the other countries where Australians are imprisoned, and because of the potential access Palfreeman has to the European Court of Human Rights ('ECHR') and a prisoner transfer agreement. While each case brings forth a plethora of legal and political issues, on both international and national levels, the discussion below focuses on demonstrating the limits of the available legal avenues and the political considerations that have, or could have, been at play.

A David Hicks

Hicks presented a particularly problematic case for the Australian government in terms of the efforts Australia would exert in protecting one of its nationals imprisoned abroad. Hicks was captured by Northern Alliance forces in Afghanistan in early December 2001,¹⁹ and was transferred to US custody in Guantánamo Bay. He was subsequently detained for six years, during which time concerns were raised as to human rights violations in relation to due process rights as well as the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.²⁰

¹⁹ David Hicks was initially charged in 2004 by the US Military Commission. These charges are laid out in *United States v David Matthew Hicks*, Military Commission Charge Sheet (June 2004) <<http://www.defense.gov/news/Jun2004/d20040610cs.pdf>>. Following the US Supreme Court ruling in *Hamdan v Rumsfeld*, 548 US 557 (2006), where the military commission system was found to be unconstitutional, Hicks was subsequently charged in 2007 under the new *Military Commissions Act of 2006*, Pub L No 109-366, 120 Stat 2600.

²⁰ See generally Leila Zerrougui et al, *Situation of Detainees at Guantánamo Bay*, UN ESCOR, 62nd sess, Agenda Items 10 and 11, UN Doc E/CN.4/2006/120 (27 February 2006).

Australia sought a range of assurances from the US regarding the treatment of Hicks. Notably, these included that

the United States would not seek the death penalty in Hicks's case, that Australia would seek his extradition to Australia to serve any sentence, that Hicks would have confidential access to his lawyer and that Australian officials would be permitted to monitor his trial.²¹

Australian officials continuously monitored the progress of the military commission process and were in frequent contact with US officials as to Hicks' situation.²² However, the steps taken by the Australian government were influenced by its perception of Hicks as a security threat, as well as Australia's resolve to support the US following the September 11 terrorist attacks.²³

Australia's position can be contrasted to that of the United Kingdom ('UK'), which sought the repatriation of all of its nationals after their detention in Guantánamo Bay.²⁴ The UK did not endorse the detention and trial methods proposed by the US to the same extent as Australia,²⁵ and therefore had greater political room to manoeuvre in seeking the return of British nationals.²⁶ Australia's failure to seek similar treatment for Hicks resulted in two particular actions taken by Hicks to improve his situation: the acquisition of British nationality on the basis of his mother's nationality; and a case before the Federal Court of Australia on the question of whether Australia had a duty to consider seeking his return.²⁷

The bond of nationality was a critical issue in Hicks' treatment. Had he been a British national, it is possible that he would have been returned to the UK within three years.²⁸ In contrast, because of his Australian nationality, Hicks was not returned to Australia for almost six years. At the time Hicks was detained in Guantánamo Bay, he only held Australian nationality but he was also entitled to British nationality.²⁹ Although Hicks sought to have his British nationality registered, he faced considerable resistance from the British government.³⁰

²¹ Klein and Barry, above n 9, 17–18. See also Leigh Sales, *Detainee 002: The Case of David Hicks* (Melbourne University Press, 2007) 96–8.

²² Sales, above n 21, 92–8, 167–9, 172, 186–90, 213, 215–16.

²³ *Ibid* 52–4.

²⁴ 'Timeline: Guantanamo Bay Britons', *BBC News* (online), 27 January 2005 <http://news.bbc.co.uk/2/hi/uk_news/3545709.stm>.

²⁵ Sales, above n 21, 54.

²⁶ *Ibid* 101.

²⁷ *Hicks v Ruddock* (2007) 156 FCR 574.

²⁸ 'Timeline: Guantanamo Bay Britons', above n 24.

²⁹ According to Klein and Barry, above n 9, 5, Hicks could claim

a right to British citizenship by virtue of a new s 4C inserted into the *British Nationality Act 1981* (UK), extending citizenship by descent to those persons born between 1961 and 1983 of mothers with British citizenship at the time of birth, a right previously granted only to those whose fathers had citizenship.

³⁰ See *ibid* 5–7. Although the British Government advised that it would grant the request to register Hicks, a simultaneous order would be sought to deprive Hicks of that citizenship on the basis that he had taken action seriously prejudicial to the interests of the UK. Hicks' citizenship was revoked on this basis. The ability of the UK to immediately revoke his citizenship based on

Ultimately, the UK was compelled to register Hicks as a British citizen in accordance with its laws, but then revoked his citizenship the following day.³¹

This episode reflects the importance accorded to nationality in determining what protections will be granted to individual prisoners. It underlines that an individual is dependent on whatever steps their government is willing to take for its nationals. Hicks' situation would have arguably been ameliorated if his British nationality had already been recognised prior to his detention. The significance of nationality is further highlighted by the British efforts to deny Hicks his British nationality. The UK sought to avoid the situation where Hicks, as an incarcerated national overseas, would be in a position to make any claims against the British government by reason of his nationality. Both the citizen and his or her country of nationality clearly have expectations as to their respective entitlements and duties that arise from the bond of nationality.

The treatment of Hicks can be contrasted with that of Mamdouh Habib, another Australian national incarcerated in Guantánamo Bay. Nationality was also relevant in Habib's case because he is a naturalised Australian. Habib has alleged that Australia informed him that he was being stripped of his Australian nationality and would be sent to Egypt.³² Such a denial of nationality again reflects the significance the bond holds in regulating the rights, duties and expectations of the individuals and states concerned.

Habib was repatriated to Australia without charge in 2005 on the basis that Australia 'accepted responsibility for [Habib] and will work to prevent [him] from engaging in or otherwise supporting terrorist activities in the future'.³³ The US had concluded that the case against Habib was too weak to proceed, and his return also prevented the US Congress from probing Habib's alleged rendition and torture at the hands of US officials.³⁴ Hicks' case was considered stronger, and had already commenced before the military commission at this time.³⁵ Further, Australia took the view that Hicks should be held accountable for his actions and maintained its support for his prosecution in Guantánamo Bay.³⁶

In view of Hicks' ongoing detention, his lawyers instituted proceedings before the Federal Court of Australia, seeking an order of habeas corpus and judicial review of the decision by the Commonwealth not to request Hicks' release from internment in Guantánamo Bay.³⁷ It was argued that the Commonwealth has 'a duty to *consider* an application by an imprisoned Australian citizen that a request

conduct committed prior to Hicks owing allegiance to the UK was challenged before the British courts: *Secretary of State for the Home Department v Hicks* [2006] EWCA Civ 400 (12 April 2006).

³¹ Annabel Crabb, 'Hicks Cast Out after Day as British Citizen', *The Age* (Melbourne), 27 August 2006, 7.

³² *Habib v Commonwealth* (2010) 183 FCR 62, 69 [17]–[18] (Perram J) ('Habib').

³³ US Department of Defense, 'Guantanamo Detainees to Be Transferred' (News Release, No 033-05, 11 January 2005) <<http://www.defense.gov/releases/release.aspx?releaseid=8122>>.

³⁴ Sales, above n 21, 191–2.

³⁵ *Ibid* 193.

³⁶ *Ibid*.

³⁷ *Hicks v Ruddock* (2007) 156 FCR 574.

be made to the United States authorities to deliver the citizen to Australian authorities'.³⁸ This argument sought to overcome the position under international law that a state has a *right* of diplomatic protection, but not a *duty* to protect its nationals abroad.³⁹ It is well-established that the right of a state to exercise diplomatic protection is a discretionary right.⁴⁰

In its articles on diplomatic protection, the International Law Commission ('ILC') sought to modify the status quo in order to accord greater recognition to human rights. To this end, the ILC included art 19, which provided that a state should give 'due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.⁴¹ This position had already received some traction before courts in the UK⁴² and South Africa.⁴³

In *Hicks v Ruddock*, Hicks' counsel rightly described the duty to consider as one of 'imperfect obligation',⁴⁴ and 'not enforceable as a legally binding duty'.⁴⁵ Nonetheless, any consideration by the Commonwealth, it was argued, had to be made in accordance with law and with regard only to relevant considerations.⁴⁶ Hicks' counsel submitted that the Commonwealth had entertained 'irrelevant considerations', one being that Hicks could not be prosecuted under Australian law if returned to Australia.⁴⁷ The Commonwealth responded that 'the discretion concerned is a wide and unfettered executive discretion at the highest level, and

³⁸ Ibid 592 [57] (Tamberlin J) (emphasis in original).

³⁹ *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 29.

⁴⁰ *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 44 [79]. The Court held that:

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.

⁴¹ *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 94 (referring to art 19(a)).

⁴² *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (6 November 2002) [92] (Lord Phillips) ('*Abbasi*'). In *Abbasi*, the Court of Appeal confirmed the traditional position that there was no remedy in English law to require the government to exercise any right of diplomatic protection; rather, all that was necessary was that the UK authorities had considered the request for them to exercise their right of diplomatic protection. Although referring to a duty to consider, this case underlined that the ultimate decision in determining what course of action will be pursued for the protection of prisoners abroad rests with the government concerned. See further Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 *Nordic Journal of International Law* 279.

⁴³ *Kaunda v President of South Africa* [2005] 4 SA 235, 259 [67] (Chaskalson CJ), 289–91 [188]–[192] (Ngcobo J) (Constitutional Court); *Van Zyl v Government of South Africa* [2008] 3 SA 294, 309–11 [51]–[55] (Harms ADP) (Supreme Court of Appeal). These two notable decisions in South Africa ultimately relied on a constitutional right to diplomatic protection, rather than an international law right vested in an individual. See also Stephen Peté and Max du Plessis, 'South African Nationals Abroad and Their Right to Diplomatic Protection — Lessons from the "Mercenaries Case"' (2006) 22 *South African Journal on Human Rights* 439.

⁴⁴ (2007) 156 FCR 574, 593 [61] (Tamberlin J).

⁴⁵ Ibid 593 [62].

⁴⁶ Ibid 592 [57].

⁴⁷ Ibid 592 [58].

that there are no constraints or criteria imposed on that discretion.⁴⁸ The Commonwealth sought summary judgment against Hicks.⁴⁹

The Court determined that summary judgment could not be justified at this stage of the proceeding.⁵⁰ The Court was especially concerned that 'the nature and extent of the injustice which the requesting party claims to have suffered' would need to be considered.⁵¹ It declared that

the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle [than was suffered in *Abbasi*], and is such an exceptional case as to justify proceeding to hearing by this Court.⁵²

Although the Commonwealth's application for summary judgment was dismissed, which permitted the matter to be heard in full, the case did not need to proceed following Hicks' guilty plea to the US Military Tribunal and his subsequent transfer to Australia to serve the remainder of his sentence.⁵³

That a 'duty to consider' might be applicable as a matter of Australian administrative law is a small step forward in regulating the decision-making that Australia might take to protect prisoners abroad. It is possible that Australia's flexibility in decision-making has also been reduced by the decision of *Habib v Commonwealth* ('*Habib*').⁵⁴ In that case, Habib alleged that Commonwealth officials committed torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling the commission of Commonwealth offences by foreign officials, namely those offences arising from his maltreatment during interrogation.⁵⁵ An initial question before the Federal Court was whether Habib's claim was justiciable, and particularly whether the 'act of state' doctrine would apply.⁵⁶ The act of state doctrine precludes a court from exercising jurisdiction if it would be required to determine the unlawfulness

⁴⁸ Ibid 592 [60].

⁴⁹ Ibid 576 [5].

⁵⁰ Ibid 587 [34]. Tamberlin J decided that summary judgment would be inappropriate where the scope of the 'act of state' doctrine needed to be determined: at 584–7 [20]–[34]. Factual issues relating to habeas corpus were also outstanding: at 590 [47]. Further, the submissions by Hicks' counsel as to the government taking into account 'irrelevant considerations' were not foreclosed by authority: at 597 [77].

⁵¹ Ibid 599 [84]. Tamberlin J was able to distinguish, on this basis, the decision in *Abbasi* [2002] EWCA Civ 1598 (6 November 2002). *Abbasi*'s internment had been 'for a period of eight months and there appeared some prospect of alleviation of Mr *Abbasi*'s predicament as a consequence of possible appellate review in United States courts and because of representations of the Inter-American Commission'; in contrast the injustice for Hicks was 'substantially greater' because of his internment for over five years and there being no prospect of alleviation by appellate review: *ibid* 599 [86].

⁵² *Hicks v Ruddock* (2007) 156 FCR 574, 600 [91] (Tamberlin J).

⁵³ Klein and Barry, above n 9, 18.

⁵⁴ (2010) 183 FCR 62.

⁵⁵ Ibid 70 [20]–[21] (Perram J).

⁵⁶ Ibid 66 [4]–[5] (Black CJ). The Commonwealth further argued that the claims did not give rise to a 'matter' within the jurisdiction of the court and that there was no cause of action at common law.

of the acts of another government committed in that government's territory.⁵⁷ The doctrine was at issue in *Habib*, because to make good his claim that Australian officials committed the crime of aiding and abetting the commission of crimes by foreign officials, Habib would need to prove that the foreign officials committed those crimes.

The Court noted that the *Crimes (Torture) Act 1988* (Cth) prohibited torture even when committed under superior orders or by foreign officials acting in their own territory.⁵⁸ The Act applies 'throughout the world and to all persons, consistent with the international consensus that the torturer must have no safe haven'.⁵⁹ This view further reflects the *jus cogens* status of the prohibition against torture.⁶⁰ Moreover, the act of state doctrine could not be used to protect Commonwealth officials who may have acted beyond their authority by aiding, abetting and counselling unlawful acts of foreign officials.⁶¹ These factors all indicate that the act of state doctrine would not necessarily shield the acts of officials from judicial scrutiny when there are allegations of serious human rights abuses. As such, the Federal Court held Habib's claim to be justiciable. The Court has therefore endorsed the view that there may be an exception to the act of state doctrine when the violation of a fundamental principle of international law is at issue.

This decision may indicate that the government must consider its choice of actions carefully when a citizen is detained and mistreated abroad. When that mistreatment rises to the level of torture, the government may find itself under a greater onus to act. Nonetheless, a point of distinction may need to be drawn. While the facts, as alleged by Habib, indicated a level of complicity in the acts of torture,⁶² Australian officials would not necessarily be subject to prosecution under the *Crimes (Torture) Act 1988* (Cth) if they had taken no part in the relevant events and were unaware of the individual's circumstances at the time. In any event, Habib's allegations remain untested as the case was settled prior to any decision on the merits.⁶³ It is arguable, however, that the initial decision of the Federal Court affirms a duty to consider the exercise of the right of diplomatic protection in favour of Australian nationals imprisoned abroad who are subject to serious human rights violations.

⁵⁷ The act of state doctrine was expounded in *Underhill v Hernandez*, 168 US 250, 252 (Fuller CJ) (1897), quoted in *ibid* 66 [6]:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

⁵⁸ *Habib* (2010) 183 FCR 62, 95–6 [111]–[112] (Jagot J, Black CJ and Perram J agreeing).

⁵⁹ *Ibid* 97 [117]. However, only Australian citizens and persons within Australia can be prosecuted: *Crimes (Torture) Act 1988* (Cth) s 7.

⁶⁰ *Habib* (2010) 183 FCR 62, 92–5 [95]–[108] (Jagot J).

⁶¹ *Ibid* 72 [24] (Perram J).

⁶² *Ibid* 69–70 [18]. Habib alleged that Australian officials had interrogated him and that it would have been clear to them that he had been subjected to torture.

⁶³ 'Habib Drops Torture Case against Government', *ABC News* (online), 8 January 2011 <<http://www.abc.net.au/news/stories/2011/01/08/3108799.htm>>.

Ultimately, Hicks' situation has underlined the political discretion that permeates government decision-making as to what steps will be taken to protect a national abroad. This perspective is consistent with the state-centric emphasis on the discretionary nature of the right of diplomatic protection. While Australia took a variety of actions on Hicks' behalf, these efforts were tempered by Australia's political relationship with the US, including its support for the US in the 'War on Terror'. Cases like *Hicks v Ruddock* and *Habib* have made some small inroads into this political discretion. These incursions may be said to reflect greater consideration for human rights and should be welcomed in this regard.

B *Stern Hu*

Stern Hu, an executive for the Australian mining giant Rio Tinto, is a naturalised Australian citizen and former Chinese national.⁶⁴ Hu, along with three Chinese national colleagues, was arrested on suspicion of espionage and stealing state secrets causing economic harm to China.⁶⁵ Hu was ultimately charged under the Chinese Criminal Code⁶⁶ with bribery and stealing commercial secrets.⁶⁷ He pleaded guilty to the bribery charge, but contested the amount of bribes he was accused of accepting.⁶⁸ Hu was ultimately convicted on both charges and received a combined sentence of 10 years' imprisonment.⁶⁹ His case proved controversial in Australia because of the political overtones, which included the fact that China was dealing with a representative of one of Australia's largest mineral and resource firms that is critical to China's supply of iron ore.

In relation to this political dynamic, commentators have noted that Hu was detained within weeks of Rio Tinto rejecting a major investment bid from Chinalco, a Chinese state-owned aluminium firm,⁷⁰ and a deadlock being reached in the annual iron ore price negotiations.⁷¹ Kent has described Hu's arrest as

⁶⁴ Matt O'Sullivan, "'Thrown to the Wolves': PM Accused of Ignoring Rio Man", *Sydney Morning Herald* (Sydney), 11 July 2009, 1.

⁶⁵ 'China-Australia Relations', *Radio Australia News* (online), 17 September 2009 <<http://www.radioaustralianews.net.au/stories/200909/2682137.htm>>.

⁶⁶ «中华人民共和国刑法» [Criminal Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 83, 14 March 1997.

⁶⁷ Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Estimates (Budget Estimates), *Official Committee Hansard*, 2 June 2010, 51 (Graham Fletcher).

⁶⁸ James T Areddy, 'Rio Tinto China Employees Get Prison Terms', *The Wall Street Journal* (online), 30 March 2010 <<http://online.wsj.com/article/SB10001424052702304370304575151032293098898.html>>.

⁶⁹ Michael Sainsbury and Zhang Yufei, 'China Widens Hu Bribery Net', *The Australian* (Sydney), 3 April 2010, 1.

⁷⁰ David Barboza, 'China Detains Mining Executive on Spy Charge, Australia Says', *The New York Times* (New York), 9 July 2009, A4.

⁷¹ 'Rio Tinto Employee Stern Hu Charged with Stealing Trade Secrets', *news.com.au* (online), 11 February 2010 <<http://www.news.com.au/rio-tinto-employee-stern-hu-charged-with-stealing->

just the opening bell in a fight against corruption in China's entire steel industry, aimed not just at punishing those Chinese nationals supplying information to foreign iron ore companies, but at bringing to heel the many Chinese companies seen as responsible for raising iron ore prices.⁷²

In light of these dynamics, Kent has observed that any response from Australia should be 'politely-worded but strategically targeted' rather than 'blustering threats or weak-kneed pandering'.⁷³ Certainly in the days following Hu's detention, Australia's Foreign Minister stated that the government's responses were 'sensible, measured and proportionate'.⁷⁴

The conduct of Hu's trial brought further focus on Australia's efforts to provide assistance to Hu. Australia consistently made representations as to the case being expedited and dealt with transparently.⁷⁵ A key difficulty arose because Australian officials were only permitted to attend the part of the hearings dealing with the bribery charges, and were denied access to the part dealing with the commercial secrets charges.⁷⁶ While concerns over the closed trial were voiced by the Australian government and members of the Opposition,⁷⁷ Australia also acknowledged, to Chinese authorities and publicly, that trials in Australia are occasionally closed for confidentiality purposes.⁷⁸ China maintained its judicial sovereignty to proceed with the case in accordance with Chinese law.⁷⁹ Yet this issue was ultimately not purely a matter of Chinese law. It also brought

trade-secrets/story-e6frfh4f-1225829057126>; Peter Yuan Cai, 'Secrets, Spies and Steel: The Rio Tinto Case' (2010) 2(1) *East Asia Forum Quarterly* 16, 16.

⁷² Ann Kent, 'The Case of Stern Hu: Perspectives on China's "Rule of Law"' (2009) 34 *Alternative Law Journal* 275, 275.

⁷³ *Ibid.*

⁷⁴ Stephen Smith, Minister for Foreign Affairs and Trade, 'The Detention of Rio Tinto Executive, Mr Stern Hu in China' (Press Release, 10 July 2009) <http://www.foreignminister.gov.au/transcripts/2009/090710_pc.html>.

⁷⁵ Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Estimates (Supplementary Budget Estimates), *Official Committee Hansard*, 22 October 2009, 75 (Graham Fletcher); ABC Television, 'Smith Backs Indonesia Agreement', *Insiders*, 25 October 2009 (Stephen Smith, Minister for Foreign Affairs and Trade) <<http://www.abc.net.au/insiders/content/2009/s2723420.htm>>; ABC Radio, 'Trade Minister Urges Transparency in Stern Hu Case', *AM*, 11 January 2010 (Simon Crean, Minister for Trade) <<http://www.abc.net.au/am/content/2010/s2789261.htm>>.

⁷⁶ Mark Dodd, 'Rudd Warns China on Rio Trial Secrecy', *The Australian* (Sydney), 19 March 2010, 2. The decision of the Intermediate People's Court to have a partially closed trial was at the request of one of the parties to the case: ABC Radio, 'Australia Wants Its Officials Allowed into Stern Hu Trial', *Asia Pacific*, 18 March 2010 (Linda Mottram) <<http://www.radioaustralia.net.au/asiapac/stories/201003/s2850039.htm>>. It is for Chinese court administrators to determine whether or not family and reporters may be present at trial, although given the politically sensitive nature of this case, administrators were likely to have followed directions from the Chinese government in this regard: ABC Radio, 'Lawyers Handed Evidence against Stern Hu', *The World Today*, 1 March 2010 (Stephen McDonnell) <<http://www.abc.net.au/worldtoday/content/2010/s2833076.htm>>.

⁷⁷ Dodd, above n 76, 2; John Garnaut, 'Hu Trial Raises Tensions', *The Age* (Melbourne), 19 March 2010, 2.

⁷⁸ ABC Radio, 'Australia Wants Its Officials Allowed into Stern Hu Trial', above n 76.

⁷⁹ Phillip Coorey and John Garnaut, 'Mystique of the Steel Curtain', *The Sydney Morning Herald* (Sydney), 18 July 2009, 5; Chris Buckley, 'Q+A: What is China's Rio Tinto Trial About?', *Reuters* (online), 18 March 2010 <<http://www.reuters.com/article/idUSTOE62G07820100318?>>.

into question the operation of a bilateral consular agreement in force between China and Australia.

Consular relations are addressed at the multilateral level under the *Vienna Convention on Consular Relations*,⁸⁰ to which Australia and China are both parties.⁸¹ Most relevant for individuals who are detained or arrested is the entitlement to be informed of their right to contact their consulate,⁸² as well as the right of the state to be notified without delay of the arrest or detention of one of its nationals.⁸³ In addition, consular officials have the right to visit, converse and correspond with their nationals, as well as assist in arrangements for legal representation.⁸⁴

For Australia and China, these rights have been elaborated on in a bilateral agreement, which entered into force in 2000.⁸⁵ A notable aspect of this consular agreement for present purposes is that art 11(1)(f) states unequivocally that a 'consular officer shall be permitted to attend the trial or other legal proceedings'. Certainly, a key motivation behind the agreement was to provide Australian officials with a guaranteed right of access at trial.⁸⁶ Legal scholars have maintained that Australia was fully entitled to pursue, and should have pursued, this legal right, particularly as the Chinese government has itself made clear that 'the international obligation to admit a foreign consul even to a secret trial prevails over domestic law.'⁸⁷ It seems that either Australia's representations on this point were denied by China, or Australia opted not to insist upon these rights.⁸⁸

Hu's case was also potentially complicated because of his ethnic identity and former nationality as Chinese, in addition to his Australian nationality. As China does not recognise dual nationality, Australia has had difficulties in providing consular assistance to its nationals who also have Chinese nationality,

⁸⁰ Opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

⁸¹ Australia ratified the Convention on 12 February 1973 and China did so on 2 July 1979.

⁸² *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 36(1)(b). In *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 494, the International Court of Justice ('ICJ') categorised art 36(1) as an 'individual right', which meant that the right to consular assistance belonged directly to the individual, similarly to human rights, rather than to the state itself.

⁸³ *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) art 36(1)(b).

⁸⁴ *Ibid* arts 36(1)(a), (c).

⁸⁵ *Agreement on Consular Relations between Australia and the People's Republic of China*, signed 8 September 1999, 2169 UNTS 494 (entered into force 15 September 2000).

⁸⁶ Joint Standing Committee on Treaties, Parliament of Australia, *Report 28: Fourteen Treaties Tabled on 12 October 1999* (1999) 99–100 [11.11]–[11.19] ('*JSCOT Report*').

⁸⁷ ABC Radio National, 'Stern Hu Trial', *Correspondents Report*, 4 April 2010 (Jerome Cohen) <<http://www.abc.net.au/correspondents/content/2010/s2863547.htm>>. See also Donald C Clarke, 'The Closing of the Stern Hu Trial: A Legal Analysis' on Donald C Clarke, *Chinese Law Prof Blog* (21 March 2010) <http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/the-closing-of-the-stern-hu-trial-a-legal-analysis.html>; Aredy, above n 68.

⁸⁸ The Australian Parliament's Joint Standing Committee on Treaties has requested a briefing from the Department of Foreign Affairs and Trade concerning the prosecution of Hu: Letter from Kelvin Thompson (Chair of Joint Standing Committee on Treaties) to Malcolm Stewart (Vice-President, Rule of Law Association of Australia), 21 June 2010.

particularly if they opted to enter the country on their Chinese passport.⁸⁹ Individuals might choose to use their Chinese passport in order to gain access to certain business advantages that would otherwise be unavailable.⁹⁰ Another purpose of the bilateral consular agreement was thus to clarify Australia's rights of diplomatic protection for dual Australian–Chinese nationals.⁹¹ Provided Hu entered China on an Australian passport, he should have been entitled to consular access and protection by Australia in accordance with the bilateral consular agreement.⁹²

As a matter of international law, Australia was entitled to act for Hu because of his Australian nationality.⁹³ Even if he had maintained dual nationality, Australia would remain entitled to act assuming it could be shown that his dominant ties were to Australia over those with China.⁹⁴ The question still arises as to the extent that Hu's former Chinese nationality influenced China's decisions to conduct its investigations and prosecution of Hu, particularly when it is recalled that he was detained and prosecuted along with three Rio Tinto colleagues, who were Chinese nationals.⁹⁵ As a formal, legal, matter, it is at least clear that Australia was justified in seeking to provide Hu with various protections offered by consular rights because of his Australian nationality. It remains a matter of speculation as to whether Hu's ethnic identity or former Chinese nationality tempered these efforts. The questions do at least underline that there may be limits on how well the bond of nationality will serve a prisoner held overseas.

Hu's case has also demonstrated the limitations that may exist for a state in seeking to enforce rights under consular agreements. Agreements on consular rights certainly provide an important source of reference for individual rights, distinct from any considerations about due process that might arise as a matter of international human rights law. Yet the agreements are clearly only as strong as the parties to the treaties, particularly bilateral treaties, wish them to be. In setting a precedent by denying Australian officials access to the trial of an Australian national, China faces the prospect of being denied rights under the agreement, potentially not limited to the right of access at trial.

Even if reciprocity in the application of legal rights may not be a compelling reason to act, the broader relationship between Australia and China, as well as possible reputational costs for China in its handling of the case, would also be

⁸⁹ *JSCOT Report*, above n 86, 99–101 [11.11], [11.20]–[11.21].

⁹⁰ *Ibid* 101 [11.22].

⁹¹ *Ibid* 100 [11.20].

⁹² *Agreement on Consular Relations between Australia and the People's Republic of China*, signed 8 September 1999, 2169 UNTS 494 (entered into force 15 September 2000) art 10(3). Reports have noted that Hu was travelling on an Australian passport: 'Stern Hu Charged with Stealing Trade Secrets', *The Australian* (Sydney), 11 February 2010, 1.

⁹³ *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 30 (referring to art 3).

⁹⁴ *Ibid* 43–7 (referring to art 7).

⁹⁵ According to Ellis, China regarded Hu as 'all the more traitorous because he switched nationality': Eric Ellis, 'The Stern Hu Affair is a Worrying Preview of a World Run on China's Rules', *The Spectator* (online), 22 July 2009 <<http://www.spectator.co.uk/print/australia/5200158/the-stern-hu-affair-is-a-worrying-preview-of-a-world-run-on-chinas-rules.shtml>>.

relevant. With regards to the latter dimension, Australia's Prime Minister warned China at the time that 'the world will be watching',⁹⁶ indicating that China's reputation for international business dealings was at stake.⁹⁷ In a similar vein, the Australian Foreign Minister commented that China's decision to maintain the closed trial

would [not] assist transparency or assist the understanding of the matter, not [only] so far as Australia was concerned, discharging its consular obligations to Stern Hu, but also [so far as] the international business community [was concerned].⁹⁸

Again, one is left to speculate that such concerns influenced China's decision to reduce the initial charges against Hu.⁹⁹ It would seem that even though reciprocity in Australia and China's implementation of the consular agreement may not have been a determinative factor in decision-making, reciprocity in the broader bilateral relationship, as well as China's relationship with other countries doing significant business in China, may have had greater potential for improving Hu's position.

C *Scott Rush*

Rush's case rose to prominence in the Australian media because he was one of the drug 'mules'¹⁰⁰ among the group known as the Bali Nine who was held under sentence of death in Indonesia.¹⁰¹ The Bali Nine comprised nine young Australians who were arrested in Bali for attempting to traffic heroin from Indonesia to Australia. Of those nine, only one, Renae Lawrence, pleaded guilty and received a 20 year sentence. At trial, Rush was sentenced to life imprisonment,¹⁰² but this sentence was subsequently upgraded to the death

⁹⁶ Dodd, above n 76, 2.

⁹⁷ Kent, above n 72, 275.

⁹⁸ ABC Television, 'Stern Hu Faces 10 Year Jail Sentence', *The 7.30 Report*, 29 March 2010 (Stephen Smith, Minister for Foreign Affairs and Trade) <<http://www.abc.net.au/7.30/content/2010/s2859510.htm>>.

⁹⁹ See 'China-Australia Relations', above n 65. Initially Hu was arrested on suspicion of espionage and stealing state secrets causing economic harm to China. The espionage charges were later dropped: Stephen McDonnell, 'Rio Relief after China Charge Downgrade', *ABC News* (online), 12 August 2009 <<http://www.abc.net.au/news/stories/2009/08/12/2654184.htm>>.

¹⁰⁰ A 'mule' in this context refers to someone acting as a courier of drugs.

¹⁰¹ In the final court appeal available to him, Rush's sentence was reduced from the death penalty to a life sentence. See Matt Brown, 'Scott Rush Escapes Death Penalty', *ABC News* (online), 10 May 2011 <<http://www.abc.net.au/news/stories/2011/05/10/3213037.htm>>. Myuran Sukumaran and Andrew Chan, the ringleaders of the operation, have lost their final appeals and are now dependent on clemency appeals to the Indonesian President to avoid the death penalty. See Matt Brown, 'Bali Nine Ringleader Loses Final Appeal', *ABC News* (online), 17 June 2011 <<http://www.abc.net.au/news/stories/2011/06/17/3247028.htm>>; 'Bali Nine Ringleader Loses Final Appeal', *ABC News* (online), 7 July 2011 <http://www.abc.net.au/news/stories/2011/07/07/3263067.htm?WT.mc_id=newsmail>.

¹⁰² Ronli Sifris, 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81, 83.

penalty by the Indonesian Supreme Court.¹⁰³ Three other members of the Bali Nine who had been sentenced to death had their sentences reduced to life imprisonment by the Supreme Court in 2008.¹⁰⁴ It was another three years before Rush's death sentence was commuted.¹⁰⁵ The only remaining recourse that would have otherwise been available against his death sentence would have been an appeal for clemency from Indonesia's President.¹⁰⁶

Rush's case challenged the legal parameters of Australia's efforts to protect its nationals abroad because his death sentence brought to the fore Australia's opposition to capital punishment.¹⁰⁷ Rush is of course not the first Australian to be sentenced to death overseas. The execution of Tuong Van Nguyen in Singapore in 2005 for drug trafficking offences received considerable media attention,¹⁰⁸ and the death sentence imposed on Robert Langdon for murdering a man in Afghanistan also posed diplomatic challenges in light of Australia's ongoing military engagement in that country.¹⁰⁹ These penalties raise questions as to the extent that Australia is willing to press its abolitionist perspectives internationally.

The imposition of the death penalty is not a violation of customary international law, although states may sign treaties that prohibit its use under national law.¹¹⁰ Nonetheless, a death sentence may entail a violation of

¹⁰³ *Ibid.* The prosecution had not sought the death penalty, but under Indonesian law, judges are permitted to exceed the sentencing recommendations of the prosecution.

¹⁰⁴ Geoff Thompson, 'Rush Given Fresh Hope in Death Penalty Fight', *ABC News* (online), 6 March 2008 <<http://www.abc.net.au/news/stories/2008/03/06/2181418.htm>>.

¹⁰⁵ Rush's final appeal was heard in October 2010: 'Rush's Final Appeal Hearing Wraps Up', *ABC News* (online), 4 October 2010 <<http://www.abc.net.au/news/stories/2010/10/04/3029101.htm>>.

¹⁰⁶ Julie Lewis, 'Explore International Legal Options for Bali Nine Now, Says Professor' (2006) 44 *Law Society Journal* 18, 18–19.

¹⁰⁷ This sentiment is seen most recently through the adoption of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) sch 2, which prohibits state governments from reintroducing the death penalty.

¹⁰⁸ See, eg, 'International Law Could Save Death Row Aussie: Lawyer', *ABC News* (online), 3 November 2005 <<http://www.abc.net.au/news/stories/2005/11/02/1496268.htm>>; 'Australian Anger over Singapore Hanging', *BBC News* (online), 2 December 2005 <<http://news.bbc.co.uk/2/hi/asia-pacific/4490754.stm>>; 'Howard Criticises "Clinical" Singaporean Response', *ABC News* (online), 2 December 2005 <<http://www.abc.net.au/news/newsitems/200512/s1521499.htm>>.

¹⁰⁹ Jeremy Kelly, 'Aussie Facing Death in Kabul', *The Australian* (Sydney), 27 January 2010, 1; Rod Nordland and Abdul Waheed Wafa, 'NATO Contractor is Sentenced to Death in Afghanistan', *The New York Times* (New York), 28 January 2010, A10; Michael Edwards, 'Wheels of Justice Grind Slow for Death Row Australian', *ABC News* (online), 28 January 2010 <<http://www.abc.net.au/news/stories/2010/01/28/2803137.htm>>; Anne Barrowclough, 'Australian Soldier Sentenced to Hang in Afghanistan', *Times Online* (online), 27 January 2010 <<http://www.timesonline.co.uk/tol/news/world/article7004079.ece>>; Jeremy Kelly, "'Too Dangerous" to Visit Jailed Aussie', *The Australian* (Sydney), 28 January 2010, 5; Samantha Maiden, 'Rudd Vows to Act as Robert Langdon Faces Death Penalty in Afghanistan', *The Australian* (online), 27 January 2010 <<http://www.theaustralian.com.au/national-affairs/defence/rudd-vows-to-act-as-robert-langdon-faces-death-penalty-in-afghanistan/story-e6frg8yo-1225823941457>>. Langdon's death sentence was commuted to a 20 year jail term in January 2011: 'Australian Escapes Execution in Afghanistan', *ABC News* (online), 6 January 2011 <<http://www.abc.net.au/news/stories/2011/01/06/3107214.htm>>.

¹¹⁰ Australia, for example, is a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('*Second Optional Proto-*

international human rights law if, for example, it is imposed arbitrarily, due process guarantees are not upheld, or it amounts to inhuman or degrading treatment or punishment.¹¹¹ In light of this, Rush appealed to Indonesia's Constitutional Court arguing that, inter alia, because the death penalty should be reserved for the most serious crimes, its imposition would violate Indonesia's international obligations.¹¹² The Court, however, rejected this argument.¹¹³

In the face of such national court decisions, Australia is left to assert its opposition to the death penalty through diplomatic channels. Australia's position is complicated here because it voiced no opposition to the imposition of the death penalty against Indonesians convicted of the Bali bombing terrorist attack, which killed 202 people, including 88 Australians.¹¹⁴ To then oppose the death penalty for its own nationals leaves Australia open to charges of inconsistency and hypocrisy.¹¹⁵ A consistent approach to the imposition of the death penalty would seem likely to render Australia's interventions on behalf of Rush more compelling.

The circumstances surrounding Rush's arrest also brought into the spotlight Australia's obligations in relation to mutual criminal assistance. Countries enter into mutual criminal assistance agreements in order to combat transnational

col'). The 47 member states of the Council of Europe have abolished the death penalty: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, opened for signature 28 April 1983, ETS No 114 (entered into force 1 March 1985) and *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances*, opened for signature 3 May 2002, ETS No 187 (entered into force 1 July 2003). See also 'Russia Enshrines Ban on Death Penalty', *BBC News* (online), 19 November 2009 <<http://news.bbc.co.uk/2/hi/europe/8367831.stm>>.

¹¹¹ Andrew Byrnes, 'The Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective' (Working Paper No 66, The University of New South Wales, 2007) 32–5 <<http://law.bepress.com/unswwps/flrps/art66>>.

¹¹² 'Rush's Death Penalty Unconstitutional, Says Lawyer', *ABC News* (online), 15 March 2007 <<http://www.abc.net.au/news/stories/2007/03/15/1872387.htm>>. For a critical analysis of the case, see Natalie Zerial, 'Decision No 2-3/PUU-V/2007 [2007] (Indonesian Constitutional Court)' (2007) 14 *Australian International Law Journal* 217. See also Andrew Byrnes, 'Drug Offences, the Death Penalty, and Indonesia's Human Rights Obligations in the Case of the Bali 9: Opinion Submitted to the Constitutional Court of the Republic of Indonesia' (Working Paper No 44, The University of New South Wales, 2007) <<http://law.bepress.com/cgi/viewcontent.cgi?article=1046&context=unswwps>>; Colman Lynch, 'Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case' (2009) 40 *Columbia Human Rights Law Review* 523.

¹¹³ *Decision Number 2-3/PUU-V/2007* (Petition by Scott Anthony Rush) [2007] Constitutional Court of the Republic of Indonesia, 93, 100–2 <[http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_PUTUSAN%20_PUU_V_07%20%20Hukuman%20Mati%20\(Eng\).pdf](http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_PUTUSAN%20_PUU_V_07%20%20Hukuman%20Mati%20(Eng).pdf)>. In support of its decision that drug trafficking was a sufficiently serious crime, the Court quoted the preamble of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 165 (entered into force 11 November 1990), which states that drug trafficking adversely affects 'the economic, cultural and political foundation of society' and represents 'a danger of incalculable gravity.' See also Lynch, above n 112, 583.

¹¹⁴ Mark Forbes, 'No Mercy for Bali Nine on Death Row', *The Age* (Melbourne), 31 October 2007, 2.

¹¹⁵ Byrnes, 'The Right to Life', above n 111, 40.

crime, particularly by providing information relevant to criminal prosecutions or investigations. Australia has such an agreement with Indonesia.¹¹⁶ While mutual criminal assistance treaties are not useful for the protection of individuals abroad, their operation can certainly impact on what happens to those individuals more generally. In Rush's case, the Australian Federal Police were alleged to have facilitated the arrest of the Bali Nine in Indonesia and thereby exposed them to the imposition of the death penalty.¹¹⁷ As Byrnes has noted, Rush's case highlights the need to deliberate on the extent to which a principled and consistent stance against the death penalty may be reconciled with Australia's interests in international cooperation to combat transnational crime.¹¹⁸ The reciprocity that is at work in Australia and Indonesia's relationship appears to be more firmly based on efforts to respond to transnational crime, rather than seeking to redress the imbalance that exists between the respective countries' positions on the death penalty.¹¹⁹

Rush's situation is unlikely to be ameliorated by a prisoner transfer agreement.¹²⁰ At present, no such agreement exists between Australia and Indonesia, although negotiations towards such an agreement commenced in

¹¹⁶ *Treaty Between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, signed 27 October 1995, 2076 UNTS 452 (entered into force 17 July 1999). This treaty was implemented by the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth) reg 4.

¹¹⁷ The actions of the Australian Federal Police ('AFP') were challenged in *Rush v Commissioner of Police* (2006) 150 FCR 165, 182–5. Finn J denied an application for a preliminary discovery order against the AFP on the basis of a failure to identify a possible cause of action against the AFP. He thereby rejected Rush's argument that powers under the *Australian Federal Police Act 1979* (Cth) should be interpreted restrictively in light of the *Death Penalty Abolition Act 1973* (Cth), the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ss 8(1A)–(1B), the Australian government's stance against capital punishment and Australia's signing of the *Second Optional Protocol*. See also Justice John von Doussa, 'The Death Penalty: A Matter of Principle' (Speech delivered at the National Conference of the United Nations Association of Australia, Adelaide, 22 October 2006) <http://www.hreoc.gov.au/about/media/speeches/speeches_president/2006/death_penalty.html>.

¹¹⁸ Byrnes, 'The Right to Life', above n 111, 39. See generally Sifris, above n 102.

¹¹⁹ It should, however, be noted that the AFP guidelines for information-sharing in relation to capital offences have been revised in the wake of the Bali Nine arrests and convictions: Peter Veness, 'AFP Given New Rules After Bali Nine', *Brisbane Times* (online), 18 December 2009 <<http://news.brisbanetimes.com.au/breaking-news-national/afp-given-new-rules-after-bali-nine-20091218-15g6.html>>. The article noted that the AFP Commissioner is now obligated to report biannually to the Minister for Home Affairs with regard to collaboration in international operations where an Australian is potentially exposed to the death sentence. The Attorney-General, Robert McClelland, stated that the new guidelines require 'AFP management to consider a set of prescribed factors before providing assistance in matters with possible death penalty implications'. These factors include nationality, age, personal circumstances and Australia's interest in facilitating cooperation with overseas agencies in addressing crime. Ministerial approval is also now required before the AFP may cooperate with investigations that could result in the death penalty. The Attorney-General further stated that these reforms 'represent a balanced and responsible approach that provides greater clarity and accountability, while maintaining our commitment to combating transnational crime.' See further Robert McClelland, Attorney-General, and Brendan O'Connor, Minister for Home Affairs, 'International Law Enforcement Cooperation' (Media Release, 18 December 2009) <http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_18December2009InternationalLawEnforcementCooperation#>.

¹²⁰ See below nn 147–156 and accompanying text, in relation to Jock Palfreeman.

2005.¹²¹ In the early stages of negotiations, Australia's Foreign Minister acknowledged that Indonesia was reluctant to allow its drug trafficking offenders to benefit from more lenient sentences or parole conditions in other countries.¹²² In particular, it is unlikely that the treaty would be applicable to prisoners on death row.¹²³ The commutation of Rush's sentence opens up the possibility that he may be able to avail himself of a prisoner transfer agreement in the future. However, a further point of controversy has been whether the agreement would operate retrospectively to benefit those already imprisoned.¹²⁴ Such a limitation would prevent its application to Rush and the other members of the Bali Nine.¹²⁵

Rush's case has underlined the difficulties that Australia faces when it seeks to press for its own position on international human rights standards to be applied in other countries, in particular its position on the death penalty. Such arguments may be pursued through a country's national court system. It is only if this avenue has been exhausted that Australia may consider pursuing the matter before an international court.¹²⁶ This latter option is only available if a state has consented to the jurisdiction of an international court.¹²⁷ Indonesia, however, has not accepted the compulsory jurisdiction of the International Court of Justice.¹²⁸ Diplomatic channels and the exercise of consular rights have been the primary mode for Australia to offer assistance to Rush. Even if a prisoner transfer agreement could be concluded, the limitations in its scope would most likely result in excluding Rush from the possible benefits it would afford to Australian prisoners in Indonesia.

¹²¹ 'Transfer Talks for Indonesia's High-Profile Drug Prisoners Ongoing: Minister', *Jakarta Globe* (online), 25 January 2010 <<http://www.thejakartaglobe.com/home/transfer-talks-for-indonesias-high-profile-drug-prisoners-ongoing-minister/354675>>.

¹²² ABC Radio, 'Indonesia Agrees to Prisoner Exchange Treaty with Australia', *AM*, 29 June 2006 (Alexander Downer, Minister for Foreign Affairs) <<http://www.abc.net.au/am/content/2006/s1674393.htm>>.

¹²³ *Ibid.* Another condition commonly set out in prisoner transfer agreements is that all appeals should have been exhausted. See below nn 145–154 and accompanying text.

¹²⁴ ABC Radio, 'Indonesia Agrees to Prisoner Exchange Treaty with Australia', above n 122.

¹²⁵ This non-retroactivity may also be detrimental to Schapelle Corby, another Australian who is currently imprisoned for drug trafficking in Indonesia. Australia has recently renewed its efforts to argue for her early release through a grant of clemency by the Indonesian President: Toni O'Loughlin, 'Gillard Urges Indonesia to Cut Corby Sentence', *The Age* (Melbourne), 30 July 2010, 1.

¹²⁶ See, eg, below n 138 and accompanying text.

¹²⁷ *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 101 [26]. The ICJ recalled that 'one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction'.

¹²⁸ Under art 36(2) of the *Statute of the International Court of Justice*, a state may accept in advance the jurisdiction of the Court in respect of any dispute it selects; jurisdiction may therefore be exercised when another state that has similarly consented to the Court's jurisdiction institutes proceedings. This 'optional clause' is also referred to as the compulsory jurisdiction of the Court, as states consent in advance to the exercise of jurisdiction over any dispute.

D Jock Palfreeman

Paul ‘Jock’ Palfreeman, an Australian national, was convicted of murder with hooliganism in Bulgaria at the end of 2009.¹²⁹ Palfreeman has claimed that he was acting in self-defence after he assisted two Roma women who were being physically assaulted in Sofia by a large group.¹³⁰ In the course of the ensuing fight, Palfreeman stabbed two of the assailants, injuring one and killing another.¹³¹ The murder victim was the son of a well-known Bulgarian psychologist, and as a result, the incident and ensuing trial received considerable media coverage in Bulgaria.¹³² Palfreeman’s trial was plagued by delays and concerns about the validity of evidence and testimony presented.¹³³ In this context, it may be noted that Palfreeman’s case has been heard in a country that is renowned for its corrupt judicial system.¹³⁴ His first appeal against his conviction and sentence was rejected.¹³⁵

Palfreeman’s case is of interest because it is one example of an Australian having access to a court that has exclusive jurisdiction to address specific allegations of human rights violations, notably failures related to due process rights.¹³⁶ In this instance, the relevant court is the ECHR, and Bulgaria has

¹²⁹ Under art 116(1111) of the *Criminal Code* (Bulgaria) Publication State Gazette No 26/02/04/1968 [Office for Democratic Institutions and Human Rights trans, *Criminal Code of the Republic of Bulgaria (English Version)* <<http://legislationline.org/documents/action/popup/id/8881/preview>>], a minimum of 15 years’ imprisonment is applied for murder ‘performed by hooligan motives’.

¹³⁰ ABC Television, ‘One Night in Sofia’, *Foreign Correspondent*, 2 June 2009 (Belinda Hawkins) <<http://www.abc.net.au/foreign/content/2009/s2588170.htm>>.

¹³¹ *Ibid*.

¹³² *Ibid*.

¹³³ Belinda Hawkins, ‘Sydney Man Found Guilty of “Hooligan” Murder’, *ABC News* (online), 3 December 2009 <<http://www.abc.net.au/news/stories/2009/12/03/2760349.htm>>; ‘Family’s Anger at Bulgarian Murder Verdict’, *ABC News* (online), 3 December 2009 <<http://www.abc.net.au/news/stories/2009/12/03/2760672.htm>>. The Australian Broadcasting Corporation has also obtained a copy of Dr Simon Palfreeman’s summing up of his son Jock’s case in Simon Palfreeman, *Father’s Summing Up of the Case* <http://www.abc.net.au/news/documents/2009/20091203_palfreeman.pdf>, which also outlines the alleged irregularities and flaws in the proceedings.

¹³⁴ A 2009 report noted that the Bulgarian judicial system is perceived to be the most corrupt public institution in the country: Juanita Riaño, Finn Heinrich and Robin Hodess, ‘Global Corruption Barometer’ (Report, Transparency International, 2009) 6. It was also noted that Bulgaria stood alongside countries including Cambodia, Georgia and Mongolia. See also Council of the European Union, *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism* (23 July 2008) <http://ec.europa.eu/dgs/secretariat_general/cvm/docs/bulgaria_report_20080723_en.pdf>; ‘EU Commission Unhappy with Judicial Reform in Bulgaria’, *Standard* (online), 16 March 2010 <<http://paper.standartnews.com/en/article.php?d=2010-03-16&article=32518>>.

¹³⁵ Belinda Hawkins, ‘Palfreeman Loses Bulgaria Jail Appeal’, *ABC News* (online), 22 February 2011 <<http://www.abc.net.au/news/stories/2011/02/22/3144928.htm>>.

¹³⁶ Palfreeman has a right to a fair trial under art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2005, CETS No 194 (entered into force 1 June 2010) (‘*European Convention on Human Rights*’).

consented to its jurisdiction.¹³⁷ Even though Palfreeman is a foreign national, the Court still has jurisdiction over him because the relevant acts occurred in Bulgaria.¹³⁸ The difficulty for Palfreeman in challenging his conviction before the ECHR is that he must normally exhaust all local remedies before appealing to that Court.¹³⁹ As the Bulgarian judicial system has already proven itself to be slow, Palfreeman can expect a long wait before he exhausts all local remedies. Alternatively, he could attempt to bring his claim directly before the ECHR, arguing that there is no need to exhaust the remedies.¹⁴⁰

The availability of an international human rights mechanism that Palfreeman can access on his own accord arguably removes some of the pressure on Australia to take vigorous action on his behalf. Diplomatic efforts are sometimes differentiated from the right of diplomatic protection in this regard.¹⁴¹ The latter typically only arises at the point when an individual has exhausted remedies available within the state concerned,¹⁴² although exceptions to this rule do exist. Prior to the exhaustion of local remedies, a state may offer consular assistance and undertake diplomatic *démarches*, but the right of diplomatic protection does not strictly arise. The reason such a distinction is drawn is to emphasise the national sovereignty of a state in the prosecution of individuals within its criminal justice system. On this approach, any irregularities at trial or questions as to the sentence may be resolved through the appeals process of the country concerned. The difficulty with this bright-line approach is that the very process of detention or trial, or the sentence, may amount to a violation of international human rights law, thus constituting an internationally wrongful act for which a state should be held responsible. In these circumstances, when the local remedies themselves are flawed, Australia should still consider the full panoply of actions that may be taken pursuant to its right of diplomatic protection.¹⁴³

¹³⁷ Every state that is a member of the Council of Europe is a party to the *European Convention on Human Rights* and under arts 32–4 of that treaty, each state has consented to the jurisdiction of the European Court of Human Rights to hear inter-state and individual complaints.

¹³⁸ Ibid art 1 states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Article 34 further provides that

[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

¹³⁹ Ibid art 35.

¹⁴⁰ Ibid. Exceptions to the requirement to exhaust local remedies include undue delay, that there are no reasonably available local remedies to provide redress and that the injured person is manifestly excluded from pursuing local remedies. For an overview of the exceptions as they operate in international law, see *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 76–86.

¹⁴¹ Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance' (2006) 66 *Heidelberg Journal of International Law* 321, 322–6.

¹⁴² Ibid 323.

¹⁴³ Included among the actions associated with diplomatic protection are 'consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force': Forcese, above n 11,

A further dimension to Palfreeman's case is the role of prisoner transfer agreements. This is another legal avenue that Australia may pursue in order to assist prisoners abroad. Australia has such an agreement in effect with Bulgaria under the *Convention on the Transfer of Sentenced Persons*.¹⁴⁴ The availability of such agreements is widely seen as adding a humanitarian dimension: the agreements allow prisoners to serve their sentences in countries with which they are culturally familiar, and thus facilitate rehabilitation and allow prisoners to be closer to their families.¹⁴⁵ Despite these recognised benefits, states have been slow to enter into or implement these agreements. This reluctance is usually due to concerns that these treaties threaten a state's sovereignty through a potential undermining of its national criminal justice system, in particular the enforcement of a state's drug laws.¹⁴⁶

Prisoner transfer agreements share a number of key features: a double criminality requirement;¹⁴⁷ that the relevant judgment is final; that a designated minimal amount of the sentence remains to be served; and that the transferring state, the receiving state and the prisoner all agree to the transfer.¹⁴⁸ The agreements will sometimes exclude certain crimes (such as those relating to national security or political offences) from the operation of the treaty. The receiving state will normally cover the costs of the transfer and subsequent incarceration of the prisoner.¹⁴⁹ The treaties also cover post-transfer procedures and set standards for the treatment of prisoners.¹⁵⁰ Typically, the transferring state will retain the right to pardon the offender, whereas the receiving state may grant parole or some other conditional release pursuant to its own laws.¹⁵¹ The

473, quoting John R Dugard, Special Rapporteur, *First Report on Diplomatic Protection*, 52nd sess, UN Doc A/CN.4/506 (7 March 2000) 15 [43].

¹⁴⁴ Opened for signature 21 March 1983, 1496 UNTS 91 (entered into force 1 July 1985).

¹⁴⁵ Keith Best, 'The Problems of Prisoner Transfer' (1992) 18 *Commonwealth Law Bulletin* 333, 334.

¹⁴⁶ See, eg, *ibid* 335 (referring to Egypt's concern about the inclusion of drug offences in prisoner transfer agreements); Abraham Abramovsky, 'Transfer of Penal Sanctions Treaties: An Endangered Species?' (1991) 24 *Vanderbilt Journal of Transnational Law* 449, 456 (referring to Mexico's views on its agreement with the US); Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Max-Planck-Institut für ausländisches und internationales Strafrecht, 1993) 242-3 (referring to Thailand's treaties that require a minimum period of the sentence to be served prior to transfer, in order to reduce interference in judicial decisions); Ralph Ruebner and Lisa Carroll, 'The Finality of Judgment and Sentence Prerequisite in the United States-Peru Bilateral Prisoner Transfer Treaty: Calling Congress and the President to Reform and Justifying Jurisdiction of the Inter-American Human Rights Commission and Court' (2000) 15 *American University International Law Review* 1071, 1086-7 (explaining the importance of the double criminality requirement).

¹⁴⁷ Double criminality requires that the crime exists in both the transferring and receiving states.

¹⁴⁸ These features are set out in the *Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners*, adopted by the *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, endorsed by GA Res 40/32, 96th plen mtg, UN Doc A/RES/40/32 (29 November 1985).

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

¹⁵¹ Abramovsky, above n 146, 464. However, the treaty with the Council of Europe (to which Australia is a party) allows both states to pardon an individual: *Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983, 1496 UNTS 91 (entered into force 1 July 1985) art 12.

great number of conditions that must be met in order to facilitate the transfer of a prisoner has meant that few individuals are ultimately able to rely upon this mechanism.¹⁵² Prisoner transfer agreements have also been criticised because they only apply to post-sentence detention and do not address issues arising with lengthy pre-trial detention.¹⁵³ Further, substantial delays often reduce their practical effect.¹⁵⁴

Australia's role in providing assistance to Palfreeman is hampered by the fact that it does not have an embassy or a consular office in Bulgaria. Staff must instead travel from Greece to provide consular assistance.¹⁵⁵ This fact highlights the relative lack of ties between these two countries, and thus provides an illustration of the minimal interests shared by Australia and Bulgaria.¹⁵⁶ As a consequence, there are few incentives to act only for the sake of one individual. Moreover, the lack of connections between Australia and Bulgaria indicates that Australia may have a limited number of issues that it can use as political leverage if it did wish to further assist Palfreeman's situation. Further, in light of the prominent position of the victim in Bulgaria, Australia may consider that the expenditure of resources and political capital is too great for the benefit of one of its nationals. Such a position is clearly regrettable. The relevance of reciprocity is undermined in Palfreeman's particular circumstances. Therefore, legal rather than diplomatic avenues seem the best options available to him to challenge his alleged denial of human rights.

III THREE BROAD THEMES

These case studies show that there are a variety of avenues available to provide legal protection to Australian prisoners abroad: the basic right of diplomatic protection, including a potential corresponding duty on a state to consider exercising this right; consular agreements; prisoner transfer agreements; and access to an international human rights court, depending on where the individual is incarcerated. In evaluating these options, it is important to recall that Australia's actions are not taken for the purpose of freeing an Australian prisoner overseas. That individual is bound by the laws of the country they are in. Instead, Australia's efforts may be for the purpose of ensuring the most efficient and fair

¹⁵² Choy Dick Wan, 'Prisoner Transfer between Hong Kong and Mainland China: A Preliminary Assessment' (2008) 33 *Brooklyn Journal of International Law* 463, 492. One commentator has speculated that the existence of prisoner exchange agreements undercuts the ability of governments to secure a 'diplomatic release': Gregory Gelfand, 'International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty' (1984) 64 *Boston University Law Review* 563, 586-7.

¹⁵³ Abramovsky, above n 146, 483; Wan, above n 152, 481-2.

¹⁵⁴ Wan, above n 152, 486.

¹⁵⁵ Belinda Tasker, 'Diplomats Visit Accused Aussie Murderer in Bulgaria', *The New Zealand Herald* (online), 3 January 2008 <http://www.nzherald.co.nz/bulgaria/news/article.cfm?l_id=23&objectid=10485155>.

¹⁵⁶ In 2010, Australian merchandise trade with Bulgaria totalled AUD7 million in exports and AUD41 million in imports, making Bulgaria Australia's 96th largest merchandise trading partner: Department of Foreign Affairs and Trade (Cth), *Bulgaria Fact Sheet* (2010) <<http://www.dfat.gov.au/geo/fs/bulg.pdf>>.

trial possible, or mitigating the application of an especially severe penalty, such as a death sentence. The prisoners concerned are usually detained or arrested because they have committed an unlawful act in another country and so the assistance provided by Australia must still align with that country's national sovereignty in relation to the prosecution of offences in its territory. These dynamics remain relevant when critiquing the parameters of the legal avenues open to Australia.

From each of the four case studies, it is possible to draw out the three themes identified at the start of the article, and consider how these have been, or may have been, influenced or overshadowed by political issues.

A Nationality

Nationality is a foundational principle in international law, as it links individuals to the juridical construct of the state and reaffirms the sovereignty exercised by that construct. The ties a particular individual has to a state were once considered so strong and important that international law did not recognise dual nationality.¹⁵⁷ While some states continue to adhere to this position, the reality is that individuals travel to and settle in other countries, and their work may require them to move between a range of locations. Familial ties may well span the globe and challenge the traditional conception of what may be regarded as someone's 'home'. In some respects, it may seem that international law is struggling to keep pace with these changes,¹⁵⁸ although the work of the ILC has attempted to accommodate them.¹⁵⁹

In the context of diplomatic protection, states take action on the basis of an individual's nationality and that bond of nationality may consequently be viewed as a sword because it enables a state to challenge the actions of another state.¹⁶⁰ Yet there is also a dimension of nationality being used as a shield. On the one hand, a state may seek to deny the nationality of an individual so that he or she is not granted the right of diplomatic protection. One example is the case of the UK in relation to David Hicks. On the other hand, a state may contest the nationality of an individual so as to thwart the right of another state to act on behalf of that

¹⁵⁷ Klein and Barry, above n 9, 8. See also Peter J Spiro, 'Dual Citizenship as Human Right' (2010) 8 *International Journal of Constitutional Law* 111, 112–15.

¹⁵⁸ See, eg, Peter J Spiro, 'Embracing Dual Nationality' in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 19, where a proposal is made to adopt the label of 'bina-tional' in lieu of 'dual national' in order to overcome biases against dual nationality and entrenched positions on nationality.

¹⁵⁹ See, eg, *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 32–3, explaining the abandonment of a 'genuine link' requirement for nationality, in light of economic globalisation and migration.

¹⁶⁰ See, eg, *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466. This case concerned Germany's efforts for the LaGrand brothers, who faced execution in the US. Although the brothers' ties with Germany were tenuous because they had grown up in the US, their nationality provided the basis for Germany to insist on US adherence to norms of consular process, particularly given that the death penalty was involved.

individual.¹⁶¹ While there may be much complexity in relation to the rights and duties that flow from an individual's nationality — and equally the rights and duties of a state vis-a-vis its nationals — the bond of nationality should be simply seen as a threshold point when addressing the protection of citizens abroad. Ultimately, the protection offered by nationality still depends on what a government is willing to do to assist the individual prisoner concerned.

B *Human Rights*

When considering issues of human rights for Australian prisoners abroad, due process rights to ensure a fair trial are critical. The difficulty for Australia in asserting concerns about due process is that it may be accused of seeking to apply its own judicial standards in another country, rather than respecting the sovereignty of another state, specifically in relation to that state's judicial system.¹⁶² Situations may nonetheless arise when criticisms of another state's judicial system are warranted. With a state like Bulgaria, which is renowned internationally for its corrupt and flawed judicial system,¹⁶³ an argument can be made that international standards have not been followed and human rights have been violated as a result. Equally, a failure to charge a detained individual after lengthy delay, as happened to Hicks, reflects a breach of international human rights law.¹⁶⁴ In these situations, Australia should be able to press politically that human rights considerations be taken into account in any decisions relating to the prisoner. Further, the prisoner concerned may have some limited means of their own to enforce their rights. Palfreeman, for instance, may be able to eventually access the ECHR, while Hicks sought to rely on bringing a claim of habeas corpus before national courts in order to assert his rights.¹⁶⁵

Yet it must be borne in mind that the fact that a state has a different legal system to Australia's does not necessarily mean that the procedures of that state violate international standards such as the right to a fair trial. Even within the

¹⁶¹ See, eg, *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 35–40 (referring to art 5), outlining when a claim may be made that there is no continuity of nationality (such as where there is a change of nationality between the time of injury and the time of filing the claim). Alternatively, a claim may also be made that the individual has dual nationality and closer ties to a state other than the one offering protection: at 41–7 (referring to arts 6–7).

¹⁶² There have traditionally been particular sensitivities in Asia about the imposition of what are perceived as Western standards that fail to account for Asian values. For an overview of this debate, see Yash Ghai, 'Human Rights and Asian Values' (1998) 9 *Public Law Review* 168. For a reflection on the universal value of human rights, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 96–7.

¹⁶³ See Riaño, Heinrich and Hodess, above n 134, 10–11.

¹⁶⁴ See Part II(A).

¹⁶⁵ Apart from the Australian litigation, Hicks' situation was also affected by challenges within the US in *Rasul v Bush*, 542 US 466 (2004) and *Hamdan v Rumsfeld*, 548 US 557 (2006). In *Rasul*, the US Supreme Court determined that the US exercised sufficient authority over Guantánamo Bay to permit the application of habeas corpus rights. As such, foreign nationals held in Guantánamo Bay could appeal their detention to the US judicial system. In *Hamdan*, as indicated previously, the US Supreme Court held that the military commissions initially established to try the Guantánamo Bay detainees were unlawful.

International Covenant on Civil and Political Rights,¹⁶⁶ there is acknowledgement that states are entitled to hold closed hearings,¹⁶⁷ as China did for Stern Hu. Similarly, a state like Indonesia may impose capital punishment so long as it is not arbitrary, conforms to procedural guarantees, and is applied only to the most serious of crimes.¹⁶⁸ In addition, Australia may be reluctant to criticise another country's judicial system as it may not want other countries to raise similar concerns in relation to imperfections in its own judicial system.

Capital punishment presents a particularly acute dynamic when considering the theme of human rights for the protection of citizens abroad, given Australia's opposition to the death penalty under international law¹⁶⁹ and national law.¹⁷⁰ While Australia may not be able to argue that the death penalty per se is a breach of international law, there may be a range of issues associated with the imposition of the death penalty that challenge international human rights norms. For example, in his appeal to the Indonesian Constitutional Court, Rush raised the question as to whether drug trafficking should be considered as one of the most serious crimes to which capital punishment applies.¹⁷¹ Although Australia considered international litigation to challenge Singapore's imposition of a mandatory death sentence for drug trafficking against Van Nguyen,¹⁷² political channels remain paramount in seeking to protect Australian prisoners from this fate. For such political interventions to be successful, Australia must have a clear and consistent position on the death penalty, otherwise its position is undermined with accusations of hypocrisy.¹⁷³

It does at least seem to be the case that there is more of an onus on Australia to act when its nationals are exposed to torture or other cruel, inhuman or degrading treatment or punishment in another state, compared to less serious rights violations. *Hicks v Ruddock* indicates that a case may be made, as a matter of administrative law, that Australia must at a minimum consider whether it will seek the return of an Australian prisoner abroad. The initial jurisdictional decision in *Habib* suggested that Australian officials may find themselves subject to litigation for their role in aiding and abetting torture if they are aware of an Australian being tortured in another country and take no steps to prevent that action.¹⁷⁴ This case suggests that there are consequences for the Commonwealth

¹⁶⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁶⁷ *Ibid* art 14(1).

¹⁶⁸ Byrnes, 'The Right to Life', above n 111, 32–4.

¹⁶⁹ As mentioned, Australia is a party to the *Second Optional Protocol*. See further *ibid* 36–7.

¹⁷⁰ Byrnes, 'The Right to Life', above n 111, 36. See also above nn 107, 117 for recent federal legislation.

¹⁷¹ See above nn 112–113 and accompanying text.

¹⁷² Lewis, above n 106, 18. See also ABC Radio, 'UN Official Wants Van Nguyen Case to Face the International Court', *PM*, 21 November 2005 (Philip Alston) <<http://www.abc.net.au/pm/content/2005/s1513049.htm>>.

¹⁷³ Byrnes, 'The Right to Life', above n 111, 40–1; Michael Fullilove, 'Capital Punishment and Australian Foreign Policy' (Policy Brief, Lowy Institute for International Policy, August 2006) 7–8 <<http://www.ciaonet.org/pbei/liip/liip025/index.html>>.

¹⁷⁴ As noted previously, however, the case has now been settled: 'Habib Drops Torture Case against Government', above n 63.

government under national law if it fails to take steps to protect an Australian prisoner who is being subjected to the gravest human rights violations.

C Reciprocity

Nationality and human rights are clearly important factors that guide decision-making for states when determining what steps they might take to assist their nationals imprisoned abroad. Australia's experience is consistent in this regard when considering Hicks, Hu, Rush and Palfreeman. Yet a vital element that is not only entwined with considerations of nationality and human rights, but is also an additional factor, is that of reciprocity. It is undeniable that much hangs on Australia's bilateral relationship with the country in which an Australian is imprisoned. Hu's case would undoubtedly have been assessed in the broader framework of Australia–China relations, especially because of Australia's export industry in natural resources to China. Similarly, Australia has an important strategic relationship with Indonesia, which includes joint efforts to combat transnational crimes such as drug trafficking and people smuggling between the two states.¹⁷⁵ In addition, Australia had to negotiate with the US over the treatment of Hicks at a time when Australia was highly supportive of the 'War on Terror'.¹⁷⁶ It may well be speculated that Australia had (or has) the inferior power position when bargaining with China, Indonesia and the US. Perhaps Australia sought to do more for each of the prisoners concerned but was simply denied. Yet given the complexity of the relationship chessboard with each of these states, Australia still had a number of pieces it could move, even if a checkmate was not immediately forthcoming.

Palfreeman's situation provides a point of contrast inasmuch as Australia's relationship with Bulgaria can hardly be considered on par with the others. The strategic and economic relationship between Australia and Bulgaria is not strong.¹⁷⁷ This may help to explain why Palfreeman's case appears to be less known and to have received less attention than those of Rush, Hu and Hicks. Certainly, Palfreeman's plight does not trigger as many questions because there are less political sensitivities at stake between the states concerned. A further point of contrast may be drawn with the actions taken by Australia to assist Australian prisoners in Thailand. The arrest and imprisonment of an Australian,

¹⁷⁵ Fergus Hanson, 'Indonesia and Australia: Time for a Step Change' (Policy Brief, Lowy Institute for International Policy, March 2010) 4 <<http://www.lowyinstitute.org/Publication.asp?pid=1245>>.

¹⁷⁶ Sales, above n 21, 49. Sales has observed that providing consular assistance to Australians imprisoned in the US would normally be an uncontroversial issue, except that 'in the new War on Terror, the old rules did not apply'.

¹⁷⁷ See Department of Foreign Affairs and Trade (Cth), *Bulgaria Fact Sheet*, above n 156, which places Bulgaria as Australia's 96th-ranked trading partner. It is interesting to note, however, that Bulgaria is a member of NATO, which has some relevance in relation to Australia's ongoing involvement in Afghanistan. In 2010, Bulgaria had 527 troops committed to the war in Afghanistan, and planned to increase this number: 'Bulgaria to Boost Its Troops in Afghanistan with Combat Unit', *novinite.com* (online), 30 July 2010 <http://www.novinite.com/view_news.php?id=118688>. This common engagement may be considered as one shared strategic interest between the two states.

Annice Smoel, for stealing a bar mat in Thailand was front page news in Australia,¹⁷⁸ and Australia promptly secured her return.¹⁷⁹ Another Australian, Harry Nicolaides, was also returned to Australia following a royal pardon for his crime of insulting the Thai monarchy.¹⁸⁰ These examples may indicate that Australia's stronger, or more symmetrical, relationship with Thailand facilitated the return of the Australian prisoners.¹⁸¹

The dynamic of reciprocity indicates that there may be a range of trade-offs that could occur across different issues. So, for example, Thailand's assistance to Australia in relation to the cases of Nicolaides and Smoel may have improved Thailand's claims against Australia in other aspects of their relationship. Mutual interests may mean that a country is willing to assist with regard to a national detained abroad in return for other benefits. This reciprocity is grounded in the complex political relationship between the states, and extends beyond a shared interest in maintaining adherence to principles of international law.

Ultimately, the position of an Australian prisoner is most likely ameliorated (by, for example, a reduction in penalty from the death sentence or improvement in the conduct of proceedings through greater transparency or quicker timeframes) when reciprocity, in terms of both law and politics, can be attained. Both countries involved should support adherence to relevant human rights norms, proper application of consular rights, as well as respect for national sovereignty in the conduct of criminal proceedings. It is in the interests of all countries to respect these principles. Further, if both countries concerned are interested in maintaining a good relationship and share economic or strategic interests, then challenges posed by the imprisonment of an Australian national abroad are more likely to be surmounted.

IV CONCLUSION

The legal avenues available to Australia for the protection of nationals imprisoned abroad are reasonably numerous but entail quite a few inadequacies. A lone individual, who seeks to challenge his or her imprisonment against the

¹⁷⁸ Paul Mulvey, 'Mr Rudd, Please Get Annice Smoel Home from Thailand', *The Daily Telegraph* (online), 20 May 2009 <<http://www.dailytelegraph.com.au/news/national/aussie-bar-mat-mum-released/story-e6freuzr-1225713506583>>, which quotes former Prime Minister Kevin Rudd as stating 'I just want to be saying very clearly that it's going to be tough. We're dealing with the laws of another country. We've got to work our way through that'. This statement reflects the government's acknowledgement that Australia had to take into account the laws of another country. It also underlines the importance of the political sensitivities in taking action to assist Smoel.

¹⁷⁹ Patrick Carlyon, 'Beer Mat Mum Flies into Her Girls' Arms', *The Daily Telegraph* (Sydney), 22 May 2009, 11.

¹⁸⁰ 'Nicolaides in Line for Royal Pardon', above n 3.

¹⁸¹ Australia also has a prisoner transfer agreement with Thailand, but the agreement was inapplicable to these matters. Smoel did not receive a sufficiently lengthy sentence: *Agreement between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*, signed 26 July 2001, 2208 UNTS 387 (entered into force 26 September 2002) art 3(d)(iii). The agreement did not apply in Nicolaides' case because crimes against the monarchy are excluded from its scope: art 3(c).

goliath of the state, has few tools at his or her disposal. When it comes to the protection of citizens abroad, it is readily apparent that Australian government protection is more useful than individuals seeking to enforce their rights on their own. Much, however, depends on the will and whim of the state concerned — both politically and legally.

This observation is easily borne out by the cases of the various individuals outlined above. In surveying the cases of Hicks, Hu, Rush and Palfreeman, several observations may be made. First, the Australian government is entitled to exercise a right of diplomatic protection at its discretion, albeit potentially with a duty to consider exercising that right when severe human rights violations are at stake. Second, consular relations are an important source of rights for both the state and the individual, particularly before the right of diplomatic protection has been enlivened. The rights set forth in the *Vienna Convention on Consular Relations* have been elaborated on in some bilateral agreements and may offer additional assistance to nationals imprisoned abroad.¹⁸² Third, international human rights law, particularly principles relating to due process and cruel, inhuman or degrading treatment or punishment, may contain important standards or benchmarks for the imprisoning states to adopt. However, enforcement of these rights may be difficult if Australia is not willing to assert them strongly or raise them through judicial means or in appropriate international fora. Fourth, enforcement will only be facilitated for the individual concerned if they are imprisoned in a country that is subject to a regional human rights framework, which includes judicial review of national court decisions. Finally, prisoner transfer agreements may open up the possibility of Australians returning home to serve their sentence, but the use of such agreements is not widespread and even then, there are many limitations and barriers to their operation.

Seeping into these legal avenues of redress for Australian prisoners overseas are political concerns, particularly as so much comes down to what Australia is willing to do, or perhaps what it has the resources to do. While the choice of action may be an internal decision, it seems inevitable that the bilateral political relationship is at stake as well. It is essential to consider where any particular case fits in the broad landscape of bilateral, or perhaps regional, issues. Diplomatic initiatives and consular assistance during the detention, trial and sentencing of an individual may ultimately improve the outcome for that individual within the foreign criminal justice system. The extent of those initiatives or assistance is dependent on a range of factors, including the strategic balance and economic interests shared between the countries concerned.

An Australian prisoner abroad needs to fight for legal and diplomatic options. Obviously, media publicity can assist in bringing attention to a particular person's plight. Rallying public opinion for their cause will potentially pressure the Australian government into acting.¹⁸³ Access to modern technology can

¹⁸² See, eg, *Agreement on Consular Relations between Australia and the People's Republic of China*, signed 8 September 1999, 2169 UNTS 494 (entered into force 15 September 2000).

¹⁸³ See, eg, the 'Fair Go for David' campaign in relation to David Hicks: Sales, above n 21, 90–2.

certainly help one's cause in this regard. Organisations can develop websites or set up Facebook pages dedicated to the individuals concerned. The social dynamic within Australia may become an important element in influencing Australia's decisions on what legal avenues to pursue and how diplomatic efforts should be directed.

It is suggested here that approaches that focus on the reciprocity dynamic may ultimately be more successful or strategic than approaches that rely on human rights norms or the bond of nationality. Reciprocity may augur in favour of a more rigorous application of international law, especially international human rights law. Where the reciprocity dimension to the application of the rule of law is missing, or weak, then reciprocity in political relationships may become more important. The task of using reciprocity to secure positive outcomes for a country's own nationals is by no means an easy one and does not offer great solace to a lone individual facing a highly complex legal and political framework. Given the state-centric, politically-imbued nature of diplomatic protection, no major change to the existing legal framework is to be expected in the near future, short of radical improvements to implementation of international human rights. Any individual prisoner must therefore be very strategic with the tools that are available and try to work them to their advantage.