HUMAN RIGHTS - THE WAY FORWARD

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The following paper was presented at the inaugural Michael Hirschfeld Memorial Address hosted by the Amnesty International Freedom Foundation on 30 October 1999.

Michael Hirschfeld was instrumental in establishing the Freedom Foundation in 1989. He wanted to help stabilise Amnesty International's financial base in order to guarantee the organisation's research and international campaigning efforts against gross human rights violations such as unfair imprisonment, torture and killings.

His death at the beginning of 1999 shocked and saddened fellow Freedom Foundation members who determined to establish this annual event to honour his memory and his commitment to international human rights.

I MICHAEL HIRSCHFELD REMEMBERED

Michael Hirschfeld died in January 1999. Like most interesting people, he was, by common report, a bundle of contradictions. The obituary in *The Evening Post* put it this way: [1]

> A wealthy socialist; an agnostic, a deeply committed Jew; an intellectual idealist, pragmatist; internationalist and passionate Wellingtonian.

I never met Michael Hirschfeld. He sounds very like Alan Missen, a wonderful Australian Liberal politician whose rich spirit reached out to people of differing political

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1 *The Evening Post*, Wellington, New Zealand, 7 January 1999.

loyalties. Like Alan Missen, Michael Hirschfeld was closely involved with Amnesty International. Like Michael Hirschfeld, Alan Missen saw politics as principles in action. Like Alan Missen, Michael Hirschfeld died too young. Through his membership of Amnesty International and his political party, Michael Hirschfeld made a significant contribution to tackling some of the most horrible violations of human rights that exist in our world - political killings, disappearances, torture and imprisonment of people solely for their beliefs or identity. It is an honour for me to be invited to deliver the first address that remembers Michael Hirschfeld's work and boundless energy.

It would be safe enough to examine the current challenges to human rights in our countries and in the world. It would be entirely appropriate to review the contemporary issues confronting women, children, ethnic minorities, indigenous peoples, prisoners, religious minorities and people denied political freedom. Each of these would be a topic worthy of the life of Michael Hirschfeld. In New Zealand, in particular, it is difficult to review the human rights scene without reflecting on the struggle of the Maori people to attain full equality, just as in Australia the rights of the Aboriginal and Torres Strait Islander peoples are central to our human rights debates. Throughout the former colonial empires of the European powers the readjustments of the rights of indigenous peoples in societies whose laws and cultures protected the settlers is a process that is unfolding. In a sense it has a universal human rights dimension. It is the quest for the attainment by indigenous peoples, within those societies, of the right to self-determination that is promised by the International Covenants on human rights.

Although those topics would be important and relevant, I have chosen to look outside the current paradigms to attempt to challenge thinking about the context of human rights. Not perhaps human rights as they are always now perceived. But the institutions and issues of the future which are important as we take the struggle for human rights into the new century. Truly large contemporary challenges will remain to engage Amnesty International and the successors of Michael Hirschfeld. But to be ready for the future of human rights, we must know at least the general way forward. We must be alert to new human rights issues.

II THE UNITED NATIONS HUMAN RIGHTS NETWORK

The painstaking steps to build the new world legal order have seen promising developments in recent times which can only give encouragement to those who look with optimism to the 21st century. The adoption of the constitution for the world's first

permanent International Criminal Court has been followed by intensive negotiations to set it up. These have been concerned with securing agreed definitions for the elements of the crimes which will come under its purview and the rules of procedure and evidence which it will follow.[2] One important question concerns the access of people who allege that they are victims of international crimes. What real claim will such people have on the processes of the International Criminal Court and the staffing of the Court's victims and witnesses unit? The provision of reparations to victims is another matter which has been considered. Steadily, step by step, the international community is working to build a new international institution of great symbolism and potential importance.

The most important function for the defence of human rights which I have held was that of Special Representative for the Secretary-General of the United Nations for Human Rights in Cambodia. For three years before my appointment to the High Court of Australia, I served in that office. It involved two or more missions to Cambodia each year, upon which I was required to report to the Commission on Human Rights in Geneva in April and to the General Assembly of the United Nations in New York in November.

When I arrived in Cambodia I discovered that the large United Nations Transitional Authority for Cambodia (UNTAC) force, which had supervised the elections that led to a new Constitution and National Assembly, had departed. There were but three blue helmets left in the country, although the security situation was still extremely delicate. One of the outstanding achievements of UNTAC was the growth of a large number of human rights non-governmental organisations (NGOs). They sprang up everywhere. Organisations to represent the interests of women. Those concerned with the lives of street children. Those involved in the issues of HIV/AIDS. Those devoted to the victims of land mines. Those working for prisoners. Those demanding justice for the victims of the Khmer Rouge. Those upholding the rights of the Vietnamese minority or of indigenous peoples sheltering in the mountains between Cambodia and Vietnam. The establishment of an Office of the United Nations Centre for Human Rights in Phnom Penh and the work in that office of fine human rights experts (some of them Australians and New Zealanders) afforded a permanent international presence to support, encourage and defend the human rights defenders in Cambodia.

When in the big halls of the United Nations I would rise to give my reports on the achievements and problems which I had observed in my missions to Cambodia, I saw the

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2 V Oosterveld "International Criminal Court Negotiations" in *Human Rights Tribune,* September 1999, vol 6 no 3, 11.

international community at work. Of course, the mechanisms were not perfect. The sanctions for human rights violations were often inadequate The abusers continued their affronts to humanity. But for the first time in history, tyrants were obliged to answer before the bar of humanity to the complaints of an international official looking into the "internal affairs" of their nations.

During my service, much that was good about Cambodia could be honestly reported. Much that was critical was candidly admitted by the government. But for a number of the other Special Rapporteurs and Special Representatives who ascended the rostrum before and after my reports, the stories were of unrelieved terror and horror. The Special Rapporteur on the Sudan. The Special Rapporteur on Afghanistan. The Chairman of the Working Group on Arbitrary Detentions. These and other reports were often gruesome and upsetting. But at least the representatives of the nations impugned had to attend and give their answers. Nowhere in the world is a tyrant now sure that the world is not watching and may not eventually demand an account before a Commission of the United Nations or before a court.

III CHALLENGES IN THE UNITED NATIONS MACHINERY

The experience of Cambodia was in some ways atypical. The mechanisms are not yet in place to beckon us with complete confidence to an improved world in the 21st century. There are many troubling features of current arrangements. They include:

(1) Special Rapporteurs*:* In Malaysia the Special Rapporteur on the Independence of Judges and Lawyers, a national of that country (Dato' Param Cumaraswamy) has been sued for defamation in respect of comments made by him in London in the discharge of his functions. The Court of Appeal of Malaysia declined to give summary effect to the Special Rapporteur's claim for diplomatic immunity.[3] This was so despite a letter from the Secretary-General of the United Nations asserting the entitlement of the Special Rapporteur to immunity under the Convention on Privileges and Immunities of the United Nations to which Malaysia is a party. Observers of the human rights scene in Malaysia and Singapore will not have missed the tendency in those countries to develop the law of defamation and contempt into an instrument to suppress criticism of the powerful. The United Nations Economic and Social Council (ECOSOC) referred to the International Court of Justice for an Advisory Opinion the question of whether the Special

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3 *Cumaraswamy v MBf Capital Bhd* [1998] 3 LRC 187.

Rapporteur was entitled to diplomatic immunity. That Court, by majority, advised that the Special Rapporteur was acting in the course of the performance of his mission and was immune from legal process of any kind. It opined that the Government of Malaysia was under an obligation to communicate its Advisory Opinion to the Malaysian courts in order that Malaysia's international obligations be given effect.[4] The saga continues. The Malaysian courts appear reluctant to abide by the international judgment. All of the Special Rapporteurs and Special Representatives of the United Nations would be gravely imperiled if, in the discharge of their functions, they were liable to be sued in the courts of their own country or of the countries to which their missions take them. A new weapon to suppress candid opinion and, where justified, criticism, comment and suggestions would be introduced. For the success of the system of United Nations Special Rapporteurs, it is essential that the Advisory Opinion of the International Court of Justice be heeded.

(2) Commission on Human Rights: The 55th Commission on Human Rights (CHR), the successor of that to which I reported as Special Representative, took place in March and April 1999. It was reported to be a "depressing affair".[5] Some commentators likened the atmosphere to that which had prevailed in 1994 at the 50th CHR, the first after the Vienna Conference. The 55th Session opened with the air still full of the ringing words and grand promises spoken after the celebrations of the 50th anniversary of the Universal Declaration on Human Rights. Unfortunately, the reality was far from noble. The review of the mechanisms of the Commission, which had begun in the previous session and which were aimed to enhance the capacity of the United Nations to promote and protect human rights in practical ways, seemed to get nowhere. When progress looked likely to occur a small but determined number of "like-minded" governments reportedly torpedoed the reports "while mouthing their commitment to progress".[6] The Commission was reluctant even to consider sponsoring a resolution to create a Special Rapporteur on Human Rights

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4 *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* International Court of Justice Advisory Opinion, 29 April 1999 <http:/www.icj-cij.org>.

5 L S Wiseberg "The Fifty-fifth Commission on Human Rights" in *Human Rights Tribune,* September 1999, vol 6 no 3, 6.

6 Wiseberg, above n 5.

Defenders as a means of ensuring the adoption and implementation of the Declaration on Human Rights Defenders.[7] The excuses given were that the timing was wrong. The members of the Commission were not only not prepared to maintain a Special Rapporteur on Nigeria for another year, they did not challenge the African group when it submitted language on the Nigerian resolution which co-sponsors had not agreed to. This was allowed to pass as a "technical error". The resolution commended the Nigerian elections as "free and fair" although domestic and international observers have reported that the Presidential and earlier elections had fallen considerably short of the "free and fair" ideal.[8] Outside the areas where great power or influence dictated outcomes, some progress was made. The human rights situations in Sierra Leone and Chad were added to the agenda for the next session. The mandate of the Special Representative in Iran was extended. A Special Rapporteur on the Rights of Migrant Workers and Members of their Families was appointed. Agreement was achieved on the response to the situation in Kosovo.

(3) Access of NGOs: A further institutional concern is the participation of independent NGOs, as distinct from government organised NGOs (GONGOs) in the work of the CHR and the United Nations more generally. The access of NGOs to the United Nations, and the revocation of access in one case had led to strong statements to ECOSOC, including by Amnesty International. These protested at the lack of due process in the means that were observed. The importance of human rights NGOs is recognised by the adoption in the 1998 session of the Commission of the text of the Declaration on Human Rights Defenders. But translating that text into action, weeding out government stooges and ensuring true attention to NGO advice remains a major challenge for the United Nations human rights machinery.

(4) Withdrawals from UN system: Another somewhat worrying development is the decision in the last year of a number of countries to withdraw from international human rights treaties and/or human rights mechanisms. The United Nations Sub-Commission for the Promotion and Protection of Human Rights (formerly

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7 Adopted by the CHR on 9 December 1998. At the 56th Session of the CHR in April 2000, the Commission decided to establish a UN Special Representative on Human Rights Defenders. The proposal was approved by 50 votes for, 3 against, no abstentions.

8 Wiseberg, above n 5, 7.

the Sub-Commission on Prevention of Discrimination and Protection of Minorities) adopted a resolution requesting five governments of member States to re-examine their withdrawals from, or limitations on, supervision. Specially named were Jamaica, Guyana, Trinidad and Tobago, Peru and North Korea. The first three, members of the Commonwealth of Nations, withdrew from the mechanisms of the International Covenant on Civil and Political Rights because of the criticisms which had been voiced about decisions to carry out capital punishment in circumstances found objectionable by the United Nations Human Rights Committee.[9] To those who look on these United Nations mechanisms as mere talk-fests, it is worth noting the energy and determination with which those who are subject to criticism move in order to try to avoid or deflect that criticism. The instruments and sanctions which I have described are by no means perfect. But they do illustrate an important global development. Nations are not now immune from the energetic pursuit of human rights defenders and NGOs. Fortunately, countries such as New Zealand and Australia are usually amongst the leaders in the world community (and certainly in our region) in advocating basic human rights and human dignity. It is important that we should maintain this good record. We should also submit ourselves to scrutiny for our conduct in areas touching human rights at home.

IV CRIMES OF UNIVERSAL JURISDICTION

One development of the greatest importance concerns the *Pinochet* affair. The legal cases arose out of the application by a Spanish magistrate for the extradition of General Augusto Pinochet to Spain to face trial on charges including torture, allegedly committed in Chile when he was head of state. The House of Lords, reversing a decision of the Queen's Bench Division,[10] held that Senator Pinochet was liable to extradition.[11] In January 1999, the Law Lords allowed an application on behalf of Senator Pinochet for the case to be reheard.[12] As will be known, this was done on the ground that Amnesty

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9 International Commission of Jurists *Comments on the UN Subcommission for the Promotion and Protection of Human Rights* (31 August 1999) 2, International Commission of Jurists *Assessment of 56th Session of the UN Commission on Human Rights* (3 May 2000).

10 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] 4 LRC 628.

11 *Ex parte Pinochet Ugarte* [1998] 4 LRC 659; [2000] 1 AC 61 (HL).

12 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1999] 2 WLR 272; *Ex parte Pinochet* [1999] 1 LRC 1; [2000] 1 AC 119 (HL).

International, having been joined as an intervener at the appellate stage, was associated with one of the participating Law Lords, Lord Hoffmann. He had been chairman of a charity connected with Amnesty International. It was concluded that this had disqualified him, at law, from sitting in the first hearing. However, the second decision reaffirmed the conclusion that Senator Pinochet was liable to extradition.[13] This, in turn, led to an extended hearing before a magistrate in London, Mr Ronald Bartle.

On 8 October 1999, the magistrate ruled that "all conditions are reunited to oblige me to defer Senator Pinochet to the Secretary of State's decision".[14] Upholding the validity of the extradition request, the magistrate stated that there would be no protection from prosecution under the "universal" Convention Against Torture adopted by the United Nations in 1984 and ratified by the United Kingdom in 1988. The alleged crimes brought to the notice of the magistrate included electric shock, beatings, sexual abuse and murder of victims purportedly effected under the directions of General Pinochet allegedly in the "performance of official duties". The charges date from the last 14 months of his military dictatorship which began when Chile's army removed from office the elected government of President Salvador Allende in 1973.

Initially, Senator Pinochet faced wider charges of genocide and murder. However, by the second House of Lords decision in March 1999, it was decided that the crimes alleged to have been committed before the United Kingdom ratified the Convention on Torture in 1988 could not found proceedings to extradite the accused to Spain. The decision to extradite was welcomed by the Chairman of Amnesty International in the United Kingdom, Mr Andy McEntee. He declared that it had been made "without any political bias".[15]

Although the English courts divided on the scope of the immunity of a former head of state and on whether acts of torture and hostage-taking could ever be regarded as within the functions of "official duties" of a head of state, the result of the *Pinochet* litigation is an important development within the common law world for the assertion of jurisdiction over

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13 *Ex parte Pinochet* [1999] 1 LRC 482; [2000] 1 AC 147 (HL).

14 Reported *The Australian,* 6 October 1999, 1, 19.

15 See above n 14, 19. Later the Home Secretary (Mr Jack Straw) concluded that Pinochet was unfit to stand trial and he returned to Chile. In June 2000 it was reported that a Court in Chile had lifted his domestic immunity from suit for past crimes.

universal crimes and for the limitation of impunity for those alleged to have participated in such crimes.

V SEXUALITY AND HUMAN RIGHTS

Amnesty International has extended its mandate to accept that sexual identity is an important issue of human rights which has frequently occasioned unjust punishment, including imprisonment and worse, for no reason better than the individual's sexual orientation. Not everybody, however, accepts that this is a universal issue of fundamental human rights.

Whilst the provision of legal sanctions against unconsensual or immature sexual activity are important to a civilised society, many countries, and individuals in them, have suffered from the law's over-reach in this area. As a consequence many individuals have been subject to, and continue to suffer from, criminal sanctions and also the shame, alienation and self-doubt which such laws give rise to and reinforce. It was the call for reform of the law on prostitution and homosexual offences that produced the Wolfenden Report in England in 1957.[16] That report addressed the injustices which the law had inflicted in Britain, and consequently in New Zealand, Australia and beyond, on homosexuals who engaged in sexual activity - even if adults, with full consent and in private. Some defenders of the old laws argued for the legitimacy of the community's right to impose its moral views about sexuality on everyone in society. But others contended for a more limited function of the criminal law and of the legitimacy of the state in enforcing moral precepts about which there exist strongly divided opinions.

In the 40 years since the Wolfenden Report, the latter school has gained notable successes, including in New Zealand and Australia. Gradually, in both countries, because of the work of courageous and principled politicians on both sides of politics, the old criminal offences were abolished. By 1994 only one Australian jurisdiction, Tasmania, retained laws imposing criminal sanctions on homosexual conduct for which consent was no defence.[17]

The consequence of this was a remarkable story of individual courage and purposeful action by a United Nations agency. A Tasmanian gay activist, Mr Nicholas Toonen, brought proceedings against Australia in the Human Rights Committee of the United

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16 *Homosexual Offences and Prostitution* (Her Majesty's Stationery Office, London, 1957).

17 Criminal Code (Tas) ss 122(a), (c), 123.

Nations. The Committee upheld his complaint.[18] This led to a federal statute designed to over-ride the Tasmanian laws.[19] After a challenge was mounted in the High Court of Australia,[20] Tasmania capitulated. Its laws were changed. A new non-discriminatory law was adopted which deals with unlawful sexual conduct without discrimination. Mr Toonen's case is a singularly vivid illustration of the practical way in which international law can sometimes be brought to bear upon domestic law, including in the field of criminal law and even in the sensitive area involving sexuality.

Nevertheless, discrimination and prejudice remain. Much work remains to be done:

(1) The continuing difficulty of securing respect for sexual privacy has been demonstrated by the response of courts, national and super-national, to proof of sadomasochism. As a result of searches conducted for another purpose, police in England found evidence of such conduct on the part of a group of adults. All of those involved had fully consented to the conduct concerned. None of them was seriously or permanently injured by it. Yet criminal prosecutions were brought against them. The participants were convicted. They were sentenced to extended periods of imprisonment. The House of Lords, by majority, upheld their convictions.[21] One of the dissentients, Lord Slynn of Hadley remarked: "It is not for the courts in the interests of 'paternalism' … or in order to protect people from themselves, to introduce into existing statutory crimes relating to offences *against* the person concepts which do not properly fit there". The prisoners took their

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18 *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97. See H J Steiner and P Alston *International Human Rights in Context* (Clarendon Press, Oxford, 1996) 545. For earlier decisions of the European Court of Human Rights see *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186 and *Modinos v Cyprus* (1993) 16 EHRR 483.

19 Human Rights (Sexual Conduct) Act 1994 (Cth).

20 *Croome v Tasmania* (1997) 191 CLR 119.

21 *R v Browne* [1994] 1 AC 212. Contrast *Reg v Kiccarelli* (1989) 54 CCC (3d) 121; *R v Donovan* [1934] 2 KB 498 and *R v Wilson* [1996] 3 WLR 125.

case to the European Court of Human Rights. Their case was dismissed.[22] Indeed, one of the judges, Judge Pettiti of France stated in his separate opinion:[23]

> The dangers of unrestrained permissiveness can lead to debauchery, paedophilia … or the torture of others … The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism.

This is language a long way from *Toonen*. It illustrates the unwillingness of some to tolerate deviation from majoritarian views about sexual conduct even between consenting adults in private.

(2) Even where criminal sanctions against people on the basis of sexuality have been removed, discriminatory provisions persist. They continue in areas affecting property rights, rights of superannuation and rights relating to long-term personal relationships akin to marriage.[24] In some legal jurisdictions legislation has been introduced to begin the process of rolling back the most offensive of these discriminatory laws and practices.[25] However, a great deal remains to be done. Legislators in New Zealand and Australia seem extremely timid in this area. For those who truly believe in equality before the law and an end to discrimination on bases that people cannot alter (such as their race, gender or sexuality) a major human rights challenge for the future clearly lies in the rectification of the wrongs done to people by discriminatory laws on the grounds of their sexual orientation.[26]

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22 *Lasky, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39. For United States law and commentary see W N Eskridge and N D Hunter *Sexuality, Gender and the Law* (Foundation Press, Westbury (NY), 1997) 257, 1015. The English Law Commission has proposed decriminalisation of consensual sado-machocistic sexual activity involving adults. See Eskridge and Hunter, 1010.

23 *Lasky, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, 61.

24 Compare *Quilter v Attorney-General* [1998] 3 LRC 119; [1998] 1 NZLR 523 (NZCA); *State v Kay* [1998] 1 LRC 248 (SACC); *Vriend v Alberta* [1998] 3 LRC 483.

25 Property Relations Act 1984 (NSW) as amended 1999. See M D Kirby "Same-Sex Relationships - some Australian Legal Developments" (1999) 19 Aust Bar Rev 4.

26 On 18 November 1999 a vote in the Legislative Council of the Parliament of New South Wales denied a second reading to the Crimes Amendment (Sexual Offences) Bill 1999 (NSW) whose purpose was to reduce the age of consent for same-sex activity involving males from 18 years to 16 years to equalise the age of male and female consent: New South Wales Parliamentary Debates (Legislative Council) (18 November 1999) 28.

(3) Unfortunately, it seems unlikely that the United Nations will be in the vanguard to protect gays and lesbians. It is difficult to preach to the world if you offend at home. Recent reports have indicated that discrimination exists against officers within the United Nations itself on the grounds of their sexuality.[27] As a body representing the nations of the world, the United Nations sometimes falls short in its defence of basic human rights principles. There will not be much action by the United Nations without a great deal of pressure from enlightened countries such as New Zealand and Australia. It is much more likely that independent bodies such as the United Nations Human Rights Committee or the Special Rapporteurs or independent courts will uphold fundamental principles of equality and non-discrimination. This is what occurred recently in the decision of the European Court of Human Rights in September 1999. That Court upheld the challenge to a ban by the United Kingdom military upon the service of homosexuals in the British armed forces.[28] New Zealand and Australia have long abandoned such exclusions. We have also adopted a less discriminatory policy in migration and refugee cases. This is just the beginning. The major struggles for reform lie ahead.

VI DRUGS AND HUMAN RIGHTS

Another area in which reform is essential concerns the laws and policies observed on drugs. In Australia during the past year, there have been several high level meetings to re-examine our current laws and strategies. It now seems clear that Australia's politicians and police may be ready to consider fresh approaches to drug policy and law reform. Police Commissioners have suggested that current strategies need reconsideration. Politicians of all political persuasions have begun to call for a new approach which will place greater emphasis on considerations of liberty and harm minimisation than on the implementation of law and order by use of Draconian deterrence and intrusive methods of control.

The so-called zero tolerance policing which is followed in some parts of the United States of America as a response to widespread and growing drug use in that country has

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27 "UN Employees Cry Foul" *Capital Q Weekly*, Sydney, Australia, 10 September 1999, 5.

28 *Lustig-Prean and Beckett v United Kingdom* (27 September 1999) unreported and *Smith and Grady v United Kingdom* (27 September 1999) unreported.

been reported negatively by Australian experts who have studied it.[29] Yet according to the Director of the Australian Institute of Criminology, the rate of armed robbery in New South Wales has increased by 105 per cent over the past five years. This can only be attributed to sharp increases in the crimes connected with urgent procurement of cash. Every informed observer knows that a large proportion of these crimes (and of the persons who are convicted and sentenced to prison) are connected with drug use.

In several countries of Europe new approaches are being tried. Many of these are justified by reference to considerations of the fundamental human rights of those people who are addicted to drugs or otherwise are adults who wish to use drugs in private. In Switzerland and in the Netherlands initiatives have been taken which reject the prohibitionist approach that most national and international laws have taken until now. Any change in the present criminalisation of selected drug manufacture, importation, supply and use would probably have to occur within the context of national strategies and reconsideration of international obligations. The matter is one of great importance and urgency for thousands of New Zealanders and Australians criminalised by the present approach. It is also a matter of concern for their families who watch with despair and anguish the intermittent impact of the criminal law on a person they love, see in danger and regard as sick, not evil.

No doubt, the current approach of criminal laws in New Zealand and Australia has achieved a measure of success in terms of their deterrent impact on the conduct of some persons who might otherwise have been tempted to import, obtain and use illegal drugs. However, it seems likely that the many failings of the current laws, the consequences for the human rights and dignity of those caught up in them, the erosion of civil rights of many citizens by investigative necessities and the burden of those who are suffering from the high levels of crime, will ultimately produce legal change. This is a human rights issue of the present and the future. If we are in doubt we should reflect on the number of people in our prisons for drug-related offences. Are they people who will come within the mandate of Amnesty International? Is our current way of treating drug dependant people, in particular, an offence to human rights?

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29 Report of Mr C Cunnen "Zero Tolerance Not the Answer, Says Academic Who Studied It" *Sydney Morning Herald,* Sydney, Australia, 1 March 1999, 4. See also G Zdenkowski "Mandatory Imprisonment of Property Offenders in the Northern Territory" (1999) 22 UNSWLJ 30; G Edgerton "Mandatory Sentencing Legislation: Judicial Discretion and Just Desserts" (1999) 22 UNSWLJ 256; and N Morgan "The Aims and Effects of Mandatories" (1999) 22 UNSWLJ 267.

VII NUCLEAR PERIL, PRIVACY, HIV AND THE GENOME

A recurring theme of recent years has been the impact of science and technology on the law. The importance of technological change for issues of fundamental human rights is clear. Four considerations of importance might be mentioned:

(1) Nuclear: The most perilous technology of the century is that involving nuclear fission. The proliferation of nuclear weapons and nuclear materials presents unique challenges to human survival and thus to human rights. There is probably no more urgent global challenge than this. Recent events are sobering. The proliferation of the possession of nuclear materials in countries of the former Soviet Union and the risk of sale or supply of such materials on a global market presents urgent dilemmas. So do the recent political changes in the Indian subcontinent. And so too does the rejection on 14 October 1999 by the United States Senate of the ratification of the Comprehensive Test Ban Treaty. President Clinton predicts that this will be reversed. But it is a sombre event on the eve of a new century.

(2) Cyberspace: The second consideration concerns the impact of information technology on fundamental rights. In 1980 I took part in the work of an OECD Committee which produced guidelines for the defence of privacy in the context of transborder data flows.[30] Given the different cultures and legal systems of the 24 participating countries it was remarkable that consensus could be achieved. The Guidelines proved highly influential on the privacy laws of member states, including New Zealand and Australia. The key provisions required limitations on the needless collection of personal information, security of such information once in the system and the right of access by the data-subject to his or her personal information.

Since those Guidelines were adopted, the world has embraced the Internet. It stands on the brink of cyberspace. It was in this context that *The Economist,* in May 1999, asked whether we were witnessing "the end of privacy".[31] In the past the chief practical protection for privacy lay in the sheer cost of retrieving personal information and in the impermanency of the forms in which information was typically stored. In the Internet, such practical safeguards largely disappear.

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30 *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (OECD, Paris, 1981).

31 *The Economist,* 1 May 1999, 12.

That is why new kinds of human rights are being suggested. The right not to be indexed. The right to encrypt personal information effectively. The right to secure human checking of adverse decisions made in computer files. The right to be alerted to computer decisions affecting the subject. The right of disclosure about the collections to which others have access and which may affect the projection of one's profile.[32] One suggestion in this context is that information systems should be evaluated for their entitlement to a "privacy seal".[33] Governments sometimes want to crack such seals where they consider this to be warranted for law enforcement, intellectual property protection and taxation objectives. There is no doubt that human rights issues continue to be presented by information technology. Those who are concerned about the shape of human rights in the future must go beyond prison walls to the new means whereby individuals can be harmed - including through burgeoning informatics. And a fundamental question concerns governance in cyberspace.[34] In that international environment, will it be possible to enforce the values of the societies affected?

(3) HIV vaccines: A third issue presented by technology arises in response to the HIV/AIDS epidemic. In that context there are many human rights issues which demand attention. Most of them concern the developing world where every day 16,000 new HIV infections occur.[35] Behaviour modification is a very slow and imperfect process in that world. That is why there is great pressure to develop, trial and use vaccines. Yet such vaccines will tend to be trialed not in the developed world, whose markets could immediately afford them once approved. Instead they will be trialled in developing countries where governmental approvals are readily obtained, consent of trial participants is easily secured and

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32 L A Bygrave "Data Protection Pursuant to the Right to Privacy in Human Rights Treaties" (1999) 6 International Journal of Law and Information Technology, 247; M D Kirby "Privacy in Cyberspace" (1998) 21 UNSWLJ 323; G Greenleaf "Privacy in Cyberspace: An Ambiguous Relationship" (1996) 3 PLPR 5, 88; S D Balz and O Hance "Privacy and the Internet: Intrusion, Surveillance and Personal Data" (1996) 10(2) International Review of Law, Computers and Technology, 219.

33 S Lau "E-commerce, Consumer Rights and Data Privacy" (1998) 3 I-Ways 37, 38.

34 M Armstrong and D Mitchell "Governance in Cyberspace: Content and Carriage", unpublished paper for International Institute of Communications Conference, Kuala Lumpur, Malaysia, 8 September 1999.

35 *AIDS Policy and Law* 30 September 1994 (vol 9 no 18), 1, 8.

legal remedies are problematic if things go wrong.[36] A major problem in the field of vaccines is the real interest which the vaccine producer necessarily has in the exposure of the participant in the trial to the peril which the vaccine is designed to ward off. In the case of vaccines against measles, whooping cough and the like, such a peril may be tolerable. But in exposure to HIV it is not. That is why it is imperative that the human rights of trial participants in developing countries should be respected. They need to be given effective instruction on self-protection against exposure to HIV. If the trial fails they need appropriate remedies. Host countries need the assurance that they will reap a "vaccine dividend" if HIV vaccines ultimately prove effective. This is an urgent and major challenge to human rights in the world, evidenced by the large numbers of seroconversions that are occurring all the time. Yet the lessons of past trials in poor communities instruct us that people in such trials are often extremely vulnerable. They need guardians and defenders who will speak up for their basic human dignity and human rights.

(4) Genomic science: A fourth problem arises in the context of the Human Genome Project. This is the project which, by the year 2001, will have mapped all of the human genes. In due course it will provide an encyclopaedia for medicine for the coming century. Many social, ethical and legal problems are presented by the Project. They include the use of genetic data with the potential to alter in significant ways the future of the human species. Few questions of human rights can be more fundamental than who the future human beings will be.

In the Ethics Committee of the Human Genome Organisation a Discussion Paper is being prepared on one of these problems. Once again it illustrates the interface of technology and human rights. It relates to the issue of benefit sharing. How can we be sure that those who contribute to scientific knowledge in genomic research will gain a just return? If, for example, people from a particular community or ethnicity are found to be resistant to a specific form of malaria, or to some of the side effects of tobacco inhalation, or to prostate cancer, will genomic research on those persons ensure just rewards for them as the reward for their participation? Are such persons themselves entitled to recompense? Or is their contribution to be put down to a contribution to pure science? What if the

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36 M D Kirby "HIV Vaccine: Ethics and Human Rights" unpublished paper for Fifth International Congress on AIDS in Asia and the Pacific, Kuala Lumpur, Malaysia, 24 October 1999.

> pure science leads to a medical product from which a multinational corporation, protected by patents, reaps huge rewards? Does an indigenous community, subjected to study for such purposes, attract an entitlement to reward? Or is it to be seen as nothing more than a subject of experimentation, not entitled to any part of the profits that follow? Does the nation concerned in such experimentation earn a recompense from the international pharmaceutical corporations involved? These and other like questions are presented by genomic research. They are human rights concerns. The future becomes more complex. But that is the world of science and technology. It is the world we have already entered. And its problems will not become easier.[37]

VIII TWO VISIONS OF THE FUTURE

There are many other issues which, were he here, Michael Hirschfeld would be urging upon us. Questions about the common heritage of humanity and the protection of our environment. The question of peoples' rights and in particular the peoples' right to self-determination which lay behind the recent conflicts in Bougainville, East Timor and Acheh. The issues of economic, social and cultural rights which are so important but tend to be overlooked by lawyers and many human rights activists. The particular role which lawyers can play in the implementation of fundamental human rights when construing a national constitution,[38] or a statute or executive practice,[39] or in developing the common law.[40]

The practical protection of human rights often lies in courtrooms and in prisons, as I repeatedly saw in Cambodia. It lies in protecting women and children from discrimination. It lies in defending ethnic communities and especially indigenous peoples from hate crimes and deprivations of equal opportunity. These are all issues of the present. But human rights now and in the future will extend far beyond these concerns, important though they all are. Now they reach out into the wider world of discrimination and prejudice. They throw a girdle around the earth in the form of cyberspace. They

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37 Human Genome Organisation, Ethics Committee, Discussion Paper No 1/1999, *Genome: Benefit Sharing* (London, 1999) forthcoming.

38 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 417-419 "The interpretative principle point".

39 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 373; *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.

40 *Mabo v Queensland [No 2]* [1992] 175 CLR 1, 42.

reach down into the infinitesimally small elements of our genes that make up the basic elements of our humanity.

It is our common humanity that binds us together. It has led us to some remarkable achievements in the 20th century. The past century has been a century of war and devastation, of genocide and nuclear explosions. But it has also been the century that has witnessed the establishment of the global movement for human rights and the development of norms and institutions to protect them. The battles go on as contemporary experience in countries close to home and far away makes clear to us.

Michael Hirschfeld and those like him show the way ahead. That way will require continuing attention to the causes that we know. The present can be seen as through a glass darkly. Only by effort will we see it face to face. And meanwhile, those who, as Michael Hirschfeld was, are committed to universal human rights will be seeking to identify the future challenges and to respond to them as Michael Hirschfeld did in the past. With energy, imagination, determination and courage.