

## AUSTRALIA, THE COCOS ISLANDS AND SELF-DETERMINATION

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Allegations of slavery are not normally the stuff of Australian law and politics in the latter half of the twentieth century.

However, on 30 August 1972, the majority of Australians were first made aware that Australian territory included the Cocos (Keeling) Islands, mere crumbs on the map of the Indian Ocean, where what appeared to be a feudal kingdom of Malay slaves was run by a barefoot Caucasian monarch replete with a dagger at his waist. The media seized upon this exotic scenario about which most Australians were totally ignorant.

A little less than fourteen years later, on 6 April 1984, in what was described by Australian and United Nations officials as an act of self-determination, the Cocos Islanders voted for integration of the islands with Australia.

The events of the intervening period shed some light on the Australian approach to self-determination and on the content and reality of any rules of self-determination, including the conjunction and disjunction between them and human rights generally. This is despite the salutary warning of Judge Dillard in the *Western Sahara Case* ('It is for the people to determine the destiny of the territory and not the territory the destiny of the people'),<sup>1</sup> since the approach to self-determination in the Cocos Islands and its result cannot be properly understood outside the historical (and lego-historical) context. Moreover, these events illuminate the broader issues of the auto-interpretative aspect of international law and the effect of the latter on Australian law.

### 1. The Historical Background

Discovery of the Cocos (Keeling) Islands has been attributed to Captain William Keeling, of the British East India Company, who sighted them in 1609 during a voyage from Batavia. For over three hundred years the only fame of the islands in Australian eyes was the fact that they were the site of the first major action of the Royal Australian Navy: the sinking of the German light cruiser *Emden* by H.M.A.S. *Sydney* on 9 November 1914.

Situated in the Indian Ocean, the islands lie almost 2,800 kilometres north-west of Perth and 3,700 kilometres west of Darwin, but less than 1,000 kilometres south-west of Java, Indonesia. They consist of two coral atolls with a total area of no more than fourteen square kilometres. Because of a nitrogen deficiency in the soil, coconut palms constitute the predominant vegetation cover.<sup>2</sup> To this day, coconuts are the only cash crop.

These geographical and pedological factors — isolation from Australia; relative closeness to other nations, especially to Indonesia; a location in the Indian Ocean which has become of strategic importance; smallness of size; and barrenness of land — have influenced the

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1. *I.C.J. Reports 1975*, p.12 at p.122.

2. The name 'Cocos' is derived from *Cocos Nucifera*, the fruit of the coconut palm.

history of the islands and have formed the leitmotif of political and legal consideration of the question of self-determination.

The islands had no indigenous population and remained uninhabited until 1826. In that year the first settlement was established by an Englishman named Alexander Hare. The following year a Scottish seaman, Captain John Clunies-Ross, who was a business associate of Hare, formed a second settlement. Both Hare and Clunies-Ross claimed ownership of the islands, but when Hare returned to Java in 1831 Clunies-Ross was left in sole possession. He set about developing a coconut plantation with the aid of imported Malay labour. Although usually referred to as Cocos Malays, these people are descended from East Africans, Chinese, Javanese, Indians and Sinhalese, among others.<sup>3</sup> They are Moslem by religious tradition and speak a dialect of Malay known as Cocos Malay.

Clunies-Ross made several attempts to have the islands annexed by Britain, fearing that another country would take them. This did occur during the lifetime of his son, John George Clunies-Ross. In 1857, Captain Fremantle of H.M.S. *Juno* formally declared the islands part of the British dominions and Clunies-Ross was made 'Governor of the Settlement during Her Majesty's pleasure'. The Clunies-Ross family became responsible for the order and good conduct of a British colony, setting a pattern that was to remain effectively, if not legally, in operation for over one hundred years.

In an interesting comment on the annexation, the following remarks should be noted:

In effect, things would be precisely as they had been [at Cocos] before the 'Juno' arrived but now the status quo was sanctioned by the British sovereign. Or was it? Later reports claim that this sudden interest by Britain in the fortunes of the settlers, thirty years after their arrival, was all a mistake and Captain Fremantle should in fact have been proclaiming British control over a group of coral atolls called the Maldivé Islands which lay 500 miles south-west of Ceylon!<sup>4</sup>

Despite the possibility of mistake, the acquisition was confirmed in 1878 when responsibility for supervision of the islands was vested in the Government of Ceylon by British proclamation. This responsibility was then transferred to the Government of the Straits Settlements in 1886. The islands were formally annexed to the Straits Settlements in 1903 and remained so until 1955, with the exception of the period of the Second World War when they were again attached to Ceylon during the Japanese occupation of Singapore.

These changes had little impact on everyday life in the islands. In the meantime, Queen Victoria, who had learned of the loyalty of the Clunies-Ross family in maintaining a remote British outpost, demonstrated her approval through the Governor of the Straits Settlements by means of an indenture on 7 July 1886.<sup>5</sup> This granted to George Clunies-Ross (the grandson of the original settler) and his heirs all the land above the high water mark in perpetuity, subject to four conditions. First, the Crown could resume any part of the land for public purposes without compensation other than for the value of any cultivated crops or buildings. Second, Clunies-Ross and his heirs were obliged to permit any person or company licensed by the Crown to construct and maintain telegraph cables on the land, upon payment of reasonable compensation. Third, Clunies-Ross and his heirs could not alienate any part of the lands without the prior permission of the Crown, except by will to members of the Clunies-Ross family being British subjects. Fourth, the grant of lands would be forfeited if Clunies-Ross and his heirs failed to observe any of the conditions of the indenture. The document also provided that the Governor of the Straits Settlements could exercise any of the powers of the Crown appurtenant thereto.

3. See U.N. Secretariat Working Paper on the Cocos (Keeling) Islands, 19 May 1983, p.3 (U.N. Doc. A/AC.109/730).

4. Ken Mullen, *Cocos Keeling: The Islands Time Forgot* (1974) at pp.21,22.

5. The full text of this document is reproduced as Appendix II in the Report of the first (1974) U.N. Visiting Mission to the Cocos (Keeling) Islands: U.N. Doc. A/AC.109/L.983 at pp.120,121.

Therefore, the grant did not by any means cancel the overall control of the settlement by British authorities, although it was used by the Clunies-Ross family until 1972 to reinforce persistent claims to complete hegemony over the atolls.

After the Second World War the political map of South-East Asia was considerably altered. The Netherlands East Indies, the nearest major neighbour to Cocos, became the new state of Indonesia and the Crown Colony of Singapore headed for independence. In 1955, the Cocos Islands were detached from the Colony of Singapore and were accepted by Australia to be known as the Territory of Cocos (Keeling) Islands. This transfer was effected by a Order-in-Council made by the Queen under request and consent legislation of the United Kingdom Parliament (the *Cocos Islands Act 1955*) and by the *Cocos (Keeling) Islands Act 1955* of Australia.

Under s.6 of the latter Act, any property, rights and powers which were held by the Queen in right of the United Kingdom or of the Colony of Singapore (or of the government of those countries) were henceforth held by the Commonwealth of Australia. More particularly, s.7 provided that all rights and powers vested in the Queen or in the Governor of Singapore under the indenture of 1886 are exercisable on behalf of the Queen by the Governor-General of the Commonwealth of Australia.

Once again, these legal changes had little effect on life at Cocos. John Clunies-Ross, the fifth generation of the family to 'govern' the islands, was to the Cocos Malays their sole employer, their landlord and their lawmaker. As a result of Queen Victoria's indenture of 1886, Clunies-Ross owned all the land, with the exception of a parcel bought by the Australian government in 1951 for construction and maintenance of an airfield to be used by Qantas Airways as part of an air link between Australia and South Africa.

Therefore, while housing was provided, the Clunies-Ross estate owned it and the land it stood on. As private property, permission was required to enter those parts of the islands owned by Clunies-Ross. A Cocos Malay who left the islands was not allowed to return, apparently on the premise that once 'sophisticated' by the outside world a returning native would have an unsettling effect on those who had remained behind.<sup>6</sup> Indeed, between 1948 and 1951 over 1,600 Cocos Malays had been expatriated to North Borneo, Singapore and Christmas Island when it was realised that the number of islanders was greater than the Clunies-Ross estate could maintain. This 'controlled migration scheme' as it has been euphemistically termed in much of the literature<sup>7</sup> may have allowed the natives a choice of destination, but there was no right of return to what was often the place of their birth.

Clunies-Ross was also the effective arbiter of disputes on his property. Although an *Imarat Pulo* (Council of Headmen) was in operation, Clunies-Ross and his European estate manager were members. Moreover, the composition of the *Imarat* was determined in principle by Clunies-Ross himself.<sup>8</sup> The *Imarat* was the community's local government, being responsible for keeping the peace and all internal administration, including allocation of housing sites, plans operations and work crews, and the arbitration of disputes from minor complaints to divorces.<sup>9</sup>

All Cocos Malays were employed by the Clunies-Ross estate, with the exception of a few who were employed by the Australian government for manual or domestic work connected with the airport, administration centre and radio transmitter. While the standard of living could be said in relative terms to be reasonable,<sup>10</sup> payment of wages was made in plastic

6. Mullen, *supra*, n.4 at 69.

7. *U.N. Visiting Mission Report, supra* n.5 at paragraph 27; *Cocos (Keeling) Islands Annual Report 1981-82* (Department of Home Affairs and Environment, A.G.P.S., Canberra, 1983) at 5.

8. *U.N. Visiting Mission Report, supra* n.5 at paragraph 138.

9. *Ibid.* at paragraph 40.

10. *Ibid.* at paragraph 184.

tokens redeemable only at the estate store, and this payment was at a level hardly adequate to enable the people to afford anything above subsistence requirements.<sup>11</sup>

Education of an undefined nature was available to all natives, but it was not compulsory, apparently due to the fact that John Clunies-Ross was opposed to all forms of compulsion<sup>12</sup> and was concerned about a potential 'brain drain' away from the island.<sup>13</sup>

Therefore, Australia inherited from Great Britain a legal and social situation which, on the one hand, it knew little about and which, on the other, it is arguable it had legislated to maintain. The overwhelming majority of the population was non-European. Section 18 of the *Cocos (Keeling Islands) Act 1955* provides: 'The institutions, customs and usages of the Malay residents of the Territory shall . . . be permitted to continue in existence'. But the community and the Clunies-Ross estate were inter-dependent. Clunies-Ross effectively exerted absolute control over the affairs of the people who were totally dependent on the Clunies-Ross estate economically, socially and otherwise. Lack of education and the prohibition on re-entry to the islands after travel overseas, together with the geographical isolation of the islands, prevented any appreciation of conditions in the outside world.

The historical factors, therefore, not only created a situation where the concept of self-determination could be seen to be in need of application. They affected the response to that need on the part of the Cocos Malays, Clunies-Ross and the Australian government.

Moreover, with the growth of membership in the United Nations, its composition increasingly comprised of nations which had once been European colonies, the protagonists could not indefinitely retreat from the issue.

## 2. The Legal Background

### (a) Self-Determination in International Law

The theoretical aspects of self-determination and, in particular, the extent to which it exists as a right in international law, command an immense literature. While some writers (from both third world and developed countries) subscribe to the view that it is a legal right,<sup>14</sup> others do not.<sup>15</sup> Further, amongst those who do assert the legal status of the concept, there is divergence as to its content.<sup>16</sup>

The concept of self-determination has been recognised in several international documents: the United Nations Charter,<sup>17</sup> the International Covenant on Civil and Political Rights (1966),<sup>18</sup> the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>19</sup> the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations,<sup>20</sup> and many others.<sup>21</sup>

11. *Ibid.*

12. *Ibid.* at paragraph 140.

13. Mullen, *supra* n.4 at 90.

14. Ian Brownlie, *Principles of Public International Law* (1979) at 577; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) at 103; Hector Gros Espiell, *The Right of Self-Determination: Implementation of United Nations Resolutions* (U.N. Doc. E/CN.4/Sub.2/405/Rev.1; 1980). The last author considers that self-determination has become a rule of *jus cogens*.

15. Georg Schwarzenberger, *Manual of International Law* (1976), at 59.

16. See A. Cassese (ed): *U.N. Law/Fundamental Rights* (1979) at 139-141; and generally, Michla Pomerance: *Self-Determination in Law and Practice* (1982).

17. Arts. 1(2), 55.

18. Art.1(1): 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

19. G.A. Resol. 1514(XV), paragraph 2.

20. G.A. Resol. 2625(XXV).

21. For a comprehensive account, see the study prepared by Aureliu Cristescu, 'The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments', (U.N. Doc E/CN.4/Sub.2/404/Rev.1).

It can be questioned whether such references to self-determination are merely of hortatory effect, rather than illustrating the existence of a legal right or even a legal principle.<sup>22</sup> It would appear, however, that the declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960 and referred to in a series of resolutions concerning specific territories since then, regards self-determination as a part of the obligations stemming from the U.N. Charter and a 'right' of 'peoples'.<sup>23</sup> The wording is not in the form of a recommendation. It is set forth as an authoritative interpretation of the Charter. The debate at the 39th (1983) session of the Commission on Human Rights indicated that a convincing majority of speakers recognised self-determination as one of the fundamental principles of contemporary international law, as well as a prerequisite for the exercise of other human rights and fundamental freedoms.<sup>24</sup> The 1970 Declaration on Friendly Relations attempts an elaboration of seven norms of international conduct which are expressly stated or implicit in the U.N. Charter. These include, along with the 'right' to self-determination, the principle prohibiting the use of force and the principle of non-intervention.

However, apart from the question of any putative right, the content and ambit of the right must be ascertained. What is the nature of the 'self'? What is the process of 'determination'?

To say that a 'self' must be a distinct entity does not indicate whether it is the group's subjective perception of distinctness or objective characteristics (such as religious, historic, geographic, ethnologic, economic, linguistic or racial factors) which must be utilised.<sup>25</sup> However, it has been postulated that 'such a coldly empirical approach to the problem tends to ignore the immeasurable factors that together constitute the psychopolitical 'realities' of a given situation and thus must influence a decision regarding legitimacy'.<sup>26</sup> Thus, for example, the decision of the International Court of Justice in its advisory opinion on Namibia<sup>27</sup> relied heavily on objectively perceived humanitarian factors. The question of self-determination for Bangladesh was similarly imbued with such concerns.<sup>28</sup> So was the situation of the Ibos in Biafra, but they remained a part of Nigeria. Such factors may be necessary, but they are not sufficient.

While self-determination can be seen to apply to colonial situations,<sup>29</sup> it can now be argued that it applies to other non-self-governing territories.<sup>30</sup> In a resolution in 1970 referring specifically to several non-self-governing territories, including the Cocos Islands,

22. See, for example, Ingrid Delupis: *International Law and the Independent State* (1974) esp. at 15.

23. Paragraph 1 states: 'The subjection of peoples to alien subjugation, domination and exploitation . . . is contrary to the Charter of the United Nations . . .' and paragraph 2 is in the same terms as Art.1(1) of the International Covenant on Civil and Political Rights (*supra* n.18).

24. Report of the Secretary-General on the importance of the universal realization of peoples to self-determination and the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights. (U.N. Doc. A/38/447).

25. L.C. Buchheit: *Secession: The Legitimacy of Self-Determination* (1978) at 9-11. See also Pomerance (*supra* n.16), Chapter 3.

26. Buchheit, *ibid.* at 11.

27. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports*, 1971, p. 16.

28. Ved Nanda, 'Self-Determination in International Law' (1972) 66 *A.J.I.L.* 321.

29. See, for example, Rupert Emerson, 'Self-Determination' (1971) 65 *A.J.I.L.* 459 and the resolutions noted therein.

30. G.A. Resol. 2621(XXV) 1970, entitled 'Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' specifically states in Art.3(1) that the Declaration should be fully implemented in relation to 'Trust Territories, Non-Self-Governing Territories and other Colonial Territories'. It should be noted however, that during the debate (1863rd Plenary Meeting) some representatives (e.g. Ecuador and Ireland) complained that the resolution was ambiguous and impractical. It was passed 86-5-15. Australia voted against the resolution.

the General Assembly, recalling resolutions 1514(XV)<sup>31</sup> and 2621(XXV)<sup>32</sup> declared that it:

2. Reaffirms the inalienable rights of the peoples of these Territories to self-determination and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514(XV);
3. Calls upon the administering powers to implement with respect to these Territories, and without further delay, resolution 1514(XV) and other relevant resolutions of the General Assembly;
4. Expresses its conviction that the question of territorial size, geographical isolation and limited resources should in no way delay the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with respect to these Territories.<sup>33</sup>

In 1971 the International Court of Justice held that U.N. resolutions together with humanitarian factors had made self-determination a right in a quasi-colonial situation such as Namibia.<sup>34</sup> Four years later the Court approved of this reasoning in its advisory opinion in the *Western Sahara Case*<sup>35</sup> stating that the application of self-determination required 'a free and genuine expression of the will of the peoples concerned' which, in accordance with General Assembly Resolution 1541 (XV), would lead to the emergence of a sovereign and independent State, or to free association with an independent State or to integration with an independent State.<sup>36</sup> Legal ties of allegiance between the tribes of the territory and other entities did not affect this situation, although ties of sovereignty might.<sup>37</sup>

There have been further General Assembly resolutions reaffirming these propositions.<sup>38</sup> Considering the possibility, if not likelihood, of political motivation in voting,<sup>39</sup> the legal effectiveness of these resolutions is usually sought elsewhere: the resolutions as interpretation of treaty obligations under the U.N. Charter;<sup>40</sup> the resolutions as evidence of customary international law;<sup>41</sup> the resolutions as evidence of jus cogens.<sup>42</sup> Professor Oscar Schachter considers that this may be an example of lawyers 'pouring new wine into old bottles and keeping the old labels'.<sup>43</sup> He states:

Neither a concert of great powers nor a majority of states can impose its will on an incorrigibly plural world. Yet the search for common interests and for a 'general will' continues. International assemblies, and especially the United Nations General Assembly, are the principal means for the articulation of that general will. Collective declarations of law and political ends are their natural product. Whether such declarations should be regarded as authoritative . . . cannot be determined simply by their adoption. A more complex assessment is required.<sup>44</sup>

31. *Supra*, n.23.

32. *Supra*, n.30.

33. Resol. 2709(XXV), passed at the 1929th Plenary Meeting of the General Assembly by a vote 94-1-20. Australia abstained.

34. *Supra* n.27. Note especially the separate opinion of Judge Ammoun at 58.

35. *I.C.J. Reports 1975*, p. 12.

36. *Ibid.* paragraphs 55-57. See also Pomerance, *supra* n.16, Chapter 4.

37. *Ibid.* paragraph 162.

38. For example, resolutions 35/118 and 35/119 of 1980; resolution 36/68 of 1981. The latter was passed by a vote 130-3-10. Australia voted in favour, despite the fact that the resolution recalls resolution 2621(XXV) which Australia voted against (*supra* n.25).

39. For inconsistencies in Australia's voting pattern, see footnotes 30 and 38 above.

40. M. Lachs, 'The Law in and of the United Nations' (1961) 1 *Indian J.I.L.* 429.

41. Rosalyn Higgins: *The Development of International Law through the Political Organs of the U.N.* (1963).

42. Hector Gros Espiell, *supra* n.14 and also in Antonio Cassese: *U.N. Law/Fundamental Rights* (1979) at 167-73.

43. O. Schachter, Alf Ross Memorial Lecture — 'The Crisis of Legitimation in the United Nations' (1981) 50 *Nordisk Tidsskrift for International Ret.* 3, at 5.

44. *Ibid.* at 18.

Professor Schachter's 'more complex assessment' includes an examination of the *width* of perceived social ends, motives of self-interest and power differences as to the specific measures to achieve abstract ends. Also considered is conformity with minimal procedural standards relating to the decision process.<sup>45</sup> Thus a logical analysis of resolutions is helpful, but insufficient. The *responses* of States must be examined if we are to ascertain the existence of any 'rule' of international law and the content of that rule in relation to the 'self' and the 'determination'.

Some writers, such as Professor James Crawford, have perceived a development and elaboration of legal *consequences* of self-determination in *particular* instances. The more general question of the ambit of self-determination remains, for them, as much a question of politics as law, similar to the situation relating to recognition of States and governments.<sup>46</sup> While it must be admitted that there is more than a modicum of truth in this observation, it is only a partial attack on the problem. Self-determination is a concept from which social or moral values cannot be realistically divorced. But this does not necessarily mean that those values and the extent of their application rest within the options of individual States. It is the international community which, through United Nations resolutions in particular, can establish the acceptability of a claim to self-determination to such an extent that State practice in relation to it can have the effect not only of indicating the potential validity and ambit of operation of an emerging 'rule', but that very practice can be judged on legal as well as moral criteria, as the International Court has indicated.<sup>47</sup> The objections of individual States, such as South Africa in relation to Namibia, cannot affect the validity of such a claim once the international community has injected it with a *community* value judgement, although they may indicate its effective impotence. Validity should not be confused with effectiveness. Once we talk about the legal validity of conduct in relation to a concept (even if only in the sense that it is merely not unlawful), it is then that we can begin to discern the emergence of a rule, even though at any given stage it may be *lex ferenda* rather than *lex lata* because international politics inhibits its development.

In this regard, the view of Professor Crawford paraphrased above may have put the cart before the horse.<sup>48</sup>

#### (b) Australian Law

The Commonwealth of Australia is an international entity which is bound by its obligations under international law. However, Australian law and private rights under it are not directly affected by international law.

The traditional view is that customary international law must be transformed into the *lex fori*<sup>49</sup> in a manner which makes it legally binding.<sup>50</sup> It would appear, therefore, that statements of government policy, with nothing else, will not be internally binding, despite the effect that these may have internationally.<sup>51</sup> In *Trendtex Trading Corporation v. Central Bank of Nigeria*,<sup>52</sup> Lord Denning openly disagreed with the doctrine of transformation. Lord Shaw, adopting a different approach, stated that courts could recognize international law and by applying *stare decisis*, cases which had been decided against a background of international law which had subsequently changed could be distinguished. There have been

45. *Ibid.* especially at 17,18.

46. James Crawford, *The Creation of States in International Law* (1979) at 88-89.

47. The advisory opinions on Namibia (*supra* n.34) and the Western Sahara Case (*supra* n.35).

48. Cf. Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 *International Organization* 367.

49. *R. v. Keyn* (1876) 2 Ex.D.63.

50. *Chung Chi Cheung v. R.* [1939] A.C. 160

51. *Nuclear Tests Case* I.C.J. Reports 1974.

52. [1977] Q.B. 529

no Australian cases which have had to consider *Trendtex* directly. It would appear, however, that an Australian court faced with legislation (and not only judicial statements) is bound to follow the legislation, even if it is contrary to international law.<sup>53</sup>

In relation to treaties specifically, Australian courts have consistently held that there is no direct effect on Australian law until appropriate legislation has been enacted.<sup>54</sup>

It is therefore necessary to examine Australian legislation affecting the Cocos Islands. The Australian Constitution gives the federal parliament power to make laws with respect to 'external affairs'<sup>55</sup> and territories 'placed by the Queen under the authority of and accepted by the Commonwealth'.<sup>56</sup>

The external affairs power has been interpreted widely, in the sense that as long as the use of this power relates to any genuine external obligation, it does not matter that the provisions of the legislation would otherwise be within the jurisdiction of the state parliaments or relate to matters which are not geographically 'external' to Australian territory.<sup>57</sup> Thus, controversy as to the status of the 'right' of self-determination in international law will not directly impede Commonwealth legislative power.

The power to make laws for the government of territories has been held to be an exercise of national government rather than the federal parliament acting as a local legislature.<sup>58</sup> Thus, not only will s.109 of the Constitution apply,<sup>59</sup> the power is treated as an independent source of legislative authority to which other constitutional restrictions do not necessarily apply. Thus, it has been held that s.55 (the form of taxation legislation),<sup>60</sup> s.80 (trial of indictable offences by jury)<sup>61</sup> and s.72 (appointments of judicial officers)<sup>62</sup> do not apply *per se* in the territories.<sup>63</sup> The legislative power under s.122, therefore, is plenary and unlimited as to subject matter. One incidence of this which was significant for later developments in the Cocos Islands is the decision in *Teori Tau v. Commonwealth*<sup>64</sup> where it was unanimously held that s.51(xxxi) of the Constitution (which provides that compulsory acquisition of property by the Commonwealth must be made on just terms) did not apply. In 1977 the *Lands Acquisition Act 1955* was amended to extend specifically to external territories.<sup>65</sup> This Act does provide for compensation on just terms. However, under s.6 of the Act the Commonwealth may acquire land by agreement or by compulsory process for 'a public purpose'. In relation to land in a territory, 'public purpose' is defined as 'any purpose in relation to that territory'.<sup>66</sup> The power remains wide.

The potential effect of the width of Commonwealth power is to centralize control and decision making in Canberra, rather than in the territories. Indeed, all major legislation for all territories with the exception of the Northern Territory is to be found in Acts of the

53. *Polites v. The Commonwealth and Another* (1945) 70 C.L.R. 60.

54. *Bradley v. The Commonwealth of Australia and Another* (1972) 128 C.L.R. 557; followed in *Simsek v. Minister for Immigration and Ethnic Affairs and Another* (1982) 40 A.L.R. 61.

55. *The Commonwealth of Australia Constitution Act* (63 & 64 Victoria, Chapter 12) s.51(xxix).

56. *Ibid.* s.122.

57. *Commonwealth of Australia v. State of Tasmania and Others* (1983) 46 A.L.R. 625.

58. *Lamshed v. Lake* (1958) 99 C.L.R. 132.

59. S.109: When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

60. *Buchanan v. The Commonwealth* (1913) 16 C.L.R. 315.

61. *R. v. Bernasconi* (1915) 19 C.L.R. 629.

62. *Spratt v. Hermes* (1965) 114 C.L.R. 226.

63. For a more comprehensive account, see Else-Mitchell: *Essays on the Australian Constitution* (1961) at 329-33; and Wynes: *Legislative, Executive and Judicial Powers in Australia* (1976) at 113-21. More recently see *Minister for Justice of W.A. (ex.rel. Ansett Transport Industries (Operations) Pty. Ltd. v. Australian National Airlines Commission and the Commonwealth* (1977) 12 A.L.R. 17.

64. (1969) 119 C.L.R. 564.

65. *Lands Acquisition Act 1955* (Cth) s.5A, inserted by No. 105, 1977, s.3.

66. *Ibid.* s.5 (emphasis added).

Commonwealth Parliament with only minor matters being submitted to a territory Legislative Council (where this exists) for embodiment in local ordinances.<sup>67</sup>

The formal transfer of the Cocos Islands from Great Britain to Australia occurred on 23 November 1955.<sup>68</sup> As a result of Australia's adoption of the Statute of Westminster in the Statute of Westminster Adoption Act 1942, it was necessary for Australia to pass request and consent legislation<sup>69</sup> requesting Britain to transfer the islands to the Commonwealth of Australia. They had been administered previously as part of the colony of Singapore.<sup>70</sup> This was done by Great Britain under the *Cocos Islands Act 1955*,<sup>71</sup> and as a result the Australian Commonwealth Parliament passed the *Cocos (Keeling) Islands Act 1955* which accepted the transfer and made the islands an Australian external territory.

This process is interesting to international lawyers in that the acquisition of the territory could not be said to be based on cession as no treaties were involved. Indeed the transfer was *not* basically international in character but effected by domestic constitutional arrangements.<sup>72</sup> Therefore, the *international* status of the Cocos Islands would not seem to be governed by the method of transfer. Rather, Australia's assertion of the right to control the islands since 1955 has simply been accepted by the international community.<sup>73</sup> It should also be noted that at no time was it considered necessary or desirable to consult the Cocos Malays (or, apparently, Clunies-Ross) about the transfer.

The other main provisions of the *Cocos (Keeling) Islands Act 1955* were the transfer of all property, rights, liabilities, obligations and powers to Australia.<sup>74</sup> As well as s.7, which specifically provided for all rights and powers vested in the Queen or in the Governor of Singapore under the 1886 Indenture to George Clunies-Ross to be exercisable by the Governor-General of Australia, all laws in force immediately before the transfer remained in force,<sup>75</sup> although they can be repealed.<sup>76</sup> The Governor-General has power to make Ordinances for the peace, order and good government of the territory,<sup>77</sup> subject to disallowance by either House of Parliament.<sup>78</sup> Under s.14, British subjects ordinarily resident in the islands at the time of transfer could make a declaration which would deem them to have become Australian citizens from the time of transfer.<sup>79</sup> Malay customs, usages and institutions were permitted to continue.<sup>80</sup>

Despite the wide powers of the Commonwealth parliament, by which it would not be bound to maintain existing laws, little in fact was done for twenty years to disturb the administration by the Clunies-Ross family of the community on Home Island (the site of the copra plantation). An official representative installed by the government under the *Official Representative Ordinance 1955* to perform such functions as delegated by the Minister of

67. See Else-Mitchell, *supra* n.63, at 328-9.

68. The Cocos Islands Order-in-Council, 1955, s.1, 1955 No. 1962 (Great Britain).

69. Cocos (Keeling) Islands (Request and Consent) Act 1954.

70. Under Letters Patent, dated 11 February 1886: see Section I above. For an interesting discussion of the possible invalidity of those Letters Patent, see G.M. Kelly, 'Constitutional Confusion in the Cocos Islands: the Strange Deliverance of Lim Keng' (1983) 13 *F.L.R.* 229.

71. 3 and 4 Eliz. 2, c.5.

72. This is not unusual for Australia or other Commonwealth countries: see D.P. O'Connell (ed.), *International Law in Australia* (1965), Chapter XII, 'International Law and Australia's Overseas Territories' by A.C. Castles.

73. *Ibid.* at 310-11, 317.

74. s.6.

75. s.8.

76. s.9.

77. s.12.

78. s.13.

79. Non-British subjects in a similar position did not receive this privilege until 1979. (Act No. 6 of 1979).

80. s.18.

State for External Territories was concerned almost solely with the administration of Australian activities surrounding the airstrip on West Island which, until 1967, was used by international air traffic.

It may therefore be questioned whether a seemingly liberal approach which allowed the retention of existing laws and, in particular, of ethnic customs, was motivated by humanitarianism or by disinterest in the condition of the inhabitants.

### 3. United Nations Action in the Cocos Islands and the Australian Response

Despite the paramount domestic legislative power of the Commonwealth Parliament over the Cocos Islands, which could be analogised to a colonial situation, United Nations examination of the territory has facilitated a movement towards local autonomy. However, it took nearly twenty years from the time of transfer from Britain in 1955 for this to be effected in any significant sense.

In 1957, Paul Hasluck, the then Minister for External Territories, visited Cocos after John Clunies-Ross complained of interference by the Australian representative there. The result was that Mr Hasluck (as he then was) ordered the representative to stay away from Home Island where the Clunies-Ross estate and plantation (and most of the Cocos Malays) were located.<sup>81</sup> Later, when Clunies-Ross agreed to changes in the administration of the islands and then reneged on the agreement, the Australian government continued a deliberate policy of non-intervention. The Cocos Islands seemed to be governed by a tenuous condominium between the Australian government and the Clunies-Ross estate. The islands can be, and have been, used as a base for surveillance missions of Soviet operations in the Indian Ocean and as a route to the U.S. base on Diego Garcia. With little profitability in the economic sense, the main interest in the islands lies in the area of defence and, principally, in denying them to others.<sup>82</sup>

From the time of British administration, the Cocos Islands had been listed by the United Nations as a non-self-governing territory in respect of which the administering authority was obliged to submit regular reports under Art.73(e) of the U.N. Charter. These reports, which are primarily for the purpose of information, contain statistical and technical information relating to economic, social and educational conditions in the territory. This information is examined by the United Nations Special Committee on the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples (otherwise known as the Committee of Twenty-Four), the name of which is self-explanatory. Australia has discharged this obligation since assuming administrative responsibility for the islands.<sup>83</sup>

Since that time there has been a proliferation of General Assembly resolutions pertaining to self-determination, and the Australian response bears examination. Important resolutions relating to the implementation of resolution 1514(XV) and encouraging its application specifically to the Cocos Islands occur in earnest from 1970. Resolution 2621(XXV) provides that 'Member States shall do their utmost to promote . . . effective measures for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in all . . . Non-Self-Governing Territories . . .' It also provides that 'the question of territorial size, geographical isolation and limited resources should in no way delay the implementation of the Declaration'. At the debate on this resolution<sup>84</sup> several speakers complained that the resolution was ambiguous and

81. *The Australian*, 31 August 1972, at 1; *Mullen supra* n.4, chs. 10 and 11.

82. *Mullen, ibid.* ch.11; *The Australian*, 22 September 1982, at 13.

83. The first such transmission from Australia in U.N. records occurred in 1957 — a summary of it can be found in U.N. Doc. ST/TRI/B. 1957/8.

84. U.N.G.A. Official Records, 25th Session, Suppl. 23, 1863rd plenary meeting.

impractical. The Australian representative made no speech but voted against the resolution, which was eventually passed on the vote 86-15-5.

In the same year, resolution 2709(XXV), which refers specifically to Cocos in its recitals and recalls resolutions 1514(XV) and 2621(XXV), reaffirmed the right to self-determination, called upon administering powers to implement resolution 1514(XV) in the nominated territories and re-expressed its conviction that territorial size, geographical isolation and limited resources should not delay the exercise of self-determination. This resolution was also adopted (94-1-20) with the United Kingdom voting against it because of its objection to references to military arrangements which could apply to its territory of St. Kitts-Nevis-Anguilla.<sup>85</sup> Australia abstained from voting. The political motivation behind the voting pattern cannot be ignored.

Resolutions in 1971<sup>86</sup> and 1972<sup>87</sup> were couched in similar terms.

Meanwhile, the change in Federal government in Australia in 1972 had little immediate effect on the Cocos Islands. The new Labour Minister for External Territories, Mr W.L. Morrison, closely followed the views of his predecessor, Mr Andrew Peacock.<sup>88</sup> Both were in favour of representative local government for the Cocos Islands, but as the community seemed peaceful and stable, it did not seem to be regarded as a matter of urgency. A report had been written for the government by an assistant secretary of the Department of External Territories, Mr G.M. Kerr, after a visit to the islands in 1971. Apparently on the basis of this report, John Clunies-Ross was reminded by the Australian government of its obligations under the conventions of the International Labour Organization. However, the precise contents of this report were not tabled in the Parliament prior to the demise of the Liberal-Country Party government, and still remain secret.<sup>89</sup>

However, Australia was not unco-operative with the Committee of Twenty-Four, and in 1973 it agreed to a visiting mission to the islands, which took place from 7 August to 11 August 1974. The report of this mission<sup>90</sup> is the first public document to detail conditions there. From it, a number of significant points emerge.

The mission agreed with the observations of the responsible Australian Ministers that the Cocos Malays seemed content with their mode of life. However, this was attributed to ignorance of conditions outside the islands because of their isolation.<sup>91</sup>

In an effort to enhance the political awareness of the people, copies of Malay translations of the relevant General Assembly Resolutions had been distributed to every household. While the translated texts contained some words not known to the islanders, apparently the general context had been understood by those who had read them.<sup>92</sup>

The report states bluntly:

The most urgent task of the Australian Government is to clarify its role in the territory and to assume a more effective control and administration over the territory. The degree of interdependence between the Clunies-Ross Estate and the community... is so extreme that it is practically impossible to distinguish community affairs from those of the Estate. In this respect, the Mission wishes to note

85. *Ibid.* 1929th plenary meeting.

86. G.A. resol. 2869 (XXVI).

87. G.A. resol. 2984(XXVII).

88. See *Mullen, supra* n.4. ch.12.

89. A request by this author to view the report has been shunted between the Department of Territories and Local Government, the Department of Home Affairs and Environment and the Australian Archives. At the time of writing (October, 1984) no satisfactory reply has been received despite the passage of five months since the date of the original request.

90. U.N. Doc. A/AC.109/L.983.

91. *Ibid.* paragraph 200.

92. *Ibid.* paragraph 102.

the complete control exerted by Mr Clunies-Ross...over the life of the community.<sup>93</sup>

Indeed, it was considered that the provisions of the *Cocos (Keeling) Islands Act 1955* were not being fully applied to Home Island.<sup>94</sup> Even though the islands were Australian territory they were largely private property as a result of the 1886 indenture, and were treated as such.<sup>95</sup> However, John Clunies-Ross confused proprietary rights with sovereignty. The mission found that the functions of the *Imarat*<sup>96</sup> were 'far from being those of truly self-governing entities acceptable under established international practice... Mr Clunies-Ross exerted total and complete control over the people of the territory, including the so-called local governing body.'<sup>97</sup> Workers on the estate were paid in plastic tokens redeemable for food, clothing and essentials at the Clunies-Ross store, rather than in Australian currency; education, also primarily under the control of Clunies-Ross, was rudimentary, not compulsory and did not extend beyond the age of fourteen; and members of the *Imarat* were appointed by Clunies-Ross, who had veto power over its decisions.<sup>98</sup>

The mission also expressed concern that it was not easy to determine which laws applied to Home Island: Singaporean, Australian, or otherwise.<sup>99</sup> Indeed, minor offences were unduly punished by extra (forced) labour on the estate. Similarly, the authority of the Australian representative was not clear.<sup>100</sup> The mission also recommended the diversification of the Cocos economy into fishing or the establishment of an animal quarantine station.<sup>101</sup>

A General Assembly resolution adopted by consensus in December 1974, rather feebly 'draws the attention of the administering power to the conclusions and recommendations of the Visiting Mission'.<sup>102</sup>

However, Australia did take note of the report and as early as 2 December 1974, the Australian representative in the Decolonization Committee announced that the following changes would be sought.<sup>103</sup> To help establish a community identity separate from that of the Clunies-Ross estate, an area of land on Home Island would be vested in the Home Island community as a corporate entity. A local government authority would be established, with legal and formal status, to manage the affairs of the community. The use of token money would be discontinued and replaced by Australian currency. This last development was regarded as complex, but, as a start, future government contracts with the Clunies-Ross estate would provide for direct payment of appropriate sums in Australian currency to the community. A separate community fund would be established for that purpose and rates of pay would be progressively aligned with International Labour Organization conventions. Health and education services and facilities for the administration of justice would be extended. Freedom of movement would be permitted and steps taken to grant Australian citizenship to those who wished to apply for it.<sup>104</sup> The viability of an animal quarantine station would be investigated.

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93. *Ibid.* paragraphs 202-3.

94. *Ibid.* paragraph 205.

95. For Australian ownership, easements, etc., see *ibid.* paragraph 50. Note also paragraph 170: the Australian authorities analogised the visit to Home Island with the visit of government personnel to a privately owned farm.

96. See above, Section I.

97. *Supra* n.90, paragraph 166.

98. *Ibid.* paragraphs 173-175.

99. *Ibid.* paragraph 208; see also paragraph 33.

100. *Ibid.* paragraph 209.

101. *Ibid.* paragraphs 213-14.

102. A/9748, 2318th plenary meeting.

103. U.N. Doc. A/C.4/SR. 2124.

In 1975 the office of Official Representative of the territory was abolished,<sup>105</sup> creating the new position of Administrator responsible to the Special Minister of State. To provide the Administrator with specific authority to gain access to the Clunies-Ross estate he was appointed to hold such offices as Controller of Labour, Food Controller, Sanitary Authority, Price Controller and Registrar of Schools. The Administrator was advised by an Interim Advisory Council which would eventually be replaced by an elected body. This council was appointed by the Special Minister of State. It included the former *Imarat* (Clunies-Ross, the estate manager and nine appointed headmen). Of the latter, two Cocos Malays resigned from the Council within a year (preferring the old style of administration) and another resigned from the *Imarat*, retaining his position on the Council, on the basis of conflict of loyalty.

At this time, public opinion in the islands was divided into three sections of almost equal size. Some of the islanders were dissatisfied with Clunies-Ross. Others were supportive of Clunies-Ross and opposed government intervention. The rest were prepared to wait and see how matters developed.<sup>106</sup> Within a year this seemed to be reduced to two approximately equal groups in favour of either the status quo or change. Moreover, throughout 1976, 99 Cocos Malays emigrated to Australia. This division was recognised by the Australian government as a danger to the viability of the territory.<sup>107</sup>

In the meantime, Clunies-Ross himself had informed Australia that he considered his position to be untenable and that he was prepared to sell his operations to the government. After unsuccessful negotiations, which foundered because of the purchase price demanded, the government tabled in Federal Parliament the *Lands Acquisition Ordinance 1975* on 10 September 1975, to establish a basis for compulsory acquisition of the territory on just terms. A little over a year later, Clunies-Ross sent a petition to the government signed by himself and 180 Cocos Malays, seeking negotiations for self-government of the islands on the basis of free association with Australia. These did not eventuate. In 1978 the whole of the Clunies-Ross estate, with the exception of the Clunies-Ross residence and an associated dwelling, were acquired by the government for \$6,500,000.

On 18 March 1978, the first elections were held to the Interim Advisory Council. The U.N. General Assembly approved of this development and of the purchase of the Clunies-Ross estate.<sup>108</sup> Furthermore, 1978 saw the Australian government allowing the islands to issue their own stamps and thus obtain revenue from a new source. However, the customary court on Home Island, which dealt with minor offences, was still comprised of the *Imarat* including Clunies-Ross and his manager.<sup>109</sup>

In 1979, the Interim Advisory Council became the first Cocos (Keeling) Islands Council under the *Local Government Ordinance 1979*. The Council is authorised to act to control local affairs in the area under its control in a similar fashion to a local government body and to make by-laws to achieve this. It has an advisory function in relation to proposed legislation for the territory. Ownership of the village area was transferred to this Council by

104. Anyone born in the islands after the date of transfer would be an Australian citizen. Those born before that date could apply for citizenship. However the regulations under the *Cocos (Keeling) Islands Act* as they originally stood only provided for a 'prescribed time' of two years from the time of transfer to Australia during which this could be done.

105. *Administrative Ordinance 1975* (No. 1 of 1975).

106. Statement by Australian representative to Fourth Committee, 2166th meeting, 13 November 1975; U.N.G.A.O.R., 30th Session, 4th Committee, Summary Records.

107. *Ibid.* 26th meeting, 17 November 1976; U.N. Doc. A/C.4/31/SR.26.

108. G.A. Resol. 33/411, adopted by consensus.

109. The system of courts with jurisdiction in the Cocos Islands theoretically comprised a Supreme Court of the Territory of Cocos (Keeling) Islands, a District Court, a Magistrates Court and a Coroners Court. However, in practice these were rarely, if ever, used.

deed of grant to be held in trust for the benefit of the Cocos Malay community. This was later extended to the control of the Co-Operative of Cocos Malay workers which was registered in January 1979. The Co-Operative holds the lease of the copra plantation and does some contract work. At the end of each financial year it pays surplus funds as dividends to members and provides money to the Council for community purposes.<sup>110</sup> It was through the introduction of the Co-Operative that workers' wages began to be paid in Australian currency on a regular basis.

Also in 1979, the citizenship provisions of the *Cocos (Keeling) Islands Act 1955* were amended by the insertion of s.14A. This enabled residents to make a declaration which, upon registration, provided them with Australian citizenship. As a result, by 1979, only eighteen Cocos Malays domiciled in the Cocos Islands were not Australian citizens.<sup>111</sup>

Also, by the *Singapore Ordinances Application Ordinance 1979*, all Singapore ordinances previously operating in the territory under s.8 of the *Cocos (Keeling) Islands Act* were formally repealed. Ninety-five of them were reapplied, but the confusion as to applicable laws was alleviated.

Construction began on the animal quarantine station, and utilities such as electricity and sewerage services were improved. The lot of the Cocos Malays had greatly improved since Clunies-Ross became the Cocos' Six Million Dollar Man: sufficiently so, that Australia felt confident to invite a second UN mission to the islands in 1980.

The second visiting mission in July, 1980, noted the progress made since 1974, but its report<sup>112</sup> nevertheless noted several criticisms. Until 1973, education of the Cocos Malays was carried out by John Clunies-Ross assisted by his wife. By the end of 1974 two teachers had been appointed by the Australian government whose duties included, inter alia, curriculum development. However, at the time of the visiting mission, education was still not compulsory, although adult education classes in basic literacy and conversational English had been started. At a meeting between the mission and the members of the Cocos Islands Council, the councillors were unaware of the resolutions of the General Assembly and of the Committee of Twenty-Four concerning the territory.<sup>113</sup> The Administrator replied that a programme of political education had not started and that translation of some of the concepts in United Nations documents was not easy. Australia's stated policy concerning self-determination was to bring the Cocos Malays to a level of political and social maturity sufficient to enable them to exercise their right to self-determination.<sup>114</sup> It would appear that the latter factor was progressing, especially in the economic sense, but that the former was proving a little more difficult.

The influence of John Clunies-Ross, while no longer having a proprietorial or economic basis, was still present.<sup>115</sup> Indeed, the Cocos Islands Council, which was by this time fully elected, had asked that Clunies-Ross leave the territory<sup>116</sup> and the visiting mission recommended that 'the administering power should take necessary steps to deal with this matter *effectively*'.<sup>117</sup>

110. On the latest available figures, the Co-Operative distributed surplus funds in December 1981, for the twelve months trading period to 30 June 1981. A total of \$107,705 was paid out: \$6000 to the Council and \$101,705 to the 150 members as dividends — *Cocos (Keeling) Islands Annual Report 1981-82* (Dept. of Home Affairs and Environment) at 9.

111. U.N. Secretariat Working Paper on the Cocos (Keeling) Islands, U.N. Doc. A/AC.109/L.1305, paragraph 6; *cf.* footnote 104, *supra*.

112. U.N. Doc. A/AC.109/635.

113. *Ibid.* paragraph 126.

114. *Ibid.* paragraph 93.

115. *Ibid.* paragraphs 97, 123, 201.

116. *Ibid.* paragraph 98.

117. *Ibid.* paragraph 201 (emphasis added).

The report also criticised the legal system in the islands.<sup>118</sup> While s.18 of the *Cocos (Keeling) Islands Act 1955* provided for the continuation of Malay customs, the legal system did not suitably take these into account. Also, the economy still relied almost entirely on the production of one crop (copra),<sup>119</sup> there would be no locals with sufficient training to work in the quarantine station, once it was completed,<sup>120</sup> and shipment of goods remained a problem.<sup>121</sup>

At the meetings of the Committee of Twenty-Four, the Australian representative made detailed replies to the matters raised in the report.<sup>122</sup> A willingness to co-operate was expressed, and measures to improve the various deficiencies were promised to be continued. Indeed, compulsory education for all children between the ages of six and fifteen was introduced by Ordinance on 14 August 1980. However, an interesting exchange occurred with the representative of the Soviet Union, who pointed out that the leasing of the copra plantation to the Cocos Islands Co-Operative might merely be a case of changing one master for another.<sup>123</sup> Despite the deed of grant in relation to the village area, rent had to be paid on the plantation. Rent is not paid by owners. Australia had changed from Administering Power into owner. It was true that the rent was only \$1 per annum and had never been demanded, but an arrangement established for administrative convenience at a time when there was no locally elected body to take control had resulted in the inhabitants being juridically not the owners of the land on which they worked.

Improvements continued in education. A third teacher joined the staff at the beginning of the 1982 school year and a four-week educational tour of Western Australia by all the secondary students took place in October and November 1981. While the English-medium curriculum remained, instruction was given in the Cocos Malay language as well as in oral history and traditional poetry and skills. Students were also taught about world affairs and international organizations. A blend was thus attempted of tradition with an expanded outlook.

The animal quarantine station came into operation in November 1981, with the arrival of the first shipment of cattle from North America. An apprenticeship training scheme was initiated.

In the light of the unanimous views expressed at a joint meeting of the Council and the Co-Operative Society, the Minister for Territories and Local Government informed the community that he would recommend that the Australian government acquire the remaining Clunies-Ross property interests in the islands, with the intention of giving them to the Council. The remaining vestiges of the old system would thus be swept away. John Clunies-Ross has challenged the validity of the proposed acquisition in the High Court of Australia.<sup>124</sup>

By December 1983, the leaders of the Cocos community informed the government that they were prepared to proceed to an act of self-determination. The Secretary General of the United Nations was informed and was requested to dispatch an observer mission to the islands. The act would take the form of a plebiscite in which the inhabitants would choose one of the three options set out in UN Resolution 1541(XV) (1960): independence, free association with an independent State or integration with an independent State.

118. *Ibid.* paragraph 200.

119. *Ibid.* paragraph 203.

120. *Ibid.* paragraph 206.

121. *Ibid.* paragraph 205.

122. 1182nd meeting, 23 October, 1980, U.N. Doc. A/AC.109/PV.1182, especially at 11-15.

123. *Ibid.* at 17-21.

124. This case was heard on 12 June 1984. The High Court reserved its decision. At this time of writing, the decision remains reserved.

A programme of 'political education' was undertaken to explain the options to the population. Town meetings were the main forum for discussion, although posters and audio visual materials were also prepared. Criticisms of this system by the leader of the U.N. observer mission that greater use should have been made of posters and the use of symbols and figures (rather than written language for a largely illiterate community), were reported.<sup>125</sup> These allegations were later retracted to the extent that they were not intended as a criticism of the Australian government.<sup>126</sup> The act of self-determination had apparently been free and fair, with the educational process being conducted consistently with Malay cultural practices.

On 6 April 1984, the smallest act of self-determination ever conducted took place under the auspices of the Australian Electoral Commission and observed by the U.N. mission. The 261 electors voted overwhelmingly for integration with Australia.<sup>127</sup>

On 25 June 1984, the *Cocos (Keeling) Islands Self-Determination (Consequential Amendments) Act 1984* came into operation. It amends the *Commonwealth Electoral Act 1918* to extend to the Cocos community voting rights in relation to the Australian Parliament as a district in the Federal Division of the Northern Territory.<sup>128</sup> The *Commonwealth Grants Commission Act 1973* is amended to enable the Commission to recommend appropriate forms of assistance to the Islanders.<sup>129</sup> The *Health Insurance Act 1973* and the *National Health Act 1953* are amended to place the people on Cocos in a similar position to mainland residents in respect of public medical and hospital services.<sup>130</sup> The *Social Security Act 1947* is amended to apply to residents of the Cocos Islands.<sup>131</sup>

A review has been promised in three years' time to examine the introduction of taxes.<sup>132</sup>

It appeared that Principle viii of U.N. resolution 1541(XV) (providing that integration should be on the basis of complete equality between the peoples of the territory and those of the host country) had been heeded by Australia.

#### 4. Conclusions

From the foregoing, the following observations and conclusions may be made.

The legal configuration of Commonwealth power in relation to the Cocos Islands, relying as it does on ss.122 and 51(xxix) of the Constitution and the broad interpretations of them,<sup>133</sup> with power being centralised in Canberra, has the effect of insulating the Commonwealth from the controversies and requirements of international law with respect to self-determination on the internal plane, although not necessarily on the international plane. This is augmented by the fact that international law does not automatically form a part of Commonwealth law.<sup>134</sup> Therefore, legislative responses by the Commonwealth can be regarded, *prima facie*, as an accurate indication of Australia's attitude to self-determination and of its international bona fides, within the limitations indicated hereafter.

While Australia's actions in relation to self-determination for the Cocos Islands may indicate a large degree of consistency, its attitude to other situations where

125. *The Australian*, 9 April 1984.

126. *Australian Foreign Affairs Record*, Vol. 55, No. 4 (April 1984), at 398-9.

127. The result was: Independence, 9; Free Association, 21; Integration, 229; Informal, 2.

128. Act No. 46, 1984, ss.4, 6.

129. *Ibid.* s.9.

130. *Ibid.* ss.12,13,16.

131. *Ibid.* ss.23, 24.

132. Statement by Minister for Territories and Local Government to House of Representatives, 28 March 1984 (House of Reps. *Weekly Hansard*, No. 3, 1984, at 941). At the present levels of income, the Cocos Malays are under the existing income tax threshold. Under the *Cocos (Keeling) Islands Act 1955* s.18A, goods produced in the territory are exempt from customs duty.

133. Part 2(b), *ante*.

134. *Ibid.*

self-determination may be applicable shows considerable inconsistency and political bias. For example, it would appear that a free choice of the people is an essential ingredient of self-determination. Australia has appeared anxious for such an expression of community feeling to occur in the Cocos Islands, and has criticised resolutions proposed by the Committee of Twenty-Four in 1983 dealing with the Falkland Islands dispute on the basis that provision for such an expression was absent.<sup>135</sup> Such a stance is diametrically opposed to its current attitude to East Timor and the Indonesian presence there.

Something which would appear to be clear, however, is the Australian attitude that once the expression is exercised, self-determination has been completed and the resulting situation must then be determined by reference to other areas of law and politics. For example, in a debate in the General Assembly on a resolution concerning self-determination in 1981,<sup>136</sup> the Australian representative stated: 'Our position . . . is that the question of Puerto Rico is no longer one of decolonization since the General Assembly, in 1953, decided that the people of Puerto Rico had effectively exercised their right to self-determination. Accordingly, we are opposed to moves by any Member State of the United Nations to bring the question of Puerto Rico before the General Assembly.'<sup>137</sup> Therefore, even though integration with Australia must be made 'on the basis of *complete equality* between the peoples of the erstwhile non-self-governing territory and those of the independent country with which it is integrated',<sup>138</sup> the length of time needed to achieve this fully must be left to the determination of the 'host' State. Australia has indicated that it is prepared to take up to ten years to raise services and the standard of living in the Cocos Islands to Australian standards.<sup>139</sup> If any country criticises this, Australia would apparently not regard it as a question relating to self-determination. Presumably, such a situation would relate to international human rights generally, an area where any effective and enforceable legal rights are even more amorphous than those in the area of self-determination. It must be admitted that the Australian intention relating to the payment of pensions and allowances to the Cocos Malays under the *Social Security Act 1947* is to pay them to the Cocos (Keeling) Islands Council.<sup>140</sup> This is in line with the community's practice of pooling its resources to maximise the benefit to all members of the community. However, it would appear that Australia will do this as a matter of goodwill rather than as a result of a perceived legal obligation. There will be practice without *opinio iuris*.

From this it would also appear that such aspects of self-determination, such as economic and cultural self-determination,<sup>141</sup> will no longer apply as such to the Cocos Islands.

Another aspect of the method of integration is the amendment to the *Commonwealth Electoral Act 1918* which will include the Cocos Islands as a district in the Federal Division of the Northern Territory for the purposes of federal elections. This was necessary because the Australian Constitution does not allow the boundaries of a state to be extended to take in a territory.<sup>142</sup> This situation could be altered by constitutional amendment after a referendum, but the Australian government is not prepared to undertake the expense of such a course of action.<sup>143</sup> This is so, despite the links of trade, communication and family ties

135. Verbatim Record of 1239th meeting, Committee of Twenty-Four, 15 September, 1983; U.N. Doc. A/AC.109/PV.1239, at 12-13.

136. G.A. Resol. 36/68.

137. 79th plenary meeting, 1 December 1981. U.N. Doc. A/36/PV.79, at 34-35.

138. G.A. Resol. 1541(XV) of 15 December 1960 (see also Part 2(a), *ante*), Principle viii (emphasis added).

139. Statement by the Minister for Territories and Local Government, Mr Uren, in the House of Representatives, 28 March 1984: House of Representatives *Weekly Hansard*, No. 3, 1984, at 942.

140. *Ibid.* No. 6, 1984, p. 2149.

141. See Aureliu Cristecu, *supra*, n.21 chs. 5-7.

142. s.123.

143. House of Representatives *Weekly Hansard*, No. 4, 1984: at 1523.

between the Cocos Malays and Western Australia.<sup>144</sup> The Minister for Territories and Local Government has stated that the interests of the Cocos Islanders will be effectively represented by the member for the Northern Territory,<sup>145</sup> a statement which could justifiably be accused of naivety. The links between the Cocos Islands and the Northern Territory are nil. Indeed, the provision of all services on the Cocos Islands will be administered from Canberra. It would therefore appear that the electorates with which there would be a more proper community of interest would be in the Australian Capital Territory rather than in the Northern Territory, but the federal government does not seem to have considered including the Cocos Islands within one of the former.<sup>146</sup> This has led the two major political parties in the House of Representatives each to accuse the other of attempted manipulation of voting patterns in federal electorates.<sup>147</sup> In addition, a problem may arise when the Northern Territory itself attains statehood: under the Constitution could the Cocos Islands be included within it, and will the Northern Territorians want this? The reverse side of the self-determination coin (so far as it might apply to such a situation) has been little canvassed.

Also little considered has been the effect of self-determination on the Clunies-Ross family. The Cocos Malays had made it clear by 1982 that they wanted Clunies-Ross removed from the islands altogether. This accorded with the findings of the second UN Visiting Mission.<sup>148</sup> Despite the fact that in 1978 almost all of the Clunies-Ross holdings had been purchased by Australia, the Clunies-Ross influence was still significant, not least because by that stage he was employing labour at rates higher than those set by the Cocos Islands Co-Operative and selling imported goods cheaper than the Co-Operative could. As a member, the Chairman of the Cocos Islands Council wrote to the then Minister for Home Affairs and Environment stating, in part: '... we do not believe we can proceed with [the act of self-determination] in full confidence without knowing what the Australian government intends to do about removing Clunies-Ross'.<sup>149</sup> This was, in effect, an ultimatum based on what the Council saw as unfair trading competition and the presence on the islands of one they did not consider to be a Cocos Islander. It is to be doubted whether the former complaint in itself is a valid one in the context of self-determination. If it is, it means that any internal economic advantages which may affect the act of self-determination could invalidate that act. If so, the influence of Australia, from which the Council and the Co-Operative derived both their legal existence and also their economic basis (since Australia had given them the former Clunies-Ross land after the purchase), must be viewed in a similar light.

As to the latter complaint, any real answer must turn on who settled the islands first. The Cocos Islands were originally uninhabited. It is controversial whether the ancestors of the present Cocos Malays in fact arrived before the Clunies-Ross entourage, having been imported by the rival of the first Clunies-Ross, Alexander Hare, eight months before the arrival of the first John Clunies-Ross in 1827.<sup>150</sup> After more than 150 years, it must be seriously doubted whether a difference of eight months should be regarded as sufficiently significant to consider the Clunies-Ross family as 'outsiders' whose presence should be eradicated to enable the act of self-determination to be fair.

It was not only the influence, but the sheer presence of Clunies-Ross which was apparently so intimidating. In March 1984, the Chairman of the Cocos Islands Council wrote to the *Bulletin* magazine in these terms: 'It is our feeling that if the Australian people

144. *Ibid.* All the Cocos Malays who left the Islands for the mainland settled in Western Australia.

145. *Ibid.* No. 6, 1984: at 2149.

146. *Ibid.* No. 7, 1984: at 2367.

147. *Ibid.* esp. at 2371-3.

148. *Ante*, Part 3 and *supra* n.115.

149. *Supra* n.139 at 943.

150. *Ante*, Part 1.

all knew the true situation, if they knew how [Clunies-Ross] had treated us in the past, if they knew how [he] had taken away all our fundamental human rights, they would not want to support him at all'.<sup>151</sup> Despite the apparent accuracy of this statement, it must be seriously doubted whether the framers of resolution 1514(XV) intended self-determination to be manipulated for the purposes of retribution.

Nevertheless, the Australian government made it clear that it would seek to acquire the remaining Clunies-Ross land under the *Lands Acquisition Act 1955* and hand control of it to the Cocos Malay community.<sup>152</sup> The expectation was that Clunies-Ross would then leave.<sup>153</sup> When asked whether Clunies-Ross would be *asked* to leave the Cocos Islands before or after the act of self-determination was effected, the Minister for Territories and Local Government replied: 'Mr Clunies-Ross will not be asked to leave the territory before the act of self-determination is effected. The remainder of the question is hypothetical'.<sup>154</sup> In the meantime, Australia discontinued contracting with Clunies-Ross ships for transport of supplies to the Cocos Islands, resulting, according to Clunies-Ross, in the financial collapse of his shipping company.<sup>155</sup> He has accused Australia of attempting to exile him from his family home.

The compulsory acquisition of the remaining Clunies-Ross holding has been challenged in the High Court. If the challenge is not successful, the Clunies-Ross family will have no option but to leave the islands. If the challenge is successful Clunies-Ross cannot be prevented from staying, (although the family, who still retain British citizenship, may have to obtain visas from the Australian government to return to their own home should they travel overseas). Also, in the latter event, it may be open to question whether Australia will be regarded as being in breach of an international obligation should the removal of Clunies-Ross be considered a condition attaching to the act of self-determination.<sup>155A</sup>

To contend that self-determination, or an agreement to proceed to an act of self-determination, can be conditional on the removal of a section of the population, regardless of how small a section, would be contrary. Indeed, it must be seriously doubted whether the effective expulsion of the Clunies-Ross family accords at all with this act of self-determination which opted, not for independence, but for integration with Australia. Does the right of 'peoples' to self-determination and the equality which should result from a decision to integrate only apply to *some* of those peoples? Has an erroneous distinction been drawn between 'peoples' and minorities?

The Australian approach to self-determination has always been pragmatic. Despite the stipulation in Resolution 1514(XV) that lack of economic development should not serve as a pretext for the denial of the exercise of self-determination, Australia has always regarded economic conditions (rather than education, for example) as the essential prerequisite for political freedom.<sup>156</sup> Indeed, the Australian representative to the Committee of Twenty-Four stated as recently as September 1983, that Australia did not accept that even foreign investment in a non-self-governing territory was necessarily an impediment to the exercise of self-determination.<sup>157</sup> Significant here is Australia's apparent inability to

151. *Supra* n.139 at 944.

152. *Ante*, Part 3.

153. *Supra* n.139 at 947.

154. *Ibid.*, No. 4, 1984: at 1523.

155. *The Australian*, 28 July 1984.

155A. On 25 October 1984, a majority of the Full Court of the High Court found in favour of Clunies-Ross. See (1984) 58 A.L.J.R. 554.

156. See, for example, the contribution of Mr Willessee to the General Debate at the 30th session of the General Assembly, 23 September 1975; U.N. Doc. A/AV.2357, at 8.

157. Committee of Twenty-Four, Verbatim record of the 1239th meeting 15 September 1983; U.N.Doc. A/AC.109/PV.1239, at 31.

distinguish between economic and political control of property, as seen in the interchange between Australia and the Soviet Union in the Committee of Twenty-Four concerning the *leasing* for a token rental of the copra plantation to the Cocos Islands Co-Operative.<sup>158</sup> Together with what was apparently the educational and political unsophistication of the Cocos Malays,<sup>159</sup> the question of how 'free' in any realistic sense the act of self-determination was, must be considered.

It must be remembered that compulsory education was not introduced into the Cocos Islands until 1980.<sup>160</sup> Until that time, despite some adult education classes, the majority of the population must be regarded as being functionally illiterate, and community meetings the main (or sole) source of information.

An act of self-determination resulting in integration is an unusual event. There are only two previous instances: Togo's integration into Ghana and Northern Cameroon's integration with Nigeria. Despite the distance of the Cocos Islands from Australia, its lack of economic resources (other than copra, some fishing and a few jobs at the animal quarantine station) meant that the options of independence or free association with an independent State were not realistic. However, because of the historical and economic links with Australia, integration with a State *other than* Australia was not realistic either, despite the fact that the Cocos Malays are closer geographically and culturally to Indonesia than to Australia. Indeed, such an option was not even offered at the plebiscite: integration and free association could only be made 'with Australia'.

Australia gradually came to be regarded by the Cocos Malays as a saviour. The effective transfer of land to the inhabitants, a degree of autonomy and improved education and living standards contrasted greatly with the days of unfettered Clunies-Ross control. When Australian citizenship regulations were altered in 1979, most Cocos Malays became Australian citizens. Therefore, it is little wonder that the decision at the plebiscite was for integration with Australia. Economic, social, political and historical factors favoured it. It was also the option desired by Australia, if for nothing else than the strategic advantage of not having another country gain control.<sup>161</sup> The suggestion by Clunies-Ross and one hundred and eighty Cocos Malays (a substantial proportion of the population) by petition to the Australian government in 1976 that the Cocos Islands enter into free association with Australia was ignored.<sup>162</sup>

The Australian attitude to the United Nations on the issue of self-determination for the Cocos Islands has always presented itself as one of co-operation. The fact that it took almost 30 years of Australian administration before self-determination was achieved is more an indication of lethargy rather than malice. The situation on Cocos was known to the Australian government by the early 1970's at the latest, and probably earlier. Virtually nothing was done until after the report of the first U.N. Visiting Mission in 1974. If nothing else, the U.N. has provided the motivation for improvement. It must be remembered that the transfer in 1955 involved consultation with none of the inhabitants of Cocos. The politics of publicity which attaches to U.N. deliberations can be a powerful sanction.

Australia has also stated consistently in the Committee of Twenty-Four that it considers self-determination to be a right of the Cocos Malays. In practice, that statement must be qualified by the factors already outlined. In particular, Australia is anxious to reserve to itself the privilege of determining the existence of the factor it seems to consider the most important: economic viability.

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158. *Ante*, Part 3 and *supra* n.123.

159. *Ante*, Part 3.

160. *Ibid.*

161. *Supra* n.143 at 1456.

162. See Part 3, *ante*.

The element of political education of the peoples, which both U.N. Visiting Missions considered important, took many years to be introduced. It is a fact that when the population of the islands was almost equally divided on the issue of who promised the best future for Cocos — Australia or Clunies-Ross — Australia regarded this as a danger to the viability of the territory.<sup>163</sup> The education factor could be used as a form of manipulation of the peoples when administered by a State, integration with which is one of the options under the exercise of the right of self-determination. With education, manipulation can be passive, as well as active.

On the other hand, it may smack of paternalism as well: giving the islanders what is best for them, even if they do not realise it.

While Australia was complimented on being co-operative with the U.N., indicating, *prima facie*, a considerable effect of international norms on Australia, some Australian constitutional limitations may hinder these being given full effect despite the more or less plenary power over territories. As well, cases such as *Milirrpum v. Nabalco Pty. Ltd.*<sup>164</sup> indicate that the Australian legal system generally is notoriously ill-equipped to absorb 'foreign' cultures. While s.18 of the *Cocos (Keeling) Islands Act 1955* does provide for the continued existence of Malay institutions, customs and usages, this is expressly 'subject to any law in force in the Territory from time to time'. Furthermore, the acquisition by Australia of the remaining Clunies-Ross holdings will depend upon whether, in the case currently before the High Court, the acquisition is interpreted to be for a 'public purpose' within s.6 of the *Lands Acquisition Act 1955*. As international law does not automatically form part of the law of Australia, compliance with international norms or collateral agreements made with reference to them, might not be regarded as a public purpose in this particular context.<sup>164A</sup>

On the other hand, the lessons to be learned from the Cocos episode shed some light on international law as well. Operative paragraph 1 of Resolution 1514(XV) states: 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights . . .' Obviously, the Cocos Malays were classed as 'peoples' for these purposes. But who was the 'alien': Australia or Clunies-Ross? If it is Clunies-Ross, whose family has lived in the islands effectively as long as the ancestors of the Cocos Islanders, does 'alien' really mean minority. If Great Britain and then Australia is the 'alien', the outcome of the act of self-determination has been not necessarily to remove the 'domination' over the Cocos Islands, but merely to remove its 'alien' nature. The problem, therefore, may not be so much who are 'peoples', but who is the 'alien'.

Operative paragraph 2 of the same resolution states: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status *and* freely pursue their economic, social and cultural development' (emphasis added). The Cocos situation illustrates that the 'freedom' of the determination may be effectively a myth and that once the political status has been determined the freedom to determine economic, social and cultural development is extinguished if integration with another State is chosen.

Operative paragraph 3 states: 'Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence' (or, presumably, integration). We have seen that Australia expressly does not subscribe to this view. However, it would also appear, neither does the U.N.

Operative paragraph 5 states: '*Immediate* steps should be taken . . . to transfer all powers to the peoples . . .' (emphasis added). While the choice of the Cocos Malays was integration rather than independence, the steps taken by Australia to enable them to

163. *Supra*, n.107.

164. (1971) 17 F.L.R. 141.

164A. See *supra* n.155A.

exercise the choice were hardly immediate. From the time of transfer in 1955 it took not only twenty-nine years for the plebiscite to take place, but almost twenty years before any real steps towards this were undertaken.

It is undoubtedly true that the Cocos Malays are today considerably better off than they were. However, as an exercise in the 'right to self-determination' there would appear to be a lacuna between the theory and the practice which bodes ill for the 'right' being classified as a legal right.

Whether it is despite or because of the possibility of manipulation (whether active or passive) the practice relating to the right to self-determination would indicate that the concept more often than not provides merely a structure for argument rather than a legal right. Often, it is *ex post facto* validation of a *fait accompli* when the 'rules' are not only subject to autointerpretation, but are interpreted selectively, omitting some elements as convenient. Indeed, it is the choice of available 'legal principles' which is a fundamental issue here.

Much has been written about the binding nature of U.N. (and especially of General Assembly) resolutions. They may be binding as an interpretation of the U.N. Charter; they may be evidence of customary law or indicate *opinio juris communis*; they may be effectively binding because of the operation of general principles such as estoppel or good faith; or they may be evidence of a binding unilateral declaration.<sup>165</sup>

On the other hand, they may merely be an indication of values rather than rules; the signpost indicating the path to the goal, rather than the goal itself. This does not mean, however, that they can be ignored with impunity. What it does mean is that they do not fit within the established categories for testing the validity of a rule of international law. Perhaps those categories are today outmoded, if not useless.<sup>166</sup>

Above all, the rules must be realistic. To say that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people',<sup>167</sup> must be applied and applicable contextually, rather than as an absolute. To consider that all peoples can extricate themselves totally from the shackles of their own history as well as from their present circumstances is a myth. If international law is to be effective it must come to terms with this, for no concept, legal or otherwise, can be an absolute and always operate effectively. Even today, the Cocos Malays at 'traditional' feasts enjoy dancing to the accompaniment of a Malay fiddler. The music is one bar of an old Scots tune played again and again.

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165. *Nuclear Tests Case*, I.C.J. Reports 1974.

166. See, for example, Jennings, 'What is International Law and how do we tell it when we see it?' (*The Cambridge-Tilbury Law Lectures*, Third Series, 1980) 3-32, esp. at 14-15.

167. Judge Dillard, *Western Sahara Case*, n.1.