AUSTRALIANS SENTENCED TO DEATH OVERSEAS: PROMOTING BILATERAL DIALOGUES TO AVOID INTERNATIONAL LAW DISPUTES†

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Although Australia has adopted a firm stance opposing the death penalty within Australia, this position is complicated when Australian nationals are sentenced to death for crimes committed overseas. This article explores the legal avenues open to Australia, and to the individuals concerned, in seeking a lesser penalty so as to reduce inter-state disputes in these situations. The cases of Van Nguyen and members of the Bali Nine are used as focal points in this regard. It is argued that Australia needs to decide on a firm and consistent policy opposing the death penalty, and apply this approach globally and in its bilateral relationships. These steps are required if Australia is to minimise the likelihood of inter-state disputes and ameliorate the circumstances of Australians on death row.

I INTRODUCTION

When an Australian is arrested overseas for a capital offence,[1] a complex legal relationship emerges between that individual, Australia and the arresting state. The rights and duties that emerge as a matter of international law mean that Australia is immediately thrust into a potentially adversarial position as the other state responds to these rights and duties. The prospect of inter-state tension is considerable. This article examines the particular situation of Australians being sentenced to death overseas, using this situation to show the varied ways that international disputes may result and how Australia may at least be able to take steps when the death penalty is at issue in order to minimise conflict.

Australia's position on the death penalty is clear. Australia abolished the death penalty in all states by 1985, with the last execution occurring in 1967.[2] It has more recently moved to prohibit the states from reintroducing the death penalty through the adoption of the *Crimes Legislation Amendment (Torture Prohibition and*

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1 This issue is regularly confronted by Australia, for example, the arrest of Michael Sacatides on 1 October 2010 for trafficking methamphetamines in Bali. See Matt Brown, 'Australian Faces Meth Charge in Bali', *ABC News* (online), 1 October 2010 <http://www.abc.net.au/news/stories/2010/10/01/3027446.htm>. Edward Myatt, who was arrested in February 2012 with capsules of drugs in his stomach, was also exposed to a capital offence. See George Roberts, 'Australian Likely to Escape Bali Death Penalty', *ABC News* (online), 12 July 2012 <http://www.abc.net.au/news/2012-07-11/australian-likely-to-escape-bali-death-penalty/4124528?section=vic>.

2 Andrew Byrnes, 'The Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective' [2007] *University of New South Wales Faculty of Law Research Series* 66 <http://law.bepress.com/unswwps/flrps/art66>.

Death Penalty Abolition) Act 2010 (Cth). Internationally, Australia is a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights*[3] ('*Second Optional Protocol*'), which prohibits states from executing anyone within their jurisdiction.[4] How this opposition to the death penalty has manifested itself in Australia's bilateral relationships has been less apparent.

There is no absolute prohibition on the imposition of the death penalty under international law that is binding on all states. The *Second Optional Protocol* has 73 parties,[5] and the 47 member states of the Council of Europe have abolished the death penalty under protocols to the *European Convention on Human Rights*.[6] Capital punishment still applies in countries such as the United States, China and Japan, as well as many countries in the Middle East and the Caribbean.[7] The imposition of capital punishment potentially entails an infringement of various international human rights norms. These may encompass the right not to be arbitrarily deprived of one's life, various due process rights and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.[8]

Australia's commitment against the death penalty may therefore be entrenched within Australia's own law, but it does not reflect a universal value in the international legal system. Consequently, Australia finds itself at odds when its nationals are convicted of offences carrying the death penalty in other countries. The clash was manifest with the execution of Van Nguyen for drug trafficking in Singapore in 2005[9] and remains an issue with regards to members of the Bali Nine. Scott Rush's final opportunity to appeal against his death sentence in Indonesia for drug trafficking was successful,[10] whereas the death sentences for the two ringleaders of the Bali Nine operation, Andrew Chan and Myuran Sukumaran, were upheld.[11] The fact that such cases loom large in Australian society reflects

3 *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991), which aims to encourage states to abolish the death penalty.

4 Ibid art 1(1). For a discussion of the death penalty and international law generally, see William A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 3rd ed, 2002).

5 United Nations, *Chapter IV Human Rights* (17 June 2012) United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en>.

6 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty*, opened for signature 28 April 1983, CETS No 114 (entered into force 1 March 1985); *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances*, opened for signature 3 May 2002, CETS No 187 (entered into force 1 July 2003).

7 Amnesty International, *Abolitionist and Retentionist Countries* (2012) <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#retentionist>.

8 Byrnes, above n 2, 32.

9 'Australian Executed in Singapore', *BBC News* (online), 2 December 2005 <http://news.bbc.co.uk/2/hi/asia-pacific/4487366.stm>; Michael Hor, 'The Death Penalty in Singapore and International Law' (2004) 8 *Singapore Year Book of International Law* 105.

10 Matt Brown, 'Scott Rush Escapes Death Penalty', *ABC News* (online), 27 May 2011 <http://www.abc.net.au/news/stories/2011/05/10/3213037.htm>. See also Matt Brown, 'Rush Makes Final Appeal against Death Penalty', *ABC News* (online), 26 August 2010 <http://www.abc.net.au/news/stories/2010/08/26/2994540.htm>.

11 Matt Brown, 'Bali Nine Ringleader Loses Final Appeal', *ABC News* (online), 17 June 2011 <http://www.abc.net.au/news/stories/2011/06/17/3247028.htm>.

the ongoing conflict presented to Australia in managing its bilateral relationships when Australians are sentenced to death abroad.

There are a range of legal avenues available to Australia in seeking to protect individuals abroad, though each of these avenues entails considerable discretion because of the political dynamics and national sensitivities involved. This article assesses these avenues, highlighting the potential for inter-state tension, and considers if there is or should be a difference in approach for Australia when the death penalty is concerned. The cases of Van Nguyen and members of the Bali Nine are used as points of reference in addressing: Australia's right of diplomatic protection; the consular rights of Australia and the individuals concerned; the relevance of international human rights law; and specific protections that may arise in relation to mutual legal assistance and extradition treaties, as well as prisoner transfer agreements. We explore the scope for disagreement in the various steps that may be taken by Australia and by the individuals concerned. More is ultimately needed if Australians on death row are to be spared a punishment condemned within Australia. We therefore examine how Australia could establish an authoritative position on the death penalty and utilise this stance in favour of Australian nationals sentenced to death. In this regard, we consider how Australia may externalise its internal standards in its bilateral relationships; consistency and clarity are needed both within Australia's domestic legal and political setting as well as in Australia's dealings with other countries. Such a position may not only assist those subjected to capital punishment abroad but also obviate inter-state disputes that otherwise arise.

II AUSTRALIANS ON DEATH ROW: VAN NGUYEN AND THE BALI NINE

Among the most high profile cases of Australians sentenced to death in recent years have been those of Van Nguyen and of the Bali Nine.[12] A brief overview of these

12 Another significant case was that of Robert Langdon. The Australian was sentenced to death by hanging in Afghanistan in October 2009 for shooting an Afghan guard named Karim. Langdon, who worked as a private security contractor, confessed to the shooting but claimed he acted in self-defence. However, two witnesses testified that Karim was unarmed and the shooting was triggered by an argument between the men. It was reported that Langdon tried to cover up his actions by throwing a hand grenade into the truck that contained Karim's body. He also reportedly ordered other guards to open fire in an effort to stage a Taliban attack, enabling it to be presumed that Karim was a victim of the staged attack. Subsequently, Langdon's sister revealed that he had informed his company of the events and was following orders from company headquarters. Langdon subsequently had his sentence reduced to a 20 year gaol term. For details of Langdon's story, see Jeremy Kelly, 'Aussie Robert Langdon Facing Death in Kabul', *The Australian* (online), 27 January 2010 <http://www.theaustralian.com.au/news/nation/aussie-robert-langdon-facing-death-in-kabul/story-e6frg6nf-1225823771967>; Rod Nordland and Abdul Waheed Wafa, 'NATO Contractor Is Sentenced to Death in Afghanistan', *The New York Times* (New York), 27 January 2010, A10; Jeremy Kelly, 'Kabul Jail Access "Too Dangerous" for Consular Officials to Visit Jailed Aussie', *The Australian* (online), 28 January 2010 <http://www.theaustralian.com.au/news/nation/kabul-jail-access-too-dangerous-for-consular-officials-to-visit-jailed-aussie/story-e6frg6nf-1225824141448>; Samantha Maiden, 'Rudd Vows to Act as Robert Langdon Faces Death Penalty in Afghanistan', *The Australian* (online), 27 January 2010 <http://www.theaustralian.com.au/news/rudd-vows-to-act-as-robert-langdon-faces-death-penalty-in-afghanistan/story-e6frg8yo-1225823941457>; 'Australian Escapes Execution in Afghanistan', *ABC News* (online), 6 January 2011 <http://www.abc.net.au/news/stories/2011/01/06/3107214.htm>.

cases is presented in this part, before turning to the different avenues of legal relief that were brought to bear in each of their cases. These two examples may be used to show how tension has arisen between Australia and the countries concerned.

A *Van Nguyen*

Van Nguyen, a Vietnamese-born Australian,[13] was apprehended carrying approximately 400 grams of heroin[14] while in transit through Changi Airport in Singapore in December 2002.[15] Nguyen provided an oral statement and a cautioned statement to Singapore authorities.[16] He was convicted under s 7 of the *Misuse of Drugs Act* and sentenced to death by hanging in March 2004.[17] His final appeal was rejected in October 2004, clemency was denied in October the following year, and on 2 December 2005, Nguyen was hanged.[18] On the day of his execution, hundreds of mourners gathered at a church in Melbourne, Nguyen's hometown, to hear the church bell ring 25 times, commemorating each year of Nguyen's short life.[19] The Australian Prime Minister denounced Singapore's 'clinical response' to Australia's request that Nguyen's mother be permitted to hug her son before his execution.[20] They were only permitted to hold each other's hand.[21] The Prime Minister further commented to the Singapore government that the execution 'will have an effect on the relationship on a people-to-people, population-to-population basis'.[22]

B *Bali Nine*

In April 2005, nine Australians were arrested in Bali for attempting to traffic more than 8 kilograms of high quality heroin from Indonesia to Australia: Andrew Chan, Si Yi Chen, Michael Czugaj, Renae Lawrence, Tach Duc Thanh Nguyen, Matthew Norman, Scott Rush, Martin Stephens and Myuran Sukumaran. Of those nine, Andrew Chan and Myuran Sukumaran were identified as the central

13 Phil Mercer, 'Australia Considers Taking Singapore to International Court to Prevent Execution', *Voice of America* (online), 21 November 2005 <http://www.voanews.com/tibetan/archive/2005-11/2005-11-22-voa5.cfm?moddate=2005-11-21>. Another source says he was born in a refugee camp in Thailand: 'Australian Anger over Singapore Hanging', *BBC News* (online), 2 December 2005 <http://news.bbc.co.uk/2/hi/asia-pacific/4490754.stm>.

14 'Australian Executed in Singapore', above n 9.

15 CL Lim, 'The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v Public Prosecutor' [2005] *Singapore Journal of Legal Studies* 218, 218; Mercer, above n 13. Mercer noted that Nguyen was flying from Cambodia to Australia.

16 Lim, above n 15, 218.

17 Ibid; Luke Davies, 'The Penalty Is Death: Inside Bali's Kerobokan Prison' [2008] *The Monthly* 18, 27. The possession of more than 15 grams of particular types of drugs is a crime punishable by death in Singapore: at 26.

18 Davies, above n 17, 27.

19 'Australian Executed in Singapore', above n 9.

20 Ibid.

21 Ibid.

22 Ibid.

organisers and leaders of the operation. Chen, Nguyen and Norman have been collectively referred to as the 'Melasti Three', as they were arrested, along with Sukumaran, at the Melasti Beach Bungalows. Czugaj, Lawrence, Stephens and Rush served as couriers, or drug mules, and were arrested with heroin strapped to their bodies at the airport in Bali.[23] The focus in this article is on Rush, who remained under sentence of death the longest of all the drug mules, and on Chan and Sukumaran, who are still subject to the death penalty at time of writing.

Rush, who was 19 at the time of his arrest, was apprehended at the airport with 3.4 kilograms of heroin strapped to his body.[24] Apparently couriering drugs for the first time, Rush is said to have been offered an 'all-expenses-paid' holiday to Bali, and was told he would receive AUD5000 for transporting the narcotic to Australia.[25] Rush was warned that his family would be killed if he did not follow orders.[26] He was seemingly unaware of the extent of the drug syndicate with which he was involved.[27]

Chan and Sukumaran had both reportedly been involved in drug trafficking operations between Indonesia and Australia prior to their arrest in April 2005.[28] Chan had started out as a courier before taking on a coordination role in the Bali Nine operation.[29] Police believed Chan to be the 'godfather' of the operation.[30]

All members of the Bali Nine were charged under the *Law of the Republic of Indonesia No 22 of 1997* arts 78(1)(b) and 82(1). Most relevantly, art 82(1) provides:

> Whosoever without a right and illegally: (a) imports, exports, offers for sale, traffics, sells, purchases, offers up, accepts, or acts as an intermediary in the sale, purchase or exchange of a Category 1 narcotic is to be punished by the death sentence or life imprisonment, or not more than 20 years imprisonment and a fine of not more than 1,000,000,000.00 (one billion) rupiah.[31]

23 For background on the Bali Nine, see Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95, 96–9.

24 Lindsay Murdoch, 'Bid to Save Bali Nine Member', *The Age* (online), 11 January 2010 <http://www.theage.com.au/national/bid-to-save-bali-nine-member-20100110-m0o4.html>.

25 Ibid.

26 Ibid. Some sources say this was a fabrication. See, eg, ABC, 'Road to Kerobokan', *Australian Story*, 13 February 2006 (Caroline Jones) <http://www.abc.net.au/austory/content/2006/s1569903.htm>.

27 Murdoch, above n 24.

28 See, eg, ABC, 'Bali 9 Documents Lay Out Alleged Conspiracy', *The 7.30 Report*, 10 October 2005 (Tim Palmer) <http://www.abc.net.au/7.30/content/2005/s1479026.htm>.

29 Neil McMahon and Mark Forbes, 'A Crooked Trail of Greed and Naivety', *The Age* (Melbourne), 19 November 2005, 9.

30 Philip Cornford, 'How the Trap Snapped Shut', *The Age* (online), 23 April 2005 <http://www.theage.com.au/news/National/How-the-trap-snapped-shut/2005/04/22/1114152321560.html>.

31 *Law of the Republic of Indonesia No 22 of 1997* art 82(1), quoted in Nadia Harrison, 'Extradition of the "Bali Nine": Can and Should the Risk of Capital Punishment Facing Australians Be Relevant to Extradition Decisions?' (2006) 1 *International Journal of Punishment and Sentencing* 221, 222. See *Rush v Commissioner of Police* (2006) 150 FCR 165, 170 [10], 179–80 [51]–[52].

At trial, Rush was sentenced to life imprisonment.[32] In September 2006, the Indonesian Supreme Court upgraded his sentence to the death penalty despite prosecutors not actually seeking it.[33] After pursuing further legal proceedings in Indonesia and Australia, Rush was ultimately successful in avoiding a death sentence in the final appeal available to him before the Indonesian courts.[34]

At the trials of Chan and Sukumaran, some of the drug couriers testified against them, detailing the role each had played in the drug trafficking operation.[35] Chan and Sukumaran pleaded not guilty at their initial trials and in two subsequent appeals.[36] They were criticised at trial for their failure to assist police in their investigations, and for not showing any remorse for their actions.[37] The pair were sentenced to death by firing squad by the Denpasar District Court in February 2006,[38] and subsequent appeals were unsuccessful.[39]

It was only at the final stage of appeal in the Indonesian judicial system, that the pair admitted their guilt and asked for forgiveness.[40] This appeal was further based on arguments that Chan and Sukumaran were now rehabilitated, were actively engaged in church services, and had taken on responsibilities within the prison, including the conducting of computer and English courses for other inmates.[41] Both the Governor of the prison, as well as the Denpasar District Court, had recommended that Chan and Sukumaran should be spared the death penalty.[42]

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

33 Under Indonesian law, judges are guided but not restricted by the sentencing recommendations of the prosecutor: Ibid. The Melasti Three also had their sentences changed to death sentences at this time, but their life sentences were reinstated in 2008. See Natalie Zerial, 'Decision No 2–3/PUU–V/2007 [2007] (Indonesian Constitutional Court)' (2007) 14 *Australian International Law Journal* 217, 218–219.

34 Brown, 'Scott Rush Escapes Death Penalty', above n 10.

35 McMahon and Forbes, above n 29; 'I'm Terrified of Chan, Says Lawrence', *The Sydney Morning Herald* (online), 22 December 2005 <http://www.smh.com.au/articles/2005/12/22/1135032130143.html>; 'Rush Re-enacts Drug Smuggling in Court', *The Age* (online), 13 December 2005 <http://www.theage.com.au/news/World/Rush-reenacts-drug-smuggling-in-court/2005/12/13/1134236055745.html>.

36 'Australian Death Row Pair Andrew Chan and Myuran Sukumaran Finally Admit Bali Nine Roles', *The Australian* (online), 13 August 2010 <http://www.theaustralian.com.au/news/world/australian-death-row-pair-andrew-chan-and-myuran-sukumaran-finally-admit-bali-nine-role/story-e6frg6so-1225904974203>.

37 'Bali Duo Sentenced to Death', *The Sydney Morning Herald* (online), 14 February 2006 <http://www.smh.com.au/news/world/bali-duo-sentenced-to-death/2006/02/14/1139679580306.html>.

38 Ibid.

39 See Finlay, above n 23, 97.

40 Tom Allard, 'Death Sentence Shock', *The Sydney Morning Herald* (online), 18 June 2011 <http://www.smh.com.au/world/death-sentence-shock-20110617-1g8a7.html>.

41 See Desy Nurhayati, 'Bali Nine Death Row Inmate Loses Final Appeal', *The Jakarta Post* (Jakarta), 20 June 2011, 1. See also Tom Allard, 'Lives Transformed in Shadow of Death', *The Sydney Morning Herald* (Sydney), 23 January 2010, 4; Cindy Wockner, 'Judge Makes Plea for Lives of Bali Nine', *Herald Sun* (online), 8 October 2010 <http://www.heraldsun.com.au/news/national/judge-makes-plea-for-lives-of-bali-nine/story-e6frf7l6-1225936162727>; Matt Brown, 'Australian Drug Smuggler's Death Sentence Upheld', *Radio Australia News* (online), 18 June 2011 <http://www.radioaustralianews.net.au/stories/201106/3247047.htm>.

42 SBS, 'The Condemned', *Dateline*, 14 November 2010 (Mark Davis) <http://www.sbs.com.au/dateline/story/transcript/id/600882/n/The-Condemned>; 'Australian Death Row Pair Andrew Chan and Myuran Sukumaran Finally Admit Bali Nine Roles', above n 36.

With the rejection of these final appeals, Chan and Sukumaran's fate now rest with Indonesia's President, who may grant clemency. Australia has previously announced that it would support clemency appeals to the Indonesian President.[43] The success of any efforts by Australia remains to be seen. Both the Bali Nine and Nguyen's cases raise fundamental questions as to what Australia may, should and must do in situations where Australians have been sentenced to death abroad, and how Australia's bilateral relationship is put to the test in the meantime. These issues are addressed in the next part.

III AVENUES AVAILABLE TO AUSTRALIA TO ASSIST UNDER INTERNATIONAL LAW

The most basic right Australia holds when dealing with the question of protecting its nationals abroad is the right of diplomatic protection. This right entitles Australia to take up the claim of one of its nationals who has been injured by the acts of another state and assert that claim as if it was an injury to Australia.[44] Whether Australia asserts its right of diplomatic protection is a matter of discretion for Australia.[45] As such, Australia has considerable scope to take into account the political, economic and strategic interests at stake with the country concerned. This discretion may mitigate inter-state tension. There

43 Stephen Smith (Press Conference, 6 March 2008) <http://www.foreignminister.gov.au/transcripts/2008/080306_pc.html>; Petrina Berry, 'Gillard against Chan Death Penalty', *The Daily Telegraph* (online), 18 June 2011 <http://www.dailytelegraph.com.au/news/gillard-against-chan-death-penalty/story-e6freuy9-1226077567832>. The success of such an appeal has been doubted given the President's rigid stance against drug trafficking: Julie Lewis, 'Explore International Legal Options for Bali Nine Now, Says Professor' (2006) 44 (November) *Law Society Journal* 18, 18–19; Cindy Wockner, 'Bali Nine Member Andrew Chan's Plea Fails in Death Sentence', *The Daily Telegraph* (online), 18 June 2011 <http://www.dailytelegraph.com.au/news/world/bali-nine-member-andrew-chans-plea-fails-in-death-sentence/story-e6frev00-1226077359638>.

44 The Permanent Court of International Justice articulated this right of diplomatic protection as follows:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant

Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction) [1924] PCIJ (ser A) No 2, 12. The International Law Commission ('ILC'), which is a United Nations body with responsibility for the progressive development and codification of international law, adopted a set of draft articles on diplomatic protection in 2006. See *Draft Articles on Diplomatic Protection with Commentaries*, *Report of the International Law Commission on the Work of its Fifty-Eighth Session*, UN GAOR, 58th sess, Supp No 10, UN Doc A/61/10 (2006) ('*ILC Articles on Diplomatic Protection*'). Article 1 refers at 24 to

> diplomatic protection consist[ing] of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

45 'The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case': *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 44 [79]. See also *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 28–9 (referring to art 2).

is no duty requiring Australia to assist one of its nationals abroad, though it has been suggested that a state at least has a duty to consider whether to exercise this right.[46] The Federal Court case of *Hicks v Ruddock* provided an opportunity to address this question,[47] but was not fully decided when Hicks was released from detention in Guantánamo Bay.[48]

There is a range of options available to Australia in deciding what course of action it might take on behalf of one of its nationals, including protests to the state concerned, calls for investigations or inquiries into the incident, negotiating with the state concerned and potentially turning to international adjudication or arbitration.[49] One requirement for a state exercising the right of diplomatic protection is that any national should exhaust the local remedies available to him or her.[50] This requirement reflects certain deference to the sovereign authority of another state to enforce its laws within its own territory, and a state may only pre-empt this procedure when resolution through the national judicial system is inter alia ineffective or unavailable.[51] Any inter-state dispute may therefore potentially be held at bay while these national judicial processes are undertaken.

Further rights come from consular agreements, predominantly the *Vienna Convention on Consular Relations*,[52] and also potentially any bilateral treaty to which Australia is a party with a state in which an Australian is imprisoned.[53] Article 36 of the *Vienna Convention on Consular Relations* sets forth key protections in relation to nationals who are detained, arrested and prosecuted in another state. Notably, it requires that a state be notified without undue delay of the detention or arrest of one of its nationals,[54] and that legal assistance be facilitated for that individual.[55] Bilateral consular agreements may include

46 *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 94 (referring to art 19(a)). For further discussion, see Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 *Nordic Journal of International Law* 279.

47 (2007) 156 FCR 574.

48 An initial decision was made that Hicks' claims should not be summarily dismissed for failure to disclose a reasonable prospect of success as a matter of law: ibid.

49 *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 27. See also Craig Forcese, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law' (2005) 37 *George Washington International Law Review* 469, 473.

50 *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 70–6. See also Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 *Heidelberg Journal of International Law* 321, 323. The ILC has taken the view that the line between diplomatic protection and consular assistance is unclear. See *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 27. The ILC has noted, however, that diplomatic protection tends to reflect a remedial function whereas consular assistance is primarily preventive in seeking to stop nationals being the victims of internationally wrongful acts.

51 See *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 76–86 (setting out the exceptions to the rule requiring exhaustion of local remedies).

52 *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) ('*Vienna Convention on Consular Relations*').

53 For example, Australia has a bilateral consular agreement with China, which elaborates on rights and duties set forth in the *Vienna Convention on Consular Relations*. See *Agreement on Consular Relations between Australia and the People's Republic of China*, signed 8 September 1999, [2000] ATS 26 (entered into force 15 September 2000).

54 *Vienna Convention on Consular Relations* art 36(1)(b).

55 Ibid art 36(1)(c).

additional rights and responsibilities in this situation, including guarantees to attend trials or other legal proceedings, providing interpretation during legal proceedings and providing full access and interaction between consular officials and detained individuals.

Situations have arisen where the failure to respect consular rights has led to international disputes and inter-state litigation. Australia could have potentially claimed that China was in violation of its bilateral consular treaty with Australia,[56] in view of China's refusal to allow Australian consular officials into the trial of Rio Tinto business executive, Stern Hu.[57] Concerns over the closed trial were voiced by the Australian Prime Minister, Deputy Prime Minister and the Foreign Minister, as well as members of the Opposition.[58] Three cases have been filed against the United States before the International Court of Justice for its failure to notify consular officials of the arrest or detention of foreign nationals who were subsequently sentenced to death in the United States.[59] The risk of inter-state disputes arising over assistance to foreign nationals is therefore palpable.

For Rush, Australia employed a variety of diplomatic means before initial sentencing occurred to avoid the death penalty. The Australian Foreign Minister at the time, Alexander Downer, requested in December 2005 that Indonesia's Attorney-General not call for the death sentence.[60] The Australian Minister for Justice and Customs and the Attorney-General made similar representations to Indonesia's Attorney-General, and the Australian Embassy in Jakarta voiced a similar appeal to Indonesia's Foreign Minister.[61]

A more strident international manoeuvre at this point would have involved Australia seeking the extradition of the Bali Nine members under its extradition treaty with Indonesia.[62] The power to make such a request falls within the prerogative powers of the Executive.[63] Under the treaty, Australia may request the

56 *Agreement on Consular Relations between Australia and the People's Republic of China*, signed 8 September 1999, [2000] ATS 26 (entered into force 15 September 2000).

57 China was required to do so under ibid art 11(1)(f). Stern Hu was charged under the Chinese Criminal Code with bribery and stealing commercial secrets. See generally ABC Radio Australia, 'Australia Wants Its Officials Allowed into Stern Hu Trial', *Asia Pacific*, 18 March 2010 (Linda Mottram) <http://www.radioaustralia.net.au/asiapac/stories/201003/s2850039.htm>.

58 Mark Dodd, 'Kevin Rudd Warns China on Stern Hu Trial Secrecy', *The Australian* (online), 19 March 2010 <http://www.theaustralian.com.au/news/nation/kevin-rudd-warns-china-on-stern-hu-trial-secrecy/story-e6frg6nf-1225842553737>; John Garnaut, 'Hu Trial Raises Tensions', *The Sydney Morning Herald* (online), 19 March 2010 <http://www.smh.com.au/business/hu-trial-raises-tensions-20100318-qick.html>.

59 *Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)* [1998] ICJ Rep 248; *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466; *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12.

60 Colman Lynch, 'Indonesia's Use of Capital Punishment for Drug Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case' (2009) 40 *Columbia Human Rights Law Review* 523, 527.

61 Ibid.

62 *Extradition Treaty between Australia and the Republic of Indonesia*, signed 22 April 1992, [1995] ATS 7 (entered into force 21 January 1995) ('*Australia–Indonesia Extradition Treaty*'). For discussion, see Harrison, above n 31.

63 *Oates v A-G (Cth)* (2003) 214 CLR 496, 511.

extradition of a national for an offence committed outside of Australia.[64] Australia could have sought extradition since the offence committed is one recognised in Australian law,[65] but Indonesia would still have been entitled to refuse the request as at least part of the offence occurred within Indonesian territory.[66] While Australia has the right to refuse extradition of an individual who may be charged with a capital offence,[67] there is no explicit provision addressing the possibility of Indonesia extraditing an Australian national charged with an offence carrying the death penalty. An extradition request would have communicated clearly Australia's opposition to the death penalty. Not doing so, particularly when Indonesia had a clear right to refuse, at least reduced the risk of antagonising Australia's relationship with Indonesia.

For Van Nguyen, the Australian government made over 30 written or personal representations and there were numerous public protests.[68] Singapore's High Commissioner received petitions from over three hundred parliamentary officials and one hundred parliamentarians.[69] Australia's Prime Minister at the time made numerous appeals for clemency on the grounds that Nguyen had no prior criminal record.[70] The Australian government also proposed that Nguyen could assist with investigations into drug syndicates and trafficking if the death penalty was lifted.[71] Senator Chris Ellison commented in a Speech to the Senate on 28 November 2005:

> When looking at the contact that I have had with my ministerial counterparts and other ministers from the Singaporean government, I believe I have raised this issue on no less than five occasions over that intervening period of three years. The Prime Minister himself has said that he has raised it with the Singaporean Prime Minister on some five occasions, and in March this year strong representations were made to the President of Singapore, President Nathan, by the Governor-General, the Prime Minister and the Minister for Foreign Affairs, Alexander Downer.[72]

Australia's case was hardly an easy one to make given that in the previous 40 years, only two people had been granted clemency after having been convicted of drug trafficking offences in Singapore.[73]

64 *Australia–Indonesia Extradition Treaty* art 1(2).

65 Harrison, above n 31, 221 refers to the *Crimes (Traffic in Narcotic Drugs and Pyschotropic Substances) Act 1990* (Cth) in this regard. Article 2(1) of the *Australia–Indonesia Extradition Treaty* also includes 'an offence against the law relating to dangerous drugs or narcotics' as an extraditable offence.

66 *Australia–Indonesia Extradition Treaty* art 9(2)(e). See also Harrison, above n 31, 228.

67 *Australia–Indonesia Extradition Treaty* art 7.

68 Commonwealth, *Parliamentary Debates*, Senate, 28 November 2005, 54 (Chris Ellison).

69 Sebastian De Brennan, *The Execution of Nguyen Tuong Van* (8 January 2006) <http://www.countercurrents.org/aus-brennan080106.htm>.

70 Ibid. See also Mercer, above n 13.

71 Mercer, above n 13. Mr Ruddock said Nguyen's case involved mitigating circumstances, namely, that he had no previous convictions and smuggled the heroin to satisfy legal debts of AUD30 000 accumulated by his twin brother, who was previously a heroin addict: 'Australian Executed in Singapore', above n 9.

72 Commonwealth, *Parliamentary Debates*, Senate, 28 November 2005, 53–4 (Chris Ellison).

73 Ibid 55.

Beyond these diplomatic demarches, union groups and the Opposition government demanded action against Singapore Airlines and further urged the Australian Prime Minister to boycott trade and business with Singapore, as well as call off a cricket match.[74] These steps were not taken and Fullilove explains that they would have failed the effectiveness test — they would have been unlikely to save Nguyen.[75] Fullilove further notes that sovereign governments do not respond well to bullying and these efforts would hinder other national interests, ultimately making Australia 'a less effective international player'.[76]

When diplomatic initiatives seem unlikely to prove successful and an individual has exhausted legal avenues at the national level,[77] Australia may resort to international adjudication against the relevant country in response to a violation of international law. This possibility was considered shortly prior to Nguyen's execution.[78] One reason for Australia to have pursued litigation is that an order for provisional measures, comparable to an injunction in domestic courts, could have been sought from the International Court of Justice ('ICJ') to prevent Nguyen's execution pending the resolution of the international legal dispute.[79]

Professor Philip Alston, formerly a UN special rapporteur on extrajudicial, summary or arbitrary executions, considered that the ICJ was an appropriate forum and should have been utilised.[80] He drew attention to the fact that Singapore considers itself renowned for its adherence to the rule of law, suggesting that Singapore would evince this position by accepting a request from Australia to institute proceedings.[81] When asked whether he would call on the Singapore government to consent to proceedings in such circumstances, Alston responded: 'I would be very much in favour of any such reference and I would certainly encourage both Australia and Singapore to go down that road'.[82] The Australian Prime Minister asked the Singaporean Prime Minister whether Singapore would accept the jurisdiction of the ICJ, but was told no.[83] That Australia was willing to undertake international legal proceedings underlines the inter-state tension that these sorts of cases provoke. Yet Singapore had not consented to the jurisdiction of the ICJ except under particular treaties, none of which were thought to offer support to Nguyen's plight.[84]

74 De Brennan, above n 69; Michael Fullilove, *Capital Punishment and Australian Foreign Policy* (Lowy Institute, 2006) 7.

75 Fullilove, above n 74, 7.

76 Ibid.

77 *ILC Articles on Diplomatic Protection*, UN Doc A/61/10, 70–6.

78 Lewis, above n 43, 18.

79 Such an order was obtained by Germany in *LaGrand* and by Mexico in *Avena* against the United States: *LaGrand (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 9; *Avena and Other Mexican Nationals (Mexico v United States of America) (Provisional Measures)* [2003] ICJ Rep 77. The United States adhered to this order in *Avena*, but the LaGrand brothers were executed despite the Court's order to that effect.

80 ABC Radio National, 'UN Official Wants Van Nguyen Case to Face the International Court', *PM*, 21 November 2005 (Daniel Hoare) <http://www.abc.net.au/pm/content/2005/s1513049.htm>.

81 Ibid.

82 Ibid.

83 Commonwealth, *Parliamentary Debates*, Senate, 28 November 2005, 54 (Chris Ellison).

84 Ibid. The Australian government sought advice from Professor James Crawford who found there was no basis for instituting proceedings against Singapore in the ICJ unless Singapore consented.

Similarly, Indonesia has not consented to the ICJ's jurisdiction, and in the absence of such consent, a case may not proceed.[85] At most, Australia could attempt to institute proceedings on the basis of *forum prorogatum*.[86] This approach allows a state essentially to advertise that it wants its case listed with the ICJ and invites the respondent state to accept the Court's jurisdiction for the particular proceedings. This technique has rarely been successful,[87] but promotes the political message that the applicant state considers that the respondent state has breached obligations owing to it.[88] At least Australia's opposition to the death penalty could be clearly articulated in this regard.

When assessing the steps Australia has taken to provide assistance and protection to its nationals on death row, it is apparent that a fundamental consideration is the political dynamic involved. As noted at the outset of this part, Australia's right of diplomatic protection is discretionary and as a consequence there are an array of issues that may influence Australia's actions in assisting individuals like Rush, Chan, Sukumaran and Nguyen. While Australia is undoubtedly sensitive to strategic interests and economic links, there should still be scope for Australia to take a principled position on a matter of law. As will be argued in Part 5, Australia's stance against the death penalty could potentially fall into this category and warrant stronger steps by Australia in the assistance of its nationals on death row, without necessarily antagonising the bilateral relationship.

IV LEGAL AVENUES AVAILABLE FOR THE INDIVIDUALS ON DEATH ROW

In addition to the rights that Australia may exercise on behalf of Australians abroad, those individuals may also seek to improve their position in vindication of their own rights. These rights are primarily tested through the domestic courts of the state concerned. Inter-state disputes are minimised in these settings. There are a number of simple explanations for this position. First, under international

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

86 See John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press, 1999) 136.

87 Ibid. A notable exception has been France, which accepted jurisdiction in *Certain Criminal Proceedings in France (Republic of the Congo v France) (Provisional Measures)* [2003] ICJ Rep 102, and in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177.

88 It is because of this political overtone that the ICJ does not even list a case when a matter is submitted on the basis of *forum prorogatum*. The International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 38[5] provides that

> When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

Information about the case is usually only available through the press releases from the ICJ. Some states may circulate the institution of proceedings as a document of the General Assembly to bring greater attention to the matter.

law, the primary basis for exercising 'enforcement jurisdiction'[89] for criminal offences is territoriality.[90] Exercising jurisdiction on the basis of an offender's nationality is another recognised basis of jurisdiction,[91] but would not normally trump territorial jurisdiction when the offender is arrested and detained in the state where the offence is committed. Second, and underpinning this first explanation, is the general deference accorded to a state's sovereignty over its territory, which extends to a principle of non-interference in the domestic affairs of a state.[92] While there are many instances whereby states consent to an encroachment on their sovereignty, the importance of state sovereignty in contemporary international law remains firm.[93] Finally, the lack of international acceptance on the abolition of the death penalty prevents assertions that the state meting out capital punishment is in prima facie violation of international law. Instead, claims of other violations of international human rights law may be asserted,[94] although accusations of this nature may run up against a claim of respect for national sovereignty in exercising criminal jurisdiction over offenders in that state's territory.[95]

The primary rights accruing to individuals on death row under international law are consular rights and human rights. Consular rights do not only vest in the state, but also in the individual.[96] Nguyen's consular rights were raised before Singapore's High Court, where it was argued that Singapore had breached art 36(1) of the *Vienna Convention on Consular Relations*.[97] The significance of these consular rights for capital offences has been litigated before the ICJ on the grounds that if these rights had been fully observed, the individual concerned may not have ultimately been sentenced to death.[98] The defence argued for Nguyen that the cautioned statement he provided was inadmissible because it was given before

89 Enforcement jurisdiction generally refers to the power of the state to take action, usually through its constabulary or judiciary, to ensure compliance with its laws, see Gillian D Triggs, *International Law: Contemporary Principles and Practice* (Lexis Nexis, 2006) 344.

90 See Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 652–8.

91 Ibid 659–64.

92 See, eg, *Charter of the United Nations* art 2(7).

93 See Triggs, above n 89, 3.

94 See Byrnes, above n 2, 32.

95 In response to an Amnesty International report condemning Singapore for having 'the world's highest per capita execution rate, relative to its population', the Singapore government asserted that capital punishment made Singapore one of the safest places in the world. The government also emphasised the fact that capital punishment was imposed only in relation to the most serious crimes and that rights of the offender were balanced against 'the rights of victims and the right of the community to live in peace and security'. See Li-Ann Thio, 'The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in Public Prosecutor v Nguyen Tuong Van (2004)' (2004) 4(2) *Oxford University Commonwealth Law Journal* 213, 215, citing Amnesty International, 'Singapore — The Death Penalty: A Hidden Toll of Executions' (Report ASA 36/001/2004, 15 January 2004); Singapore Ministry of Home Affairs, 'The Singapore Government's Response to Amnesty International's Report "Singapore — The Death Penalty: A Hidden Toll of Executions"' (Press Release, 30 January 2004) <http://www.mha.gov.sg/basic_content.aspx?pageid=74>.

96 *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466.

97 *Vienna Convention on Consular Relations*; Lim, above n 15, 223–4.

98 See 'Memorial of Mexico', *Avena and Other Mexican Nationals (Mexico v United States of America)* [2003] ICJ Pleadings 1, 11–38, 124–36.

Nguyen asserted his right to consular access.[99] Although Singapore is not a party to the *Vienna Convention*, Justice Kan recognised that Singapore was bound as a matter of customary international law.[100] Nonetheless, the High Court ultimately concluded that the various statements provided by Nguyen were admissible, and art 36(1) was not contravened because within 20 hours of Nguyen's arrest the Australian High Commissioner had been informed.[101]

As the death penalty may entail violations of various international human rights norms protecting individuals, efforts have been undertaken to raise these claims before the national courts concerned. In Singapore's High Court, Nguyen unsuccessfully challenged the mandatory imposition of the death penalty under the *Misuse of Drugs Act* on two bases:[102] first, the judgment disregarded constitutional assurances concerning equal protection guaranteed by the law and the right to life and, second, death by hanging violated a customary international law prohibition against torture or cruel, inhuman or degrading treatment or punishment, as articulated in the *Universal Declaration of Human Rights*.[103] The Court discussed various decisions from the ICJ, the Privy Council, the United Kingdom and India before finding that the mandatory penalty of death by hanging was not unconstitutional or an infringement of customary international law.[104] The Court ultimately evinced a distinct focus on '"localising" rather than "globalising" case-law jurisprudence in favour of communitarian or collectivist "Singapore" or "Asian" values, in the name of cultural self-determination'.[105] Nguyen unsuccessfully appealed to the Singapore Court of Appeal,[106] which similarly confirmed that domestic law overrode customary international law.[107]

Rush, Chan and Sukumaran appealed to Indonesia's Constitutional Court, the *Mahkamah Konstitusi Republik Indonesia*, in March 2007.[108] Like Nguyen, they argued that the imposition of the death penalty was a violation of constitutional

99 Lim, above n 15.

100 Ibid 219.

101 *Public Prosecutor v Nguyen Tuong Van* [2004] 2 SLR 328, [36], [39], [41], [42] (High Court); Thio, above n 95, 217.

102 Thio, above n 95, 213.

103 Ibid; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 5. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('*ICCPR*'): 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

104 Thio, above n 95, 215.

105 Ibid. Thio further contends that the decision confirms Singapore's 'imperviousness' to 'foreign and international decisions which might influence the development of a more robust human rights and public law jurisprudence, solicitous of individual liberties rather than statist concerns': at 226.

106 *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103 (Court of Appeal).

107 Ibid 103 [94]. See generally Lim, above n 15, 218–33.

108 For discussion, see Lynch, above n 60, 528–45, 581–90; Zerial, above n 33. See also Andrew Byrnes, 'Drug Offences, the Death Penalty, and Indonesia's Human Rights Obligations in the Case of the Bali 9: Opinion Submitted to the Constitutional Court of the Republic of Indonesia' (Law Research Paper No 2007-44, University of New South Wales, 2007) <http://law.bepress.com/cgi/viewcontent.cgi?article=1046&context=unswwps>.

law,[109] as well as Indonesia's obligations under international agreements, including the *International Covenant on Civil and Political Rights*, concerning the right to life.[110] Under this treaty, it was argued, Indonesia should restrict the application of the death sentence to only the 'most serious crimes'.[111]

The Court handed down a split decision on 30 October 2007, rejecting the appeal and upholding the validity of the death sentence.[112] The Court emphasised the need to balance the rights of society against the rights of the individual and, in rejecting the argument that the purpose of criminal punishment is to facilitate rehabilitation, the Court commented that the correct purpose is to reinstate the 'social harmony of society'.[113] Although the majority of the Court agreed that the death penalty was reserved for the 'most serious crimes' under international law, six of the judges perceived drug offences to be as serious as murder, and classified them as a 'most serious crime' according to Indonesian laws.[114] In sum, by identifying a range of exceptions to the right to life in international instruments and ambiguities in the phrasing of international human rights obligations, the Court was able to 'buck the international trend of abolishing capital punishment'.[115]

It must be noted that in some jurisdictions, even when national court avenues are exhausted, further appeal to a regional human rights court might exist. While Europe has abolished capital punishment, the European Court of Human Rights still stands as an example of an international forum to which an individual may have recourse.[116] In the Americas, individuals may request that the Inter-American

109 'Rush's Death Penalty Unconstitutional, Says Lawyer', *ABC News* (online), 15 March 2007 <http://www.abc.net.au/news/stories/2007/03/15/1872387.htm>.

110 For discussion, see the opinion of Professor Andrew Byrnes which was submitted to the Constitutional Court: Byrnes, above n 108.

111 *ICCPR* art 6(2), which reads: 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant …' The UN Human Rights Committee has stated that any interpretation of the 'most serious crimes' should be restrictive so that the death penalty remains an exceptional measure: Human Rights Committee, *General Comment No 6: Article 6 (Right to Life)*, 16th sess, UN Doc HRI\GEN\1\Rev.1 (30 April 1982) [7].

112 Lynch, above n 60, 581.

113 *Decision Number 2-3/PUU-V/2007* [2007] Constitutional Court of the Republic of Indonesia 93, 100–2; Zerial, above n 33, 221.

114 *Decision Number 2-3/PUU-V/2007* [2007] Constitutional Court of the Republic of Indonesia 93, 101–2. This was considered necessary because of the impact that drug trafficking has on 'the economic, cultural and political foundation of society': at 100, citing the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990). See also Lynch, above n 60, 583; Mark Forbes, Sarah Smiles and Daniel Flitton, 'No Mercy for Bali Nine on Death Row', *The Age* (online), 31 October 2007 <http://www.deathpenalty.com.au/death-penalty-articles/2007/10/31/no-mercy-for-bali-nine-on-death-row/>.

115 Lynch, above n 60, 525.

116 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 1: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Article 34 further provides:

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

Commission of Human Rights pursue a case before the Inter-American Court of Human Rights against the member states that have accepted its jurisdiction.[117] Some states may also be party to the *First Optional Protocol* to the *ICCPR*,[118] or make a declaration under art 22 of the *Convention against Torture*,[119] which would allow for challenges related to international human rights associated with the death penalty before international committees.[120] The availability of these fora takes pressure away from Australia inasmuch as the individual may be able to pursue their own case without complete reliance on the government to act. This option did not exist for Nguyen, nor is it available to the Bali Nine members, because there is no regional human rights court in Asia,[121] and neither Singapore nor Indonesia have consented to individual applications being submitted under the *ICCPR* or the *Convention against Torture*.[122] If these avenues were available, the likelihood for inter-state disputes may be decreased on the basis that the individual pursues claims in his or her own right against the state, rather than an inter-state dispute emerging.

Individuals imprisoned abroad may be able to seek return to their home country if there is a prisoner transfer agreement between the state where they are imprisoned and the state of their nationality. These agreements promote humanitarian perspectives in terms of allowing an individual to serve their sentence within a community with which they are familiar and in which they are likely to be closer to their family, and facilitate the prisoner's rehabilitation into society at the conclusion of their sentence.[123] The existence of these agreements may be seen as another outlet for reducing inter-state tensions. However, there have been a number of difficulties associated with the operation of prisoner transfer agreements because of the potential costs involved, concerns about respecting the imprisoning state's sovereign jurisdiction over crimes committed in its territory,

117 *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) arts 41(f), 44–51.

118 *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) ('*First Optional Protocol*').

119 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1464 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').

120 These international committees are established under different international human rights treaties and are usually charged with monitoring adherence to the treaties through a system of reports from state parties. The competence of the committees to hear individual applications may also be available at the option of the states concerned.

121 The Association of South East Asian Nations ('ASEAN') has established a Working Group for an ASEAN Human Rights Mechanism, and one of the proposals under consideration is a court that could render binding decisions. See Chairpersons of the Working Group and the National Working Groups, *About Us* (2007) Working Group for an ASEAN Human Rights Mechanism <http://www.aseanhrmech.org/aboutus.html>.

122 Neither Singapore nor Indonesia are parties to the *First Optional Protocol*; Singapore is not a party to the *Convention against Torture*, and while Indonesia is a party to the latter, it has made no declaration accepting individual complaints under art 22 and has further excluded consent to jurisdiction of the ICJ under art 30 of the treaty.

123 Keith Best, 'The Problems of Prisoner Transfer' (1992) 18(1) *Commonwealth Law Bulletin* 333, 333.

and the length of time required to process a transfer.[124] Australia is a party to the *Council of Europe Convention on the Transfer of Sentenced Persons*,[125] and has also finalised a prisoner transfer agreement with Thailand.[126] Australia has been negotiating a prisoner transfer agreement with Indonesia since 2005.[127] However, this agreement will not assist Chan or Sukumaran, as both countries have reportedly agreed that it would not be applicable to death row prisoners.[128] If prisoner transfer agreements do not operate to fulfil their humanitarian purpose then they risk becoming another source of dispute between the countries concerned.

The development of international law to recognise that individuals are subjects, and not just objects, of international law has expanded the range of rights on which individuals may rely in seeking to ameliorate their circumstances when imprisoned for crimes overseas. While the individuals concerned may be found guilty of criminal acts and are thus legally responsible for that conduct, the particular issue of concern here is the application of the death penalty for such crimes. The experience of Nguyen and the Bali Nine members shows that the primary avenue of legal redress for the individuals concerned is the national courts of the country in which they are jailed. This position is understandable as individuals are bound by the laws of the country they are in, irrespective of the nationality of the individual. Nonetheless, the transnational nature of certain crimes,[129] and the bond of nationality to another state, opens up other avenues for these individuals. The relevance of these options certainly varies depending on the particular circumstances of any given individual, especially in relation to where they are imprisoned. It remains clear that Australians sentenced to death will need the assistance, if not the intervention, of their government if they are to avoid capital punishment.

124 Abraham Abramovsky, 'Transfer of Penal Sanctions Treaties: An Endangered Species?' (1991) 24 *Vanderbilt Journal of Transnational Law* 449, 483; Choy Dick Wan, 'Prisoner Transfer between Hong Kong and Mainland China: A Preliminary Assessment' (2007–08) 33 *Brooklyn Journal of International Law* 463, 481–2, 486, 492; Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Max Planck Institute for Foreign and International Criminal Law, 1993) 243, referring to Thailand's agreements requiring a minimum sentence being served prior to transfer to reduce interference in Thai judicial decisions; Best, above n 123, 335.

125 *Council of Europe Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983, CETS No 112 (entered into force 1 July 1985).

126 *Agreement between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*, signed 26 July 2001, [2002] ATS 22 (entered into force 26 September 2002).

127 Adam Gartrell, 'Prisoner Swap on Track', *The Advertiser* (Adelaide), 26 January 2010, 26. Both parties initially thought an agreement would be signed by the conclusion of 2006 yet negotiations proved more complex. Difficulties have related to whether it would apply to drug-trafficking offences, the length of the sentence to be served prior to exchange and whether it would apply to those already imprisoned in Indonesia. See Geoff Thompson, 'Indonesia Agrees to Prisoner Exchange Treaty with Australia', *ABC News* (online), 29 June 2006 <http://www.abc.net.au/cgi-in/common/printfriendly.pl?http://www.abc.net.au/am/content/2006/s1674393.htm>.

128 Thompson, above n 127.

129 The transnational nature of Rush's case has been highlighted by the role of the Australian Federal Police in his arrest in Indonesia. See *Rush v Commissioner of Police* (2006) 150 FCR 165, [22] and discussion about this case in Section V, Part A, below.

V EXTERNALISING INTERNAL STANDARDS IN BILATERAL DIALOGUES

While Australia is officially opposed to the death penalty, there are limited means for Australia to exert this position in relation to its nationals who are sentenced to death overseas. Australia presently strives for a delicate balance in seeking to ameliorate the position of Australians on death row while respecting the rights of the other state to exercise criminal jurisdiction. The more forcefully Australia seeks to exert its rights, the greater the risk of inflaming the bilateral relationship. So what can Australia do?

Ultimately, if Australia is serious about its role in preventing the application of the death penalty to its nationals in overseas jurisdictions, Australia would need to take a position that is not only clear, but also consistent.[130] This position must be evident not only in diplomatic efforts supporting individuals, but also against the death penalty generally. Moreover, Australia must remain committed to its opposition over the death penalty in its bilateral relationships. These two dimensions are explored in this part to show how Australia could take steps that would allow more powerful action on behalf of Australian nationals sentenced to death abroad. Knowing that Australia has an uncompromising position on the death penalty will set the parameters for discussion and potentially moderate the degree of friction that may otherwise arise in addressing the issue.

A *Global Consistency in Diplomatic Efforts*

Australia's stand against the death penalty must be consistent when dealing with its different nationals sentenced to death abroad. One immediate inconsistency that was palpable for Rush was the conduct of the Australian Federal Police ('AFP') in relation to his arrest. Before Rush left for Indonesia, his parents had a 'gut feeling' something was wrong.[131] Rush's parents, through family friend and barrister Bob Myers, notified the AFP, who allegedly assured them that Rush would be warned and asked not to board the flight.[132] The AFP did not speak to him at all.[133] It may rightly be questioned whether the AFP should have favoured one individual in these circumstances and risked compromising an investigation into a complex transnational crime. Instead, the AFP wrote to their Indonesian counterparts, providing relevant information as to the drug operation and reportedly stating that the Indonesian police should 'take what action they deem appropriate'.[134] By contrast, Australia sought assurances from the United States that David Hicks

130 Fullilove, above n 74, 7–8.

131 ABC, above n 26, 2.

132 Ibid 2–3; *Rush v Commissioner of Police* (2006) 150 FCR 165, [14]–[15].

133 *Rush v Commissioner of Police* (2006) 150 FCR 165, [21].

134 Ibid [22].

would not be subject to the death penalty when Hicks was detained in the US military prison in Guantánamo Bay following his arrest in Afghanistan.[135]

Consistency is a vital element in this regard in Australia's approach to the death penalty. Fullilove has noted that the Australian Department of Foreign Affairs and Trade ('DFAT'):

> takes a pragmatic approach to each case. … In some cases for example, the emphasis is put on an individual's personal circumstances; in others, on the strength of the bilateral relationship. Generally DFAT prefers high level political representations to interventions in local judicial processes, unless there is strong evidence that due process has not been followed.[136]

This approach is consistent with showing respect for a state's national sovereignty over criminal matters, as well as with the view that the right of diplomatic protection only arises once local remedies are exhausted. Fullilove rightly acknowledges, '[i]t is not easy to judge the effectiveness of diplomacy that is often quiet'.[137]

If Australia is to succeed diplomatically, its moral high ground, or soft power,[138] needs to be intact. In relation to those responsible for the 2002 Bali bombings, members of the Australian government issued statements that signalled 'a retreat from this principled condemnation, under the rubric of respecting other states' sovereignty'.[139] Byrnes has advocated that Australia needs to moderate its position in this regard:

> Pursuing the interests of Australian citizens in a manner that shows a consistent and principled approach to the death penalty does not necessarily involve publicly denouncing the imposition of every death sentence in a foreign country, but it certainly involves refraining from welcoming the possibility of the death penalty for those who are viewed with disfavour or contempt by the Australian Government or the Australian community more generally, such as the Bali bombers or Al Qaeda members.[140]

Prior to Nguyen's execution, Singaporean and Malaysian press questioned Australia's approach, particularly whether Australia could maintain that its nationals should be subject to different laws compared to the nationals of the

135 Natalie Klein and Lise Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality' (2007) 13(1) *Australian Journal of Human Rights* 1, 17–18, referring to responses from the then Attorney-General: Phillip Ruddock, *David Hicks — FAQ — April 2006* (10 January 2008) Fair Go for David (Archived by Pandora) <http://pandora.nla.gov.au/pan/24144/20080110-0020/www.fairgofordavid.org/htmlfiles/documents/aghicksfaq.html>.

136 Ibid.

137 Ibid.

138 Joseph S Nye Jr, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (Oxford University Press, 2002) 9, describes soft power as 'getting others to want what you want'; it is 'the ability to set the political agenda in a way that shapes the preferences of others'.

139 Byrnes, above n 2, 40. See also ibid 45, citing a series of comments by former Prime Minister John Howard supporting the use of the death penalty for the Bali Bombers, Osama bin Laden and Saddam Hussein.

140 Byrnes, above n 2, 40–1.

country they are in.[141] Fullilove has argued a consistent stance against applications of the death penalty will facilitate the government's credibility in challenging specific cases of capital punishment.[142] Australia will be on surer footing in assisting nationals on death row if its opposition to the death penalty is renowned at the international level.

A *Regulating Bilateral Legal Relationships to Underline Abolition*

If Australia consistently affirms its abolitionist position globally, Australia could then assert its opposition to the death penalty more strongly in the bilateral agreements that are formulated in the criminal area with retentionist states. For example, in negotiating a prisoner transfer agreement with Indonesia, Australia could have insisted on its availability for death penalty prisoners precisely because such a sentence would not be imposed in Australia. There cannot be mirrored reciprocity on this issue given Australia and Indonesia's different positions on the death penalty. Yet Indonesia's exercise of territorial jurisdiction has clearly trumped Australia's sentencing laws and practice. Could Australia have done more in the negotiations to promote its abolitionist view?

Australia could also take a firmer position when dealing with its international cooperative arrangements in transnational criminal law enforcement efforts. Rush's case stands out in this regard as well. The activities of the Bali Nine had been under surveillance by the AFP prior to their departure overseas and the AFP's collaboration with Indonesia enabled their apprehension.[143] The AFP apparently feared compromising the operational integrity of their investigation and emphasised that they had no legal grounds to prevent Rush boarding the flight.[144] These actions essentially exposed the Bali Nine to arrest for capital offences in Indonesia.

The actions of the AFP in facilitating the arrests of the Bali Nine were challenged in *Rush v Commissioner of Police*.[145] The Federal Court closely considered regulations relating to the AFP's cooperation with overseas agencies.[146] Under the *Mutual Assistance in Criminal Matters Act 1987* (Cth), s 8(1A) requires a request for mutual assistance to be refused if it relates to the prosecution or punishment of an offence where the death penalty may be imposed unless it is believed by the Attorney-General that there are 'special circumstances' that compel assistance to be granted. Section 8(1B) permits a request for mutual assistance to be refused if it is believed by the Attorney-General that acceding to the request may lead to the imposition of the death sentence, and, after taking into account the interests

141 Examples of this media coverage are provided in Fullilove, above n 74, 5–6, 14.

142 Ibid 6.

143 See Sifris, above n 32, 82.

144 ABC, above n 26; *Rush v Commissioner of Police* (2006) 150 FCR 165, [21].

145 *Rush v Commissioner of Police* (2006) 150 FCR 165.

146 Ibid [33]–[53]. The decision was made in the context of an application for preliminary discovery, but was denied for failure to identify a possible cause of action.

of international criminal cooperation, is of the view that in the circumstances, the request should not be granted. Arguably this does not represent a strong enough position against the death penalty. As Justice von Doussa has noted, speaking extra-judicially, it does not go so far as to mandate the refusal of a request for assistance that may potentially subject an Australian to the risk of capital punishment.[147] Even this qualified abolitionist commitment is undermined by the latitude awarded to the police in its agency-to-agency assistance arrangements.[148] Pursuant to the AFP Guidelines on International Police-to-Police in Death Penalty Charge Situations, the AFP can provide assistance at an agency-to-agency level before charges have been laid, irrespective of whether the request pertains to offences in respect of which the death penalty may be imposed.[149]

In *Rush v Commissioner of Police*, the fact that limitations on providing agency-to-agency assistance in cases involving capital offences only operated once a suspect was charged meant that the actions of the AFP were lawful.[150] This approach would facilitate AFP involvement in transnational criminal investigations.[151] Yet Justice Finn commented on the need to re-examine the existing procedures: 'when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country'.[152]

Such a re-examination is warranted, as it is arguable that the *ICCPR* and its *Second Optional Protocol* preclude Australia from rendering material assistance to another country in investigations that may potentially result in the application of the death penalty.[153] According to the United Nations Human Rights Committee, for states that have abolished capital punishment, there exists an obligation not to expose a person to a 'real risk' of its application in the context of deportations

147 John von Doussa, 'The Death Penalty — A Matter of Principle' (Speech delivered at the National Conference of the United Nations Association of Australia, Adelaide, 22 October 2006) <http://www.hreoc.gov.au/about/media/speeches/speeches_president/2006/death_penalty.html>. Cf Simon Bronitt, 'Directing Traffic: The Death Penalty and Cross-Border Law Enforcement' [2006] (Autumn) *Australian National University Reporter* <http://info.anu.edu.au/mac/Newsletters_and_Journals/ANU_Reporter/097PP_2006/_02PP_Autumn/_bronitt.asp>, who contends that these limitations on the provision of assistance 'are tantamount to a national policy opposing the imposition of the death penalty: congruent with our domestic stance which abolished the imposition of capital punishment for federal offences in 1973'.

148 von Doussa, above n 147, 3; Bronitt, above n 147.

149 *Rush v Commissioner of Police* (2006) 150 FCR 165, [50]. See also Byrnes, above n 2, 38; Bronitt, above n 147; von Doussa, above n 147, 3.

150 *Rush v Commissioner of Police* (2006) 150 FCR 165, [73].

151 For discussion supporting the current structure of police-to-police cooperation in these circumstances, see Finlay, above n 23, 106, 112–7.

152 *Rush v Commissioner of Police* (2006) 150 FCR 165, [1].

153 Byrnes, above n 2, 38. Finlay, above n 23, 108–112, argues that there is no violation of international legal obligations in this context.

or extraditions.[154] It is less clear that an obligation exists not to render material assistance to a state that imposes the death penalty.[155]

Thus, Rush's case dramatically underlined the need to deliberate on the extent to which a clear and consistent stance against the death penalty can be maintained in lieu of Australia's interests in international cooperation to combat transnational crime.[156] Clearly Rush's case instils the impression that, at least in regard to its relationship with Indonesia, Australia privileges international cooperation in criminal law enforcement at the expense of maintaining a strong and consistent abolitionist stance.[157] This view is further strengthened by the enactment of the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth), which failed to include an express provision requiring the refusal of assistance where there is a risk that an Australian may be exposed to capital punishment.[158]

The Australian Parliament did ultimately recommend a review of relations between the AFP and overseas law enforcement agencies, particularly in regard to information sharing with countries that permit capital punishment.[159] New guidelines were subsequently implemented.[160] With respect to involvement in investigations that potentially expose Australians to the death penalty, ministerial approval is now required and AFP management must 'consider a set of prescribed factors before providing assistance in matters with possible death penalty implications'.[161] These factors include the prospective offender's age and individual circumstances, the seriousness of the suspected criminal activity, potential risks to persons in not providing the information, the degree of risk to the person, including the likely imposition of the death penalty and Australia's interest in facilitating international cooperation to combat transnational crime.[162] Former Attorney-General Robert McClelland stated these reforms 'represent a balanced and responsible approach that provides greater clarity and accountability, while

154 See *Judge v Canada* (3rd Cir, 05-4954, 1 November 2006) slip op, where the United Nations Human Rights Committee found that Canada violated its obligations set out in art 6(1) of the *ICCPR* because Mr Judge was deported before it was certified that the death sentence would not be applied: Human Rights Committee, *Roger Judge v Canada: Communication No 829/1998*, 78th sess, UN Doc CCPR/C/78/D/829/1998 (13 August 2003) [10.4].

155 Byrnes, above n 2, 38. See also Finlay, above n 23, 110–2.

156 See Byrnes, above n 2. For a detailed discussion of this issue, see Sifris above n 32.

157 Sifris, above n 32, 86, 107. Sifris further notes that the commitment to international cooperation to combat transnational crime was reinforced in 2006 when Australia signed the *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2008] ATS 3 (entered into force 7 February 2008): at 86.

158 Ibid 88.

159 Andrew Fraser, 'Inquiry into AFP's Foreign Links "Overdue"', *Canberra Times* (online), 9 October 2008 <http://www.canberratimes.com.au/news/local/news/general/inquiry-into-afps-foreign-links-overdue/1329052.aspx>.

160 Australian Federal Police, *New AFP Guidelines Released* (18 December 2009) <http://www.afp.gov.au/media-centre/news/afp/2009/december/new-afp-guidelines-released.aspx>.

161 Attorney-General Robert McClelland, quoted in Peter Veness, 'AFP Given New Rules after Bali Nine', *AAP Bulletins* (online), 18 December 2009 <http://news.brisbanetimes.com.au/breaking-news-national/afp-given-new-rules-after-bali-nine-20091218-l5g6.html>.

162 Australian Federal Police, above n 160.

maintaining our commitment to combating transnational crime'.[163] However, as noted by Stephen Blanks, New South Wales Council for Civil Liberties Secretary, this policy ought to be upgraded into legislation as '[e]xposing Australians to the death penalty is not simply a matter of being at the whim of the attorney-general or the government of the day'.[164]

A further dimension to Australia externalising its abolitionist position in its bilateral relations could require Australia to take greater account of the risk of individuals facing the death penalty when deported from Australia. This question arose before the UN Human Rights Committee in *Mrs GT v Australia*, whereby Australia's decision to repatriate a Malaysian national to face drug charges could have resulted in the imposition of the death penalty and thus violated art 6 of the *ICCPR*.[165] The majority of the Committee determined there was insufficient evidence to conclude there was a real risk of prosecution on drug charges and hence imposition of a mandatory death sentence.[166] It may be noted that Australia sought confirmation from Malaysia that the victim would not be prosecuted for the same crimes he had committed in Australia and hence risk exposure to capital punishment,[167] and that Malaysia had not previously prosecuted returned individuals who had been convicted of exporting drugs.[168] Although questions may be raised as to whether Australia closed all the loopholes in this regard, *Mrs GT v Australia* reflects a case of Australia taking steps within its bilateral relationships to protect individuals (and in this instance, a non-national) from the death penalty.

A stronger position has been evinced by Australia in relation to extradition. Australia has previously reflected its opposition to the death penalty in bilateral treaties with Indonesia through the inclusion of an exception for extradition where the individual is sought for an offence carrying the death penalty.[169] This approach is consistent with jurisprudence of international human rights bodies that countries that have abolished the death penalty should not expose individuals to a real risk of its imposition by deportation or extradition.[170]

163 Attorney-General Robert McClelland, quoted in Veness, above n 161.

164 Stephen Blanks, quoted in Veness, above n 161.

165 Human Rights Committee, *Mrs GT v Australia: Communication No 706/1996*, 61st sess, UN Doc CCPR/C/61/D/706/1996 (4 November 1997).

166 Ibid [8.4]. Committee members Eckart Klein and David Kretzmer dissented on this point, commenting, at [3]:

> As the death penalty is mandatory for the offence committed by T in Malaysia, we must assume that this penalty will be imposed in Malaysia. The question is not whether an intention of the Malaysian authorities to prosecute T has been proved, but whether strong evidence has been provided to refute the assumption that Malaysian law will be applied. The answer is negative.

167 Ibid [4.2].

168 Ibid [5.7].

169 *Australia–Indonesia Extradition Treaty* art 7 reads:

> Extradition shall not be granted if the offence with which the person sought is charged or of which he is convicted, or for which he may be detained or tried in accordance with this Treaty, carries the death penalty under the law of the Requesting State unless that State undertakes that the death penalty will not be imposed or, if imposed, will not be carried out.

170 See, eg, Human Rights Committee, above n 154, [10.4].

Arguably Australia's stance against the death penalty could, and should, remain uncompromising. This stance does not imply that Australia will be unable to offer police assistance in cases where there is a risk that capital punishment will be imposed. Rather, that Australia's assistance will, as suggested by Colin Macdonald QC, be contingent on assurances from the requesting country that they will not inflict capital punishment.[171] Australia's position on a bilateral basis would therefore be clearer and better demonstrate Australia's opposition to capital punishment. An unequivocal position held by Australia might facilitate the bilateral relationship by creating an 'agree to disagree' scenario.

VI CONCLUDING REMARKS

It is vital that Australia's opposition to the death penalty be firm, as such a stance may ameliorate the circumstances of those Australians who are at risk of, or subject to, capital punishment abroad, as well as reduce inter-state tension. At present though, it is appropriate to question what Australia's priorities are on this issue. Ultimately, Australia must determine where its position on the death penalty lies in relation to other inter-state issues. Australia may have many ties across a variety of issues with a country that imposes the death sentence on an Australian national. The treatment of an Australian national may be linked to another of these issues and negotiations may involve some trade-off between the states. It may well be argued that this type of bargaining is not appropriate when a life is at stake but hard-nosed *Realpolitik* may dictate otherwise.

The inter-linkage of political issues on a bilateral, or perhaps regional or multilateral basis, underlines how important it is for Australia to decide on the level of opposition to capital punishment it wishes to exert internationally. Determining the strength of this stance is critical, as Australia not only acts to protect one of its nationals from a punishment condemned within Australia, but is also asserting its own right, as a state, of diplomatic protection. That right of diplomatic protection provides a mechanism by which Australia may affirm its understanding of the relevant international law standards when it takes up the claims of its nationals.

Could Australia develop a non-negotiable stance around this issue? Only if Australia is resolute in its opposition to the death penalty. A non-negotiable stance would mean that Australia sends the message to the countries concerned that irrespective of any other relationship that Australia might have with that state, when it comes to the issue of the death penalty, Australia will do everything it can to prevent its application to its nationals. This approach would require more than diplomatic interchanges between the relevant officials, but concrete and visible steps (such as, for example, seeking to institute international litigation when all domestic avenues of appeal have been exhausted). Resolutions could be

171 ABC, above n 26, 6. See also Sifris, above n 32, 107. Finlay, above n 23, 116, has argued that this approach is unrealistic because such assurances cannot easily be given in relation to operations that are carried out on a police-to-police level.

consistently sought from the UN General Assembly,[172] and the issue brought to the attention of relevant human rights institutions within the UN framework or to the relevant treaty bodies established under the *ICCPR* or the *Convention against Torture*. Australia's non-negotiable stand opposing whaling may be an example of a principle to which Australia has remained committed, even though this position tests Australia's important relationship with Japan. With consistency and clarity, Australia may be able to strike a similar position in its opposition to the death penalty. Even if the legal avenues then present their own deficiencies, the inevitable reliance on political and diplomatic channels may instead hold greater promise than presently seems to be the case.

172 Australia has previously done so before the United Nations Commission of Human Rights. See Sifris, above n 32, 85. Australia most recently voted for a General Assembly Resolution concerning a moratorium on the death penalty: *Moratorium on the Use of the Death Penalty*, GA Res 63/168, UN GAOR, 63rd sess, Agenda Item 64(b), UN Doc A/Res/63/168 (18 December 2008).