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The New Anti-Internationalism
Australia and the United Nations Human Rights Treaty System

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Table of Contents

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The work is dedicated to my son Sam, because I would like him to live in a safer world, one made so at least in part by governance under the international rule of law.

Summary

For the last five years, Australia's human rights record has been under critical scrutiny by all six UN human rights treaty committees. The nation's internationally acknowledged leadership in this arena is now seriously in question. A close study of the committee reports discloses a worrying retreat by the Australian Government from its obligations under international law.

The committees, which monitor national performance of international human rights treaty obligations, have levelled criticisms at Australia on three principal grounds.

1. Unlike every other comparable Western nation, Australia does not have a constitutional or statutory Charter of Rights with remedies to match.

2. National governments, including the present one, are criticised for not having taken sufficient action to ensure that the comparative disadvantage of Australia's indigenous peoples is addressed. In this regard, significant differences between Aboriginal and non-Aboriginal standards of health, education and housing; mandatory sentencing; high rates of Aboriginal incarceration; the treatment of the Stolen Generation; and the absence of any significant progress towards reconciliation have been marked out consistently for adverse comment.

3. The Government's treatment of people seeking asylum has also been a matter of significant concern. The policy of mandatory detention, the isolated and harsh circumstances of its imposition, tough new border protection legislation, and the denial of basic legal and social entitlements to applicants for refugee status have each been the subject of widespread international condemnation.

The Howard Government's response to consistent and concerted international criticism by the UN, however, has been particularly severe. It has rejected all adverse comment categorically and has instead called for the complete overhaul of the UN human rights treaty body system itself.

To encourage this overhaul, the Government announced a series of measures which together represent a significant retreat from its international treaty obligations. Among others, these measures include: a more selective approach to reporting on its human rights performance; the withdrawal of automatic consent to requests by UN human rights agencies to visit Australia to assess domestic compliance with international treaties; and a refusal to ratify the Optional Protocol on the Elimination of All Forms of Discrimination Against Women (CEDAW).

This disengagement has been regarded poorly by the UN abroad and with considerable concern by the Human Rights Commission at home. As the President of HREOC, Professor Alice Tay, remarked pithily: 'the purpose of UN reform must be to strengthen the international protection of human rights, not to undermine it'.

While some more constructive initiatives to achieve reform were announced in 2001-2002, in comparison with instances of official rebuke, non-cooperation and

disengagement, these measures, while worthwhile themselves, are relatively insignificant.

A number of recent examples suffice to bolster the point. The Government delayed for more than two years the visit of the UN Working Group on Arbitrary Detention which wished to examine conditions in immigration detention facilities. The Group was finally permitted to visit in 2002 in association with the UN High Commissioner for Human Rights envoy, Justice Bhagwati, whose visit was similarly delayed for months. The reasoned and critical reports of both were subsequently rejected out of hand by the Government late last year.

Australia failed to ratify the Optional Protocol on the Convention against Torture in July 2002. The amendment would have permitted UN representatives to visit member states' prisons and detention centres without first requesting permission. Countries which voted against the amendment were China, Cuba, Egypt, Japan, Libya, Nigeria and Sudan, not company Australia is normally accustomed to keeping.

The 'Pacific Solution' has been a conscious attempt to evade Australia's responsibilities under the International Convention on the Status of Refugees. It may be that the Convention is in urgent need of review but this fact does not make such evasion and the deliberate ill-treatment and disentitlement of applicants for refugee status in far-away camps any more justifiable.

Last December, Australia became the last Western nation not to support the incorporation of a right to self-determination in a new UN statement on the rights of indigenous peoples.

The pattern is clear. UN criticism of Australia's human rights performance is to be cast aside in favour of the Howard Government's reassertion of the nation's sovereign, democratic right to do as it pleases.

There is no doubt that the UN Treaty system needs reform. But it is not of the kind the Government proposes. This report outlines a number of important measures that could be taken to make the system far more effective; however, these are not reforms the Government is likely to embrace since they would empower the system. That, in turn, would make critical scrutiny of Australia's human rights record even more likely.

The report concludes by considering why the Government seems to believe it advantageous to adopt such a strident approach to the UN. The most straightforward explanation would be that the UN's criticisms have been misguided and consequently that the Government has been right to reject them. Such a view, however, cannot reasonably be maintained in the face of the progressive intensification of international criticism of Australia's human rights performance and the force of independent, international and domestic legal opinion that contradicts the Government's positions, particularly as these relate to indigenous peoples and people seeking asylum.

This is not to deny that some UN criticism has been misplaced. Nor is it to deny that the UN treaty committee system is in need of reform. The case for reform is compelling. Nevertheless, the Government's refusal to admit even the most minor infraction of its

international obligations in the face of informed and concerted legal and political censure requires a more persuasive account of its anti-UN stance.

From another perspective, it may be that the dynamics of domestic political disagreement hold the key. The Government's criticism of the UN can legitimately be seen as yet another example of wedge politics. To attack the UN over human rights is calculated to alienate the socially progressive wing of the Labor opposition while appealing to its blue-collar affiliates who can be expected to be unimpressed by 'foreign' condemnation. The political advantages of such a strategy are obvious.

The pervasive sense of economic and physical insecurity experienced by many Australians in the face of the global tide of events appears, however, to constitute the most persuasive source of explanation.

The deep distrust of economic globalisation felt in many parts of rural and suburban Australia has made it attractive for the Government to adopt an anti-international stance. Unwilling, however, to shake loose from the extensive web of international economic treaties to which it is a party, and having only a limited capacity to influence the global economic forces that press in at every point, the Government has chosen skilfully to displace domestic concern about the loss of economic sovereignty on to international agencies promoting a global social democratic agenda of which the UN human rights system is one. Economic globalisation remains unchecked while, popularly, no interference from international political and social organisations will be tolerated.

This political development has been accelerated dramatically by the perceived threat of international terrorism. In the post September 11 world, it is not to the UN but to the US that many Australian eyes have turned. In response, the Howard Government has aligned itself ever more closely with the US and Britain and loosened the ties forged so assiduously by the Keating Government with neighbouring nations in East Asia. There has been a disengagement at many different levels from countries and cultures that do not resemble our own. A new unilateralism is abroad, one that is popular here because it returns Australians to a more secure and comfortable identification with nations and peoples 'like us'.

In this environment, then, the Howard Government safely makes political hay when multilateral organisations like the UN seek to constrain Australia's sovereign, Anglo-Celtic discretion. In rejecting what is foreign and re-embracing what is familiar, the Government has struck a resonant electoral chord with the assertion of a patriotic sovereignty in the face of actual and manufactured insecurity.

Australia's commitment to the observance of universal human rights standards, and its co-operation with the international institutions established to monitor them, has been one regrettable casualty of this emerging, populist foreign policy position.

1. ‘A falling out of friends’

1.1 The meeting

On March 21 2000, a small but significant drama played itself out in Room XI of the Palais des Nations in Geneva, the home of the United Nations (UN). To the left of the committee room stage was a horseshoe shaped table around which sat 12 men and women whose appearance signified that they came from many parts of the world. To the right, seated in a row at the base of the horseshoe, were ten others, nine men and one woman all of whom appeared European. At the back of the stage, observing the political theatre, there were several more rows of people, a noticeable number of whom had dark skin and listened intently.

The actors in the play were the members of the UN Committee on the Elimination of Racial Discrimination and its invitees. The Committee occupied the horseshoe. At the table in front of them was the Australian delegation to the Committee who were appearing before it to present a report and a case. At the back sat an assortment of journalists, officials, representatives of non-governmental human rights organisations, indigenous Australians and interested members of the international diplomatic community.

At the top of the Committee table sat the Committee’s Chair and next to him the Committee’s rapporteur on Australia, Ms Gay McDougall from the US. In the middle of the Australians sat Mr Phillip Ruddock, Australia’s Minister for Immigration and Multicultural Affairs. Mr Ruddock had led the delegation to Geneva to present Australia’s report on its compliance with its international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. Australia had not presented a report for ten years, despite the fact that three had been due, so there was much to discuss.

The Chair welcomed Mr Ruddock warmly:

> I take particular pleasure in welcoming the presence among us with a view to what I look forward to, a constructive dialogue, of a delegation headed by the distinguished Australian Minister, the Honourable Phillip Ruddock, Member of Parliament…Let me say how much we appreciate the fact that you took the trouble to come from what you call ‘down under’ in order to hold this dialogue with the Committee.

The Minister was equally generous:

> Thank you very much Mr Chairman and distinguished members of the Committee. First may I congratulate you, as I understand you’ve only just assumed your position and it’s obviously a very important one for the Committee and one which we value because we’ve always had a close co-operative relationship with your predecessors.

Two hours later, by the time the oral and subsequent written interchange between the two parties was concluded, however, the polite and co-operative relationship was in tatters. To understand why, and by way of preface to the larger themes canvassed by this paper, it is instructive to follow the theatre piece further as most facets of the subsequent disagreement and dissension between the Howard Government and the UN human rights treaty body system emerge from its dramaturgical development.[1]

Mr Ruddock introduced the Howard Government's report to the Committee. In his opening remarks he outlined what he saw as the Government's major achievements. He spoke *ex tempore*, or appeared to, as his address was somewhat rambling, certainly by comparison with the more structured and concise presentations of the departmental officials who followed him. Nevertheless, the thrust of his argument was clear. Australia had performed exceptionally well in dealing with issues of race and racial discrimination and the Government was committed to doing even better. Not long after he began he made an unfortunate, perhaps Freudian slip:

> Now this report is not simply a reflection of the Government's commitment to racism…

But he recovered to produce a lengthy recitation of the Government's achievements. Australia had led an international force in East Timor to restore security there. It had taken four thousand Kosovar refugees and given them temporary safe-haven. The Government had pursued a policy of multiculturalism actively adopting a 'new agenda for multiculturalism' and established a Council for a Multicultural Australia to promote harmonious community relations. It had launched an anti-racism campaign known as 'Living in Harmony' a centrepiece of which was the creation of a new 'Harmony Day.' A public relations campaign had been established to raise community awareness and understanding of the nation's cultural diversity. This was supplemented by a community grants program to assist a wide diversity of ethnic and cultural organisations:

> These programs underlie the significant government commitment to promoting cultural diversity and addressing racism in a positive way…by building upon elements of value in your society, of tolerance and harmony, you can bring wider acceptance to a wider group of people.

The Minister turned to the situation of indigenous Australians. He began with an important admission:

> Now, without doubt, one of the greatest blemishes in Australia's history has been the treatment of our indigenous peoples. I don't think you would find many Australians who would look back at our history who would say it was always appropriate. The doctrine of *terra nullius* for instance denied indigenous land rights while indigenous peoples suffered injustices under many practices that past generations were involved. Now it is impossible to undo the wrongs of the past, but the Australian Government has committed itself firmly to address what

[1] This reconstruction and the quotations are taken from The Committee on the Elimination of Racial Discrimination, 56th Session, Summary Record of the 1393rd Meeting, CERD/C/SR 1393, 1394, 1395, 29 March 2000 and a transcript of the proceedings.

> it sees as today's unacceptable level of disadvantage suffered by Australia's indigenous peoples.

Consequently, he said, funding on Aboriginal programs had increased. New measures were being taken to make Aboriginal and Torres Strait Islanders more self-sufficient, to remove the need for welfare support and provide better access to health, education and housing. The Government had also committed itself wholeheartedly to the cause of reconciliation between indigenous and non-indigenous Australians. Early results should not be expected, however, as this was a matter of changing peoples hearts and minds. It was an intangible process and when it might be completed was entirely beyond measurement or prediction.

Mr Ruddock noted the Committee's prior criticisms of the Government's alterations to Native Title legislation. The problem here, he said, was the uncertainty created by the High Court's Wik decision. The subsequent amendments to the Act were necessary to remove this uncertainty and had been the product of an extensive consultative process. In the end, the Act represented a delicate balance of all the relevant interests including those of 'states and territories, of miners, of pastoralists and the interests of our indigenous peoples'. In the context of these proceedings, the ordering of these interests was perhaps unfortunate, if accidental.

Thus far, things had gone tolerably well. In making his presentation, however, perhaps the Minister underestimated the knowledge and preparation of the Committee's rapporteur, Ms McDougall, and the nature of her intended statement in response. Invited by the Chair to introduce the Committee's issues and concerns, the articulate American moved quickly from laudable generalities about Australia's human rights record to regrettable specifics.

The two groups most affected by racial discrimination in Australia, she observed, were the indigenous and immigrant communities. Despite the Committee's earlier request for more information, the Australian report, she remarked, had failed to give sufficient detail of how in practical terms the situation of the immigrant population had been improved. She also requested that further information be provided on the situation of women, in particular indigenous women, women refugees and women migrants all of whom appeared to suffer significant economic and social disadvantage.

She commended the Commonwealth and State Governments for enacting an impressive array of laws and establishing a number of bodies to combat racial discrimination. But she noted that there was a substantial difference between the achievement of formal and substantive equality and asked whether the Government was committed to the latter as well as the former. She expressed her concern that no specific prohibition of racial discrimination existed in Australian law. Consequently, the Commonwealth could override the Racial Discrimination Act simply by passing subsequent legislation. What action did the Government propose to take in this regard, she asked, in particular since it had considered overriding the Act in the context of the debate over native title? If the Act were overridden, did the Minister regard Australia's obligations under the International Convention as having been repudiated?

She noted the huge cuts to the operating budgets of both the Aboriginal and Torres Straits Islander Commission (ATSIC) and the Human Rights and Equal Opportunity Commission (HREOC) and inquired how such cuts could be sustained without affecting the quality of the work. Speaking more generally about the situation of indigenous Australians she asked straightforwardly:

> Why has a country with Australia's resources been unable to ensure that a community representing less than 2 per cent of the population has a decent standard of living?

She then moved to more specific problems in relation to Australia's indigenous population. She referred to the heavy over-representation of Aboriginal people in prison. She criticised mandatory sentencing laws in the Northern Territory and Western Australia and noted their contribution to such over-representation particularly in relation to juvenile incarceration. Why would the Commonwealth not use its constitutional power to override legislation that had such a discriminatory effect, she inquired. Although it was too early to assess the full impact of the Native Title Act amendments, she expressed concern that it may restrict the entitlement of native title holders to negotiation over land use, or replace it with lesser entitlements of notification and consultation. This problem appeared to be magnified by the delegation of significant legislative powers with respect to native title to State and Territory Governments.

She asked what tangible progress had been made in implementing the recommendations of the report of the inquiry into the 'Stolen Generation.' Why, she asked:

> …is it so difficult for the Australian Government to take full responsibility and apologize for the actions of its predecessors?

It was one thing, she concluded, to suggest that the Government was committed to reconciliation. It was quite another, however, for the Government to define policies and programs designed to achieve that end and benchmarks against which its achievements could be measured. Something more tangible than hope, aspiration and long-term attitudinal change would seem to be required.

The Chair invited other Committee members to pose questions and most did. The questions were not always well informed, particularly on Australian constitutional issues, and at times they were wayward, for example in suggesting that legislation might properly be enacted to ban the One Nation Party because of its advocacy of racist policies. But overall their drift was clear. Australia appeared to be performing worse rather than better in relation to the elimination of the substantive disadvantage of its indigenous peoples and its proud record of multiculturalism had seemed to have been undermined by a rise in community intolerance, particularly in relation to refugees and asylum-seekers, and the failure of governments adequately to stem it. The Committee members wanted to know why.

It fell then to Minister Ruddock to respond. It was regrettable that, in many aspects, his responses seemed either condescending or inadequate. His condescension was manifested in a number of different ways. From the outset he implied that it would be

difficult for the Committee to come to any informed conclusions regarding Australia's compliance with its international obligations because it did not have sufficient longitudinal knowledge to reach them:

> First I said to the distinguished delegate from India yesterday, that I remembered meeting Mrs Gandhi, and she asked me how long I was going to be in India. And she said, well I said to her, nine days, and she said, well that's good. Most come for two and then think they can write a book. And I think there is a sense of that in what we are discussing here. I have lived a lot of these issues for many years.

He referred erroneously to members of the Committee as delegates, implying they were there to put their governments' views. In the midst of the proceedings, the Chair reminded him that the committee members were independent and that the term delegate was inappropriate. Perhaps worst of all, he frequently deflected the specific questions and criticisms levelled at Australia by particular committee members by engaging in counter-criticism of the human rights record or performance of the nations of their origin, thus implying that they were in no position to make adverse comment.

The Minister's responses to the more specific criticisms levelled against Australia's recent performance with respect to removing discrimination against indigenous and migrant peoples were equally dismal. In response to questioning with respect to the continuing health, education and social disadvantages of Aboriginal people, he suggested that the problem stemmed principally from their choice of lifestyle rather than from any failure of government policy:

> And the situation is that Aborigines live in circumstances and aspire culturally to live differently to other Australians. And who am I to say that in those aspirations, they shouldn't have them? I'm not…. Later when the view developed that that we should respond to peoples' aspirations, we saw a change in the way in which we wanted to allow people to live…And people moved away from those centres where very often services had been delivered…But the cost of delivering services to people who make a choice and want to be dispersed are significant. And the capacity to deal with infant mortality issues has been influenced by movement which was a response to people's desire to live traditionally and culturally.

With respect to mandatory sentencing he asserted that it was not the role of the Commonwealth Government to intervene to override State legislation, even though the Prime Minister had expressed disagreement with its content. This was the case even where that state legislation may be in breach of Australia's international obligations. The answer, of course, glossed over the Commonwealth's intervention to override Territory legislation with respect to euthanasia and the foreshadowed amendments to the Commonwealth Racial Discrimination Act designed to permit the states to enter the native title arena. In an answer that was difficult to comprehend, he denied in addition, that mandatory sentencing would have a discriminatory impact with respect to Aboriginal peoples, despite their far higher rates of incarceration in Australian penal institutions:

> And the fact is that under our criminal justice system, the responsibility for these questions rests with the States. Now I think that the impact can be quite variable, because convictions are required, I'd suspect that it's probably, in many cases, going to be more difficult for convictions to occur because I think it's a natural reaction that those who are involved in the proceedings work harder to make sure that if a mandatory sentence is likely, that it is resisted, if there is any possible doubt…(so) the fact is that mandatory sentencing is likely to produce an outcome where indigenous people, if the offences related to these matters, would be less represented in the statistics, rather than more represented…it cannot be established that mandatory sentencing has significantly led to over-representation in our criminal justice system.

This assertion would come as a considerable surprise to criminologists and crime statisticians across the country.

On the disadvantage experienced by indigenous and migrant women, the Minister sought to bolster his case by responding from his personal experience.

> There are different views in our society about the role of women. And even in our indigenous community…women are segregated culturally and cultural and traditional reasons for difference can be very challenging issues if you have a view about equality of the sexes, we do try to deal with these issues up front. We try to empower women, and if you knew some of the women around me, by blood and other, you would know that empowerment of women is a very significant issue, particularly those that are young and professional and look for the fulfilment of their own opportunities.

On native title his answer was stronger. He pointed out correctly that the Committee's request that the operation of the legislation be suspended to permit more extensive consultation with representatives of indigenous groups could not be achieved at the will of the executive and, indeed, that such a course would be constitutionally undesirable. And he restated the Government's position that the Act was the product of extensive parliamentary and hence democratic debate.

> The Native Title Act is an enactment of our Parliament. The amendments to the Native Title Act are an enactment to our Parliament, enactment to our law by our Parliament. That is, it's been legislation passed by the House of Representatives and the Senate.

There seemed a failure to appreciate that even laws passed by a democratic national parliament could still be in breach of international conventions to which Australia was a party. Nevertheless the point that the decision to pass legislation weakening the entitlement of indigenous people to land had been a conscious and extensively debated one, was made effectively.

Finally, on the Stolen Generations, he justified the Government's decision not to issue any formal apology by reading extensively from its parliamentary motion expressing

regret for the actions of past generations and the hurt and trauma that many Aboriginal people continue to feel. The fundamental distinction between a national apology and an expression of parliamentary regret nevertheless seemed to elude him.[2]

1.2 The fallout

In the context of the competing perspectives so evident in the interchange between the Committee and the delegation, it came as no surprise that the Committee was critical of Australia's performance with respect to racial discrimination and that the Government's subsequent response to the Committee's report should repudiate its conclusions.

In its concluding observations, the Committee welcomed Australia's comprehensive report and the initiation of many programs that focused on the elimination of racial discrimination. In diplomatic language, however, it expressed a number of major concerns with respect to Australia's compliance with its international obligations under the international convention. It noted the absence of any entrenched guarantee prohibiting racial discrimination. It expressed grave concern regarding the inordinately high rates of Aboriginal incarceration. It noted the racially discriminatory effect of mandatory sentencing legislation. It expressed anxiety at the apparent loss of confidence by the Aboriginal community in the process of reconciliation. It regretted that the Commonwealth Government had felt unable to apologise to the members of the Stolen Generation in order, at least in part, to address the 'extraordinary harm inflicted by these racially discriminatory practices'. It remained concerned about the dramatic inequality still experienced by large sections of the indigenous population. Somewhat outside its terms of reference, it also urged the Howard Government to comply with its obligations under the international refugee convention.[3]

The Government's response, issued by media release, was hostile.

> The Government rejects the comments made by the UN Committee on the Elimination of All Forms of Discrimination in Geneva on Friday. The Committee's report is an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs. We are seriously disappointed about the Committee's comments on race relations in Australia. The Committee has apparently failed to grapple with the unique and complex history of race relations in Australia. It has paid scant regard to the Government's input and has relied almost exclusively on information provided by non-government organisations. This is a serious indictment of the Committee's work. It is unacceptable that Australia, which is a model member of the UN, is being criticised in this way for its human rights record.[4]

Four days after the media release, the Minister for Foreign Affairs announced a comprehensive internal governmental review of Australia's entire relationship with the

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[2] On this important distinction see Gaita, R (1999) 'Genocide and the Stolen Generations' in Gaita R (1999) *A Common Humanity: Thinking About Love and Truth and Justice*, Text Publishing.

[3] Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 19/04/2000. CERD/C/304/Add.101.

[4] Attorney-General, Media Release, 'CERD Report Unbalanced', 26 April 2000.

UN human rights treaty system.[5] With more UN committees soon to report on different aspects of Australia's human rights record, the stage was set for a major confrontation. The dimensions and implications of this confrontation for both Australia and the UN constitute the principal subject matter of this paper.

When he visited Australia early in 2000, the Secretary-General of the UN, Kofi Annan, described Australia as a model member of the UN. The paper's purpose is to document and explain why such an endorsement from the international community is no longer likely.

[5] Minister for Foreign Affairs, Media Release, 'Government to Review Treaty Committees', 30 March 2000.

2. The UN Human Rights Treaty Monitoring System

2.1 The overarching framework

That the UN would play a pivotal role in the international promotion and protection of human rights was foreshadowed clearly in the UN Charter enacted on June 26, 1945.[6] The Charter was brought into existence as a direct response to the murder, malignity and collective madness characteristic in particular of the wartime Nazi regime in Germany. It was founded on three principal ideals: the preservation of international peace and security; the self-determination of peoples; and the existence and enhancement of human rights.

The ideal of human rights, internationally shared and observed, was made more tangible with the subsequent adoption by the UN General Assembly of the Universal Declaration of Human Rights in 1948.[7] The Declaration set down the fundamental rights and freedoms which the international community of the time believed were the inalienable entitlement of every human being. The rights and freedoms were of four different kinds:

- Personal Rights, including the right to life, the right to equality, the right to liberty, the right to security, freedom from torture and so on.
- Civil and Political Rights, permitting individuals to take part in decisions about their systems of government and in political decision-making. These include freedom of conscience, freedom of thought and expression, freedom of assembly and association, and the right to vote.
- The Rights of Individuals in Groups, for example, the right to privacy and family life, freedom of movement, the right to asylum in case of persecution, the right to property and freedom to choose a religion.
- Economic and Social Rights, including the rights to work, to education, to health, to social security, to participate in cultural life and other related entitlements.

Under the Declaration, every one of these rights and freedoms must be capable of exercise without discrimination of any kind including discrimination on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other relevant status.

The direct relationship between post-war declaration of these rights and the evil that had preceded it was made abundantly clear in the preamble to the declaration which reads in part:

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[6] Charter of the United Nations of June 26, 1945.

[7] Universal Declaration of Human Rights, UN General Assembly, Resolution 217A (III) of 10 December 1948.

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
>
> Whereas it is essential to promote the development of friendly relations between nations…
>
> Now, therefore, The General Assembly
>
> Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations…"

The Universal Declaration still stands as the fundamental statement of principle in international human rights law. At the time of its adoption, however, core components of a corresponding international system for the recognition and enforcement of human rights remained to be developed. The Declaration was too general to be applied specifically in the international and national contexts. Further, it contained no provisions that would have created an institutional framework through which the monitoring and enforcement of the rights declared might have been made possible. These two critical tasks were embarked upon subsequently, first through the development of specific and detailed international human rights covenants and conventions and, secondly, through the establishment of specific monitoring mechanisms under the UN's umbrella.

2.2 The six human rights treaties and their monitoring mechanisms

The UN Declaration, in the intervening period, has spawned six principal covenants and conventions[8]. These are as follows:

- The International Covenant on Civil and Political Rights (December 16, 1966)
- The International Covenant on Economic, Social and Cultural Rights (December 16, 1966)
- The International Convention on the Elimination of All Forms of Racial Discrimination (December 21, 1965)

[8] A seventh convention has been introduced recently: The Convention on the Rights of Migrant Workers and their Families. Its treaty body is in the process of establishment.

- The International Convention on the Elimination of All Forms of Discrimination Against Women (December 18, 1979)
- The International Convention Against Torture (December 10, 1984)
- The International Convention on the Rights of the Child (November 20, 1989)

Every state that is a member of the UN is a party to at least one of these human rights treaties. More than 80 per cent have ratified four or more of them. The Asian group of nations has been the most dilatory in ratifying them. The European group has been the most supportive. This participation by states has been voluntary. The obligations imposed by the treaties have been assumed freely by signatory nations. Ratification means that sovereign states agree to be bound in international law to the standards and procedures contained in the covenants and conventions. These nations, therefore, assume a duty to protect and promote human rights as defined internationally in all domestic laws and governmental practices.

The institutional framework for the monitoring and enforcement of international human rights standards and procedures developed in parallel with the adoption of the six treaties. For each treaty a supervisory committee to monitor participating nations' compliance with their treaty obligations has been established.[9] The six committees are:

- The Human Rights Committee (HRC)
- The Committee on Economic, Social and Cultural Rights (CESCR)
- The Committee on the Elimination of Racial Discrimination (CERD)
- The Committee on the Elimination of Discrimination Against Women (CEDAW)
- The Committee Against Torture (CAT)
- The Committee on the Rights of the Child (CRC).

The treaty bodies are comprised of members elected by each regional group of ratifying states. The elections are accompanied by intense lobbying by states and groups of states. The Human Rights Committee, for example, is comprised of 18 members having 'recognised competence in the field of human rights and being of high moral character'. Its members are elected by a secret ballot by the states that are party to the covenant or convention. The members are nominated by their state but are put forward for election by the Secretary-General in alphabetical order. To be elected, the member must receive an absolute majority among the nations participating in the election. With the exception of the Human Rights Committee, committee membership is required to conform to certain rules in relation to their geographic distribution.

[9] The Committee for the ICESCR, unlike the others which were created by treaty, was established by a resolution of the UN's Economic and Social Council in 1986.

The work of the six committees is complemented by that of other UN organs. These include the Economic and Social Council, the Commission on Human Rights, the Office of the High Commissioner for Human Rights, and thematic and country rapporteurs whose task is to undertake specific inquiries into human rights abuses of a particular kind e.g. racial discrimination, or abuses by government in a particular country. The work of these institutions and individuals is beyond the scope of this present analysis, except to say that it has been one of the weaknesses of the institutional framework created that there has been insufficient co-ordination and co-operation between the work of these bodies and the six committees to the substantial detriment to the effectiveness of the latter.

2.3 The treaty committees' functions

The treaty committees have two primary functions.

The first is to engage in the periodic review of the human rights performance of each signatory nation. Normally this review begins with the presentation to the relevant committee of a state report outlining the measures taken by the state to meet its obligations during the preceding reporting period. While reporting periods vary they tend to be of approximately five years. The committee considers the country report and invites representatives of the party to supplement it with oral presentation by a national delegation of the kind described in the preceding chapter. The committee addresses questions to the delegation. Then, following a consideration of the written and oral reports and responses, the committee produces a set of concluding observations in which it summarises its views with respect to the performance by the presenting country of its international human rights obligations and makes recommendations for improvement where appropriate. This process was delineated in detail in Chapter 1.

The second function of the committees is to hear and determine individual complaints. Four of the committees have individual complaints mechanisms established either by treaty or the adoption of optional protocols. There are now optional protocols ratified and brought into effect under the International Covenant on Civil and Political Rights and the Covenant on the Elimination of Discrimination Against Women. Where it is so provided, individuals in member countries who believe that their human rights have been infringed, and all domestic remedies have been exhausted, may bring a complaint before one of the relevant committees. These complaints are then considered by the relevant treaty committee which then expresses its view as to whether the complaint in relation to an alleged violation should be dismissed or upheld. In hearing and determining complaints, the committee is required to apply the law of the treaty to the particular case in hand. In this way, an extensive international human rights jurisprudence is constantly in the process of development.

In the significant majority of individual petitions concerning Australia, the complaints alleged have been either considered as beyond jurisdiction because all domestic legal remedies have not been exhausted or because no infringement of a relevant right or freedom has been found. Nevertheless, there are some individual complaints that have been successful, perhaps the most well-known of which was Toonen v Australia in

which the international legality of Tasmania's laws prohibiting homosexual activity even between consenting adults in private was denied.[10]

The advent of the individual complaints procedures was clearly an enormously important development. However, it has not been utilised nearly to the extent that might reasonably have been expected given the numbers of countries that have ratified the treaties and protocols. By the year 2000 no fewer than 186 countries had ratified at least one. Yet 30 per cent of these states have never been the subject of complaint and only 60 complaints are registered annually from a potential constituency of more than a billion people. Ignorance of the relevant procedures is plainly the main reason. But there are other issues and difficulties with the procedures to which I return in a later chapter.

2.4 Some concluding observations

The UN Human Rights Treaty Body System, as just described, has developed on a somewhat *ad hoc* basis over the past half century. Its nature and progress reflect at every level and in every organ a fundamental tension between the implementation of genuinely international human rights norms, on the one hand, and state sovereignty on the other. The entire system is designed to promote respect for individual human rights throughout the world. In this great endeavour, national borders and boundaries are of marginal significance. Yet, at the same time, the sovereign right of states to determine what should occur within their borders and boundaries is recognised as a fundamental pillar of the existing system of international law and its associated institutions. The balance between the desirable enforcement of universal human rights standards and the corresponding sovereign national entitlement to determine the applicability and relevance of those standards, therefore, is an extremely fragile and tenuous one. The tension is inherent and demonstrable in the functions and powers of the UN human rights committee system.

The following examples should suffice to make the point. There is a significant disjunction between states' ratification of the six human rights treaties and their active participation in the monitoring and evaluation processes established under them. Elections to the six committees are intensely contested, at least in part so that governments may ensure that elected members will not be overly critical of the nations, including their own, which come before them for scrutiny. The institutional structure, while handsome in itself, has constantly been starved by member nations of the resources required to make it genuinely effective. There remains a gaping hole between the rights afforded by the six treaties and the power of the existing institutional procedures to remedy their violation. Finally, the entire system remains advisory and recommendatory in nature. Sovereign states remain free to accept or reject criticisms directed at them at will.

However undesirable it may seem when viewed from an international perspective, the repudiation of committee criticisms, the attacks on committee effectiveness, and the deeper questioning of the committees' political and legal legitimacy, remain common among participating nations. Until quite recently, however, the Australian government

[10] *Toonen v Australia*, Communication No.488/1992, Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992.

has stood in the vanguard of nations supporting both the principles upon which the treaty system has been founded and the mechanisms through which those principles may be made universal and tangible. But a significant change occurred following the events described in the previous chapter. Australia's position with respect to the international application of human rights is no longer the same, and its respect for the UN organs through which that application is made real has significantly diminished. This alteration has been to the substantial detriment of its international reputation. It is with Australia's retreat from a position of leadership in relation to the protection and promotion of international human rights that the remainder of this paper is devoted.

3. The UN Treaty Committee Reports on Australia

In the past five years, each of the six UN human rights treaty committees has issued a report on Australia's progress in the achievement of its treaty obligations. In this chapter, the committees' commentaries will be described in order to provide a snapshot of how Australia's human rights performance has been regarded in these UN forums and to set the background for a more detailed consideration of Australia's political and diplomatic response to them.

3.1 The Committee on the Elimination of Racial Discrimination

The Australian Government's present endeavours to reform the treaty system were at least in part sparked by its reaction to the report of the Committee on the Elimination of Racial Discrimination.[11] It is therefore appropriate to begin with a detailed consideration of that Committee's commentary on Australia's performance under the relevant treaty.

In its introduction, the Committee expressed its appreciation of the comprehensiveness of Australia's written report and of the appearance before it of the high level delegation that included Minister Ruddock. It indicated that it had been encouraged by the attention given by Australia to its obligations under the Convention and to the work of the Committee itself. It noted that Australia had implemented many positive legislative and policy measures designed to reduce the incidence of racial discrimination and promote the idea of multiculturalism. It applauded the establishment of ATSIC and the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. It signalled its support for the enactment of the *Racial Hatred Act* 1995 that introduced civil prohibitions upon humiliating and intimidating behaviour based on race. And it singled out the Howard Government's initiatives in launching 'A New Agenda for Multicultural Australia' and the 'Living in Harmony' programs for special commendation.

Nevertheless, the Committee expressed its concerns with respect to a number of matters bearing on the implementation of Australia's treaty obligations. It noted that the Australian Constitution provided no entrenched guarantee that would preclude the Commonwealth, the States or the Territories from enacting racially discriminatory legislation. In the absence of any such constitutional protection, the Committee suggested that, where necessary, the Commonwealth Government should be prepared to use the Constitution's external affairs power to override State Government legislation that infringed upon Australia's commitments under the treaty and to use S.122 of the Constitution similarly to override Territory laws having the same effect. It noted that Australia was a party to the Vienna Convention on the Law of Treaties and that s.27 of that Convention required parties to ensure the consistent application of their treaty obligations throughout their respective jurisdictions.

With respect to native title, the Committee expressed the view that, in drafting amendments to Native Title legislation, the Commonwealth Government had taken

[11] Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 10/04/2000. CERD/C/304/Add.101.

insufficient steps to ensure that representatives of the Aboriginal community had been adequately consulted. In consequence, the Committee recommended that the Government should in future ensure that indigenous people could participate more effectively in the making of decisions with respect to their entitlements to land. Such participation, it pointed out, is required under s.5(c) of the Convention and the General Recommendation XXIII of the Committee which 'stresses the importance of securing the informed consent of indigenous peoples in relation to important legislative decisions affecting their destinies'.

Grave concern was conveyed in relation to the high rates of Aboriginal incarceration in Australia's prison system. These rates, the Committee noted, were far higher than for the general population. The Commonwealth Government, it said, should give high priority to the implementation of further legislative and programmatic measures designed to reduce the socio-economic marginalisation of indigenous communities, discriminatory practices in law enforcement and the lack of sufficient diversionary programs designed to impose punishments that could substitute for imprisonment. More particularly, the Committee criticised regimes of mandatory sentencing of offenders in both the Northern Territory and Western Australia. The imposition of these regimes, it pointed out, targeted offences that were committed disproportionately by indigenous Australians, especially young people, leading to a racially discriminatory impact on their rates of incarceration. These laws, the Committee concluded, seemed highly likely to be in breach of Australia's obligations under the treaty and it urged that they be reviewed urgently.

The Committee took note of the HREOC's report on the Stolen Generations and questioned the adequacy of the Commonwealth Government's response to it on two grounds. First, it criticised the Government's refusal to issue an apology to those indigenous people whose lives had been damaged by prior policies of children's removal from their families. Secondly, it expressed concern that the Government had felt it inappropriate to provide those affected with monetary compensation. It recommended that the Government reconsider its position with respect to both these matters in order to 'address appropriately the extraordinary harm inflicted by these racially discriminatory practices'.

The Committee took note of recent statements from the Australian Government in relation to asylum seekers and affirmed its view that Australia should take care to implement its international obligations under the 1951 International Convention on the Status of Refugees and the 1967 Protocol to that Convention.

Finally, the Committee acknowledged that the Commonwealth Government was taking very significant steps designed to improve the health, housing, employment and educational situation of Australia's indigenous peoples. Nevertheless, it concluded, there remained serious concerns at the continuing discrimination experienced by the indigenous population in the enjoyment of their economic, social and cultural rights. In particular the Committee pointed to the dramatic economic inequality that still existed between the indigenous and general populations.

3.2 The Human Rights Committee

Four months after the CERD Committee had reported, the Human Rights Committee issued its concluding observations on Australia's implementation of its international commitments under the International Covenant on Civil and Political Rights.[12]

The Committee praised the comprehensiveness of the Australian report while lamenting its lateness. The report was due five years after the second report but had instead been received ten years later. The Committee acknowledged the many positive steps that had been taken by the Australian Government to meet its treaty obligations. It welcomed the Government's accession to the Optional Protocol to the Covenant which permitted individuals to lodge communications with the Committee in relation to alleged infringements of their human rights within Australia. It commended the enactment in all States and Territories of legislation to outlaw discrimination. It praised the establishment of the Office of Aboriginal Social Justice Commissioner. It noted the very considerable improvements that had taken place in the position of women within Australian society at large and particularly within the public service, in universities and in the general workforce. Although work remained to be done, it observed that progress had been significant. It pointed to the strengthening of certain provisions of the *Sex Discrimination Act* 1984 as a further, constructive development.

Having provided this generally healthy report card, the Committee enumerated a number of remaining concerns. It observed that, unlike most Western nations, Australia does not have a constitutionally entrenched Bill of Rights. In its absence, and in the absence of a constitutional provision giving effect to the Covenant, there remained lacunae in the protection of Covenant rights. These, it said, may deprive Australian citizens of an effective remedy where their rights had been infringed in contravention of Article 2.

The Committee addressed related problems posed by federal-state relations in ensuring that Covenant rights were complied with. It referred to the Australian delegation's explanation that in cases where such rights may be infringed by State Governments or the Governments of the Territories, the resolution of the problem became a matter of political negotiation between the Commonwealth Government and the State or Territory Government concerned. Like the CERD Committee before it, the Human Rights Committee concluded that the fact of federalism could not relieve a state party, in this case Australia, of its obligations to comply with its international human rights obligations. Article 50 of the Covenant states specifically that its provisions shall extend to all parts of federal states without limitation or exception. Consequently, the Committee concluded, political arrangements between the Commonwealth and the States could not be such as to condone restrictions on Covenant rights.

In making these comments it was likely that the Committee had the Northern Territory and Western Australian mandatory sentencing legislation in mind. Its report expressed concern that such legislation had been enacted, observing that its most likely effect

[12] Concluding Observations of the Human Rights Committee: Australia. 28/07/2000. A/55/40 paras 498-528 and see further, Human Rights and Equal Opportunity Commission (2000) 'Australia's Human Rights Record Reviewed by the UN Human Rights Committee'.

would be to cause the imposition of sentences that were disproportionate to crimes committed and to counteract the Commonwealth Government's endeavours to reduce the incidence of the incarceration of indigenous people. These effects ran contrary to obligations imposed by a number of the Covenant's important provisions. The Committee urged the Commonwealth Government, therefore, to intervene to ensure that mandatory sentencing legislation was reassessed with a view to ensuring Australia's full compliance with the relevant Articles.

The Committee also addressed the situation of Australia's indigenous population more generally. It expressed its concern that the 1998 amendments to the *Native Title Act* may have affected indigenous interests in and entitlements to land in a manner inconsistent with the requirements of Article 27 of the Covenant. Further, the Act may have circumscribed the capacity of indigenous people to participate effectively in decision-making with respect to all matters affecting their interests in native title lands. This was especially the case where legal entitlements under native title and under existing pastoral leases came into conflict. In all cases, and again consistently with Article 27, the Committee requested that the Commonwealth Government secure indigenous peoples' traditional forms of economy (hunting, fishing and gathering) and the protection of their sites of religious and cultural significance. The Committee noted the report on the Stolen Generations and urged the Government to afford those who had been affected by the policies concerned a proper remedy for the infringements of their rights in accordance with Articles 2, 17 and 24 of the Covenant.

The Committee considered the mandatory detention of people seeking asylum in Australia. It expressed the view that such incarceration may be in breach of Australia's obligations under s.9(1) of the Covenant which, among other things, provides that 'no one shall be subject to arbitrary arrest or detention'. In this context it issued serious criticism of the Government's policy of not informing detainees of their rights to seek legal advice and of not permitting detainees to be visited by officials from relevant non-governmental organisations in order to inform them of their rights and how they might best be exercised. It concluded by recommending that:

> …the State party reconsider its policy of mandatory detention of 'unlawful non-citizens' with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.

Finally, the Committee questioned the Government's response to its decision in *A v Australia* in which the Committee had found in favour of the complainant in a case brought under the Optional Protocol to the Covenant.[13] It noted that the Government had simply rejected its interpretation of the Covenant and hence its conclusions. In relation to this action the Committee stated tersely that:

> Rejecting the Committee's interpretation of the Covenant where it does not correspond with the interpretation presented by the State party in its submissions

[13] Communication 560/1993: Australia. 30/04/1997. CCPR/C/59//D/560/1993.

to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications. The Committee recommends that the State party reconsider its interpretation with a view to achieving full implementation of the Committee's view.

3.3 The Committee Against Torture

The Committee Against Torture reported in November 2000.[14] It welcomed the constructive dialogue that had taken place with the Australian delegation and the copious additional information the Government had provided in response to its requests. It noted, nevertheless, that the Australian report on its obligations under the Convention had been submitted with a delay of six years. The Committee also expressed its appreciation of the work of relevant statutory agencies and non-governmental organisations in facilitating its work.

The Committee welcomed Australia's intended ratification of the first Optional Protocol to the Torture Convention. It noted and praised the many inquiries undertaken by Royal Commissions, parliamentary committees, HREOC, ombudsmen and other similar statutory bodies at both federal and state level relevant to the fulfilment of Australia's treaty obligations. It expressed its pleasure in relation to contributions by Government to non-governmental agencies providing rehabilitation services for victims of torture and Australia's contribution to the UN voluntary fund for victims of torture. It also noted the many measures taken by the Government to address the historical, social and economic underpinnings of the disadvantages experienced by the indigenous population.

It then stated a series of briefly expressed concerns. These concerns related to:

- The lack of appropriate mechanisms to review ministerial decisions relevant to Article 3 of the Convention. Article 3 provides that no person shall be expelled or returned to another State where there are substantial grounds for believing that they will be in danger of being subject to torture.

- The continuing use by prison authorities of instruments of physical restraint that may cause unnecessary pain or humiliation.

- Allegations of the use of excessive force by police and prison officers.

- Legislation providing for mandatory minimum sentences, which, the Committee observed, may have a discriminatory effect on the indigenous population which remains over-represented in the general prison population. The Committee recommended that Australia review such legislation carefully to ensure that it was not in breach of its international obligations and take further steps to address the comparatively high rate of Aboriginal incarceration.

[14] Concluding Observations of the Committee Against Torture: Australia. 21/11/2000. A/56/44, paras 47-53.

3.4 The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW, like the other Committees, praised the quality of Australia's delegation and report while at the same time noting that every one of Australia's reports to the Committee had been between two and five years late and not all had been in conformity with the Committee's reporting guidelines.[15]

The Report was issued in 1997 and contained a great deal of positive comment about Australia's endeavours to enhance the status of women in Australian society. It listed the 1993 National Agenda for Women, the *Sex Discrimination Act* 1984, the *Human Rights and Equal Opportunity Act* 1986, the annual women's budget statement and the creation of the Office of Sex Discrimination Commissioner as significant and constructive developments. It described Australia's role in combating violence against women as a pioneering one and expressed the hope that it would contribute to the creation of an environment in which such violence would no longer be tolerated. It welcomed the development of a national women's health strategy with its focus upon the health of women suffering particular social disadvantage including indigenous women. It noted the Australian Law Reform Commission's report on the Equality of Women before the law and stated that were this equality entrenched in the Constitution it would reinforce Australia's position as a world leader in relation to the advancement of women's rights and entitlements. Somewhat ironically in the light of later events, the Committee also praised Australia's support for and contribution to the development of the Optional Protocol to the CEDAW Convention.

The Committee's comments on the negative side of the ledger related principally to measures introduced since the election of the Howard Government in 1996. It expressed concern that the budget of the Office of the Status of Women and the HREOC had been cut by 40 per cent. It disapproved of the discontinuation of the women's budget statement and the national register for women which had provided a model for other governments that had embarked on similar initiatives. It expressed alarm at policies that may have the effect of slowing down progress towards the achievement of full gender equality particularly in the areas of housing, child care assistance and employment support. It noted with concern that new legislation on workplace relations may have a disproportionately negative impact on women, since many women worked in part-time and casual positions and were not, therefore, in as strong a position as other workers to negotiate favourable working agreements. It expressed disappointment that Australia had persisted with its reservation to the Convention regarding the provision of maternity leave and that it had failed to ratify a related ILO Convention concerning maternity benefits. Finally, it communicated its concern that much still needed to be done to redress the continuing disadvantage experienced by Aboriginal and Torres Strait Islander women, in particular in relation to their higher incidence of maternal mortality, lower life expectancy, reduced access to the full range of health services, high incidence of domestic violence, and high rates of unemployment.

[15] Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia. 31/05/95. A/50/38, paras 593-601.

3.5 The Committee on the Rights of the Child

The Committee on the Rights of the Child, which reported in 1997, saw many positive signs that Australia was providing leadership in the protection and advancement of children's rights.[16] It noted in particular the longstanding adoption of policies fundamental to underpinning the position of children in Australian society. These policies included the wide range of welfare services for children and their parents, the provision of universal and free education and the existence of an advanced public health system. The Committee indicated its support for the provisions of the Family Court Act and endorsed the introduction of the *Crimes (Child Sex Tourism) Act* 1994. It also welcomed the Government's stated intention to ratify the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption.

The Committee's broad endorsement of Australia's policy and law was tempered by three specific criticisms. The Committee observed that although Australia had ratified the Convention on the Rights of the Child, neither these rights nor any remedies for their infringement had been entrenched either constitutionally or legislatively. Such legal protection as children's rights assumed, therefore, was obtained indirectly rather than directly. The Committee recommended that comprehensive domestic legislation and policy reflecting Australia's international obligations in this regard be implemented.

Next, the Committee turned its attention to the position of Aboriginal children. It expressed its concern that Aboriginal children were significantly over-represented as a percentage of children detained in the juvenile justice system. In this context, this Committee, like every other, voiced its concern in relation to mandatory sentencing one result of which was to magnify the already existing over-representation of Aboriginal children in detention. The problem of children in detention was also raised in relation to people seeking asylum in Australia. Here again the Committee urged that the policy of mandatory detention of asylum seekers, in particular those with children be urgently reviewed. It concluded that:

> The situation in relation to the juvenile justice system and the treatment of children deprived of their liberty is of concern to the Committee, particularly in the light of the principles and provisions of the Convention and other relevant standards such as … the UN Rules for the Protection of Juveniles deprived of their Liberty.

Finally, the Committee conveyed its concern that, despite significant efforts by Government and non-governmental organisations alike, the standards of health and education applicable to the children of Aboriginal people, new immigrants and children living in rural and remote areas fell significantly below those enjoyed by children more living in better established communities.

[16] Concluding Observations of the Committee on the Rights of the Childe: Australia. 10/10/97. CRC/C/15/Add 79.

3.6 The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights provided the most recent report on Australia's performance of its international human rights obligations.[17] It observed that the majority of Australians had a high standard of living and that the Commonwealth Government continued to take many steps to ensure that this standard was maintained. It noted with appreciation Australia's leadership role in providing military and humanitarian assistance to the people of East Timor. It expressed its approval of the fact that there appeared to have been an increase in the number of women employed at high level in both the public and private sectors. It noted that the Government was spending very significant sums of money in order to improve the economic and social situation of Australia's indigenous population.

The Committee regretted, however, that the terms of the Covenant on Economic, Social and Cultural Rights had not been afforded constitutional or statutory recognition. Consequently, its provisions could not be invoked before Australia's courts of law. Despite the financial allocation referred to previously, it expressed its deep concern that:

> the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the fields of employment, housing, health and education.

It also expressed concern that amendments to the *Native Title Act* 1993 had affected the process of reconciliation with Australia's indigenous population adversely. It noted that Australia had not enacted any entitlement to paid maternity leave and that it had not ratified Convention 103 of the International Labor Organisation regarding the provision of such leave. Finally, it expressed a further concern that too many Australians in the public health system were required to wait for extended periods for medical services in hospitals and in particular for surgery.

3.7 Concluding remarks

Several conclusions may be drawn from the preceding descriptive analysis. First, the UN Human Rights Treaty Committees have been generally positive about Australia's human rights record. While the positive/negative format is standard, there can be little doubt, on a close reading of the committees' concluding observations, that Australia's performance of its obligations under each of the six treaties is regarded in a reasonably favourable light. This does not mean that no problems exist. Clearly they do. But it does mean that such criticisms as are made need to be placed in their overall context.

Secondly, it is also clear that each committee has become more critical of Australia's human rights performance than it had been in reports issued in the early 1990s. Although the earlier reports had canvassed similar issues, when the negative side of the ledger is considered it is apparent that every committee has concluded that Australia's fulfilment of its international treaty obligations has not been as effective or comprehensive as it had been in the preceding reporting period. The most obvious change that occurred between reports was the election of the Howard Government in

[17] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia. 01/09/2000. E/C.12/1/Add.50.

1996. It is unsurprising, therefore, that the Government should have reacted critically to the commentaries described.

Thirdly, the six committees' criticisms of Australia's human rights performance have strong common threads. The criticisms are not the product of a rogue member or two or even a rogue committee or two but have been consistent and concerted. Three such threads in particular stand out.

- Australia is criticised because, unlike many other Western nations, it has not entrenched human rights protections constitutionally and has not incorporated the provisions of a number of the Covenants in domestic law in a manner that would provide an individual whose rights had been infringed with an appropriate and accessible domestic remedy.

- Australia is criticised because it has not taken sufficient steps to ensure that the comparative disadvantage of and discrimination against its indigenous peoples is eliminated. In this regard, the significant differences between Aboriginal and non-Aboriginal people's standards of health, education and housing; the introduction of mandatory sentencing; the high rate of Aboriginal incarceration and the lack of effective reconciliation with and remedy for the members of the Stolen Generations were marked out consistently for adverse comment.

- Australia is criticised because of its treatment of people seeking asylum. The policy of mandatory detention of those requesting refugee status; the isolated and harsh circumstances of their detention; and the lack of legal and social entitlements afforded them, even after refugee status has been conferred, are subjects of deep concern. This is a level of concern, of course, that was expressed in the earlier period of the Government's tenure. Its later, tougher stance in relation to these matters and towards border protection more generally is likely to attract further, more intensive committee criticism.

Fourthly, and perhaps most interestingly in the light of the subsequent political imbroglio, none of the criticisms levelled by the Committees could be regarded as either surprising or particularly wide of the mark. Almost every expression of concern raised by the Committees has already been and continues to be the subject of intense political discussion and debate within Australia itself.

The present Government and many Australians may dislike the fact that the UN Treaty Committees regard Australia in several important respects as being in breach of its human rights treaty obligations, but the fact that this may be the case should come as no great shock to anyone. Regrettably, for the most part, the commission of these breaches has been the product of conscious government policy.

4. Australia's Response to UN Treaty Body Reports

4.1 The initial political reaction

The Australian Government's hostile response to criticisms made by the six UN Treaty Committees was the culmination of discontent that stemmed primarily from Mr Ruddock's appearance before the CERD Committee and gained momentum from that point onwards. The Government's first response was to announce a 'whole of government' review of the operation of the UN Treaty System as it affected Australia. The review was to be conducted by an inter-departmental committee and its conclusions and recommendations would be reported to the Cabinet for further action.

The connection between the review's initiation and Mr Ruddock's experience at CERD was made clear in the press release that announced it:

> …the Government was appalled at the blatantly political and partisan approach taken by the UN's Committee on the Elimination of All Forms of Racial Discrimination (CERD) when it examined Australia's periodic reports in Geneva last week. The Government approached the meeting seriously and in good faith, submitted detailed reporting on Australia's performance under the relevant Convention and fielded a strong delegation, led by the Minister for Immigration and Multicultural Affairs, Mr Ruddock. The Committee's response was disappointing in the extreme…(it) is based on an uncritical acceptance of the claims of domestic political lobbies and takes little account of the considered reports submitted by Government.[18]

Cabinet considered the report of the inter-departmental committee five months later. Regrettably, the review report has never been made public.[19] The treaty review, the Government said, had found that the UN human rights treaty bodies were in need of a complete overhaul. More specifically, it concluded that the treaty committee system required radical reform:

- to ensure adequate recognition of the primary role of democratically elected governments and the subordinate role of non-governmental organisations;

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[18] Minister for Foreign Affairs, Media Release, 'Government to Review UN Treaty Committees', 30 March 2000.

[19] The continuing secrecy attaching to the Report has been the subject of substantial adverse criticism, not least from the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade which remarked:

> At a public hearing on 19 May in Canberra, the committee requested a private briefing on the review and a copy of its terms of reference. Neither was forthcoming. The committee was disappointed that it was not given at least a private briefing, especially as the Government was aware of this inquiry. Some committee members believe strongly that, if the Government wanted to review Australia's interaction with the human rights treaty bodies, there should have been a full and open inquiry. (*Australia's Role in United Nations Reform*, Joint Standing Committee of Foreign Affairs, Defence and Trade, June 2001, pp 146-147).

- to ensure that committees and individual members worked within their mandates;
- to improve co-ordination between committees; and
- to address the inadequate secretariat resources for research and analysis to support the Committees' work.[20]

Cabinet decided that its co-operation with the treaty system would, from that point, be contingent upon the achievement of effective reform. It announced that the Government would take several additional measures to advance the reform agenda. It signalled a more robust and strategic approach to Australia's interaction with the treaty committee system to maximise the beneficial outcomes for Australia and to enhance the effectiveness of the system more generally. In that context, the initial package of measures designed to advance the Government's agenda was as follows.

- Australian reporting to and representation at treaty committees would be based on a more economical and selective approach where appropriate.
- Australia would agree to visits to Australia by treaty committees and the provision of information for the purposes of such visits only where there was a compelling reason to do so.
- Australia would reject unwarranted requests from treaty committees to delay removal of unsuccessful asylum seekers from Australia.
- Australia would not sign or ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which established a new complaints procedure.
- The Government would establish a standing inter-departmental committee jointly chaired by the Department of Foreign Affairs and Trade and the Attorney-General's Department to advance a program of reform. [21]

Addressing the UN General Assembly in September 2000, the Minister for Foreign Affairs, Mr Downer, summarised Australia's concerns and the reasons for its initiatives in these terms:

> Australia is a strong proponent of the universal application of human rights standards, committed to continued support for international human rights protection.
>
> We are concerned that the committees, established to monitor international compliance with human rights treaties, are losing credibility and effectiveness because of the way they operate…

[20] Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, Joint Media Release, 'Improving the Effectiveness of United Nations Committees', 29 August 2000.
[21] Ibid.

> Australia's review found that the committees need to adopt a more consistent approach to their role, and understand the pitfalls of simply accepting without analysis the submissions put before them by non-government organisations. It is important that adequate recognition be given to the role and views of governments which are democratically elected and which take their treaty commitments seriously. The committees need also to be more balanced and strategic about targeting key human rights offenders and avoid unfairly focusing their criticism on countries with good human rights records.[22]

4.2 A preliminary assessment of the Government's response

At the heart of the Ministerial response to the wide-ranging and consistent criticism by the UN Treaty Committees there lay a curious contradiction. On the one hand, it is clearly appropriate that the Government should take action to improve the operation of the human rights treaty system where its defects are readily identifiable. As shall be discussed in the next two sections, it has generally been accepted within and outside the UN that the system can and should be radically improved. On the other hand, however, the reasons provided by the relevant Ministers in favour of reform related principally to their dissatisfaction with the committees' criticisms of the Government's own human rights performance. Consequently, the practical measures announced appeared to involve greater disengagement from the system.

Similarly, there appeared to be an assumption underlying the Ministerial initiative that should the committee system be improved, it would follow inevitably that criticism of the human rights record of democratic nations like Australia would diminish. However, it is much more likely that a more efficient and probing committee review of the human rights performance of parties to the UN's major human rights conventions will result in better informed and even more searching critiques of Australia's compliance with its international obligations. These are threads to which I shall return presently.

The internally contradictory nature of the Government's position was noted by several observers at the time. The President of HREOC, Professor Alice Tay (a Howard Government appointee) expressed the matter pithily by noting that 'the purpose of reform must be to secure the international protection of human rights, not to undermine it'. She continued by expressing regret that the announcement of the whole of government review and the rejection of the CERD committee report had come just before the commencement of the Olympic games:

> In this Olympic year, the eyes of the world are on Australia. Our problems however are many. Indigenous people still live in the greatest poverty, have high infant mortality rates, shorter life spans, lower achievement levels in education and higher rates of incarceration than any other sector in society. The gap between the haves and the have-nots continues to widen; between information rich and information poor; opportunities and resources for regional and urban dwellers increasingly differ and new political actors attempt to manipulate these differences

[22] Minister for Foreign Affairs, *Keeping the United Nations Relevant: International Peace and Security, and Reform*, Statement to the 55th Session of the General Assembly of the United Nations, New York, 18 September 2000.

> to their own short-term advantage. While state and federal governments of all persuasions have endeavoured to remedy these problems, the fact remains that this is a major human rights challenge for the whole community.[23]

While clearly, the Ministerial statement contained its positive elements, close observers of Australia's human rights performance were concerned that this positive message had been outweighed by the defensive negativity of the statement. The consequence was that the wrong message had been telegraphed not only to a domestic audience but also to the international community. Professor Hilary Charlesworth, the Director of the Centre for International and Public Law at the Australian National University, for example, remarked that:

> (The Government) announced a scaling back of Australia's involvement with these committees. It did say that it was very interested in pushing reforms for the treaty monitoring bodies, and everybody knows that they are in need of reform. The way to reform them…is not by distancing Australia from them. I know from separate discussions with officers from the Department of Foreign Affairs and Trade that there are some high level diplomatic initiatives going forward about reform of the treaty bodies and I welcome those. I think they are creative, but the general tone of the press release has caused considerable alarm both within Australia and outside Australia. It was read as a statement from a formerly quite engaged member of the UN to be one that was really putting the UN on notice that, if the UN said too much about Australia, Australia would increasingly keep the UN at arm's length…it gave quite a lot of comfort to countries that, frankly, we would not want to be in the same group as.[24]

Well-respected international human rights organisations expressed similar reservations. The US based Human Rights Watch said that the Howard Government's decision to distance itself from the UN treaty system was particularly disappointing because in many areas Australia had been a champion of human rights. Like the US, however, Australia's support for human rights abroad had not always translated into good policies at home and it cited Australian Government anger over critical UN scrutiny of mandatory sentencing, the treatment of asylum-seekers and policies towards its indigenous peoples:

> The Australian decision on the UN is particularly unfortunate, because it will add a hitherto respectable voice to those of repressive governments seeking to undermine the international system for the protection of human rights.[25]

Amnesty International's spokesman was even more blunt.

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[23] Statement from the President of the Australian Human Rights and Equal Opportunity Commission, Professor Alice Tay, to the 56th Session of the Commission on Human Rights, April 2000.

[24] Professor Hilary Charlesworth, Evidence provided to the Joint Committee on Foreign Affairs, Defence and Trade (UN Sub–Committee), Reference: *Australia' Relations with the UN in the post Cold War Environment,* 21 March 2001.

[25] Sidney Jones, Asia Director, Human Rights Watch, Media Release, August 31 2000.

> I think it's an embarrassing overreaction that will only make Australia look silly. It hurts Australia's reputation and influence in the international community and it looks a bit like a tennis player refusing to play by the rules because it doesn't like the decision by the referee. It's 55 years hard work by Australian diplomats…building up the very treaty system which is now under attack by Australia. It is Australia which is electing people to sit on the committees. It's Australia which has given these committees clout. And now when the committees use their clout, Australia says "No, we can't have that".[26]

Since many similar reactions were voiced in response to the Government's announcement that it wished to reform the UN Treaty System, it became apparent that the positive side of its message had largely been marginalised, except perhaps in tabloid editorials. The principal reason was readily discernible. The key measures that had been announced appeared punitive rather than constructive, retaliatory rather than conciliatory. Brief consideration is now given to each of these measures.

4.3 The reform package unpacked

The first measure was that Australia would take a more 'economic and selective' approach to its reporting obligations under the six treaties. It is difficult to determine precisely what such an approach will involve. Looked at constructively, it may simply reflect the Government's intention to effect a rationalisation of reporting requirements by, for example, combining the six treaty reports into one consolidated document, thus avoiding undue duplication and overlap. It may perhaps mean that less expansive but more focused reports will be provided. In addition it may signal an intention to send fewer delegations from Australia to present reports before committees in oral hearings. This would leave the task of presentation to the less expert members of Australia's permanent mission in Geneva. All this remains to be determined.

More negatively, however, it appears already to have resulted in a 'go-slow' in the production of periodic reports with the next report to CEDAW, for example, being already two years late and the 2002 year end deadline for the next CERD missed. The use of the word 'selective' too suggests that the Government may elect to pick and choose the information to be provided with respect to Australia's compliance with its international obligations. This would represent a significant withdrawal of co-operation.

The more general problem, however, is that all of these changes proceed on the assumption that it is for Australia alone to determine what information it should provide to the UN committees and the format in which it should be provided. The reverse is the case. Each UN committee has quite explicit guidelines about the content required and the manner of its presentation. A failure to observe these guidelines represents a departure from Australia's commitment and obligation to abide by treaty rules.[27]

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[26] Heinz Shurman Zeggel, Amnesty Spokesman, Interviewed on the ABC's AM program, March 31, 2000.

[27] See to similar effect Evatt, Justice Elizabeth (2001), 'How Australia 'Supports' the United Nations Human Rights Treaty System', 12 *Public Law Review* 3; and 'Australia's Performance in Human Rights' 26(1) *Alternative Law Journal* 1.

The second measure announced was that Australia would agree to requests by UN committees and other human rights organs to visit and to the provision of related information only 'where there was a compelling reason to do so'. In practice, what this means is that the Australian Government's standing invitation for UN committees, commissions, and rapporteurs to visit appears to have been withdrawn. Every visit has now become the subject of negotiation and substantial delay. Negotiation over the timing of such visits will not always be inappropriate. For example, it seemed reasonable for the Government to suggest a deferral of the visit by the UN Working Party on Arbitrary Detention when that Working Party elected to arrive in Australia at almost the same time as the Olympic Games. But what is envisaged here appears significantly tougher.

For concrete evidence of such a hardening attitude one need look no further than the protracted negotiation and delay which characterised the Government's response to a request from the UN High Commissioner on Human Rights, Mary Robinson, for her representative to examine the conditions under which asylum-seekers have been mandatorily detained and the similar, earlier stonewalling and delay in relation to the visit of the UN's Rapporteur on Racism. This attitude was encapsulated by the Prime Minister, Mr Howard when, responding to a question concerning to the High Commissioner's request he said:

> Well, I'm not immediately bowled over by every request that comes from Mrs Robinson.[28]

From the point at which the request was made, it took almost five months for the visit of the Commissioner's representative, Justice Bhagwati, to be arranged. Requests by the UN Rapporteur on Racism and the Rapporteur on Toxic Waste to visit Australia to examine Australia's compliance with the relevant human rights and environmental conventions have been similarly finessed and set back.

The third measure announced was that Australia would reject unwarranted requests from UN committees to delay the deportation of people whose applications for refugee status have been rejected. This measure originated in the Government's concern that people seeking asylum in Australia may seek to delay their departure by lodging individual petitions with UN committees, arguing that their cases had not been dealt with in a manner consistent with Australia's obligations under international law. Where such a petition is lodged, it is open to the relevant committee to request the host country to take no further steps towards deportation pending a consideration of the petition. The Government's concern had been ignited in a case brought before the Committee Against Torture in which the Committee determined that the provisions of the Torture Convention had not properly been applied by Australian authorities. Consequently, the petitioner Mr Elmi, could face torture if returned to his home country of Somalia.[29] Subsequently, a number of other asylum-seekers had sought to approach the UN committees for requests that their deportation be stayed.

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[28] The Prime Minister, John Howard, interviewed on the ABC's PM Program, January 20, 2002.
[29] *Sadiq Shek Elmi v Australia*, Committee Against Torture, 22nd Session, Communication No. 120/1998, 25 May 1999, UN Doc CAT/C/22/D/120/1998.

The announcement that the Government would reject unwarranted requests for stays of deportation appeared again to represent a hardening of attitude. The Government's discretion in relation to matters of deportation would clearly be paramount and less weight than previously would be placed upon the existence and outcomes of UN committee deliberations in particular cases.[30] The danger, as the Elmi case cited so clearly demonstrated, is that where a mistake is made, the consequences of deportation for the person in question may clearly be dire.[31]

The fourth measure announced was that the Australian Government would not become a signatory to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. The Optional Protocol would have allowed Australian petitioners to approach CEDAW for the hearing and determination of individual complaints of discrimination that in the view of the petitioner had not properly been dealt with domestically. Of all the measures taken, this one was perhaps the most criticised. The Sex Discrimination Commissioner, Susan Halliday (a Howard appointee), criticised the decision and the fact that neither her office nor peak women's organisations had been consulted about it.[32] Peak women's organisations too were clearly upset and described the decision as a retrograde step.

The Foreign Minister, Mr Downer, defended the decision on the basis that in a democracy such as Australia's everyone could express their views, laws outlawing discrimination were in place and sanctions for their breach were more than adequate.[33] No further international recourse was, therefore, required. This was a view contested among others by Justice Elizabeth Evatt who for many years had been the independent Australian expert elected to CEDAW:

> It must, however, be disputed whether Australian law provides for remedies in every case covered by the Women's Convention. Even one case where the international procedure could throw light on an area of discrimination against women not covered by Australian law would make the Protocol worthwhile. By refusing to ratify, Australia has undermined this country's commitment to women's rights both here and throughout the world. There seems no real connection between this measure and the goals stated by the Government.[34]

This latter observation goes to the heart of the problem under discussion. The Government's avowed intention in its initial announcements concerning its relationships with the UN treaty system was to make that system more effective. Yet none of the

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[30] In a presentation before the Committee Against Torture that took place on November 16 2000, the Government informed the Committee that it would no longer automatically comply with requests for a stay but would instead examine each request individually and more closely prior to making the relevant decision: Summary Record of the first Part (Public) of the 444th Meeting: Australia – Second and Third Periodic Reports, Committee Against Torture, 25th Session, para 17, 21 November 2000, UN Doc CAT/C/SR.444.

[31] It is interesting to note in this regard that the Committee on Torture has rejected claims for delay of deportation in response to Australian Government submissions on more occasions that it has accepted them.

[32] Susan Halliday, interviewed on the ABC's *7.30 Report*, 29 August 2000.

[33] Alexander Downer, interviewed on the ABC's *7.30 Report*, 29 August 2000.

[34] *Supra* Note 25, at p.7.

measures just discussed is calculated to achieve that effect. Instead, in political, diplomatic and legal circles, the announcement was perceived domestically and internationally as defensive and destructive of what had formerly been regarded as a positive and co-operative relationship between Australia and the UN human rights system.

The immediate reason for the Government's hostility is not difficult to divine. As illustrated in the previous section, the Howard Government's performance in the human rights realm had been the subject of increasing, consistent and sustained criticism by the committees, particularly in relation to its treatment of Australia's indigenous peoples and those seeking asylum here. This is not to suggest that the committees' performance has always been flawless nor that their conclusions have invariably been correct. More will be said of this presently. But the problem areas have plainly been identified and the critical trend is clear. Not only that but this international criticism has mirrored precisely similar, escalating, domestic concern.[35]

In this situation the Government has two choices. Either it can acknowledge the validity of the international and domestic criticism, whether in whole or in part, and take action to improve its human rights performance or it can turn on the critics. Clearly, it has chosen to do the latter. In doing so it appears to have diminished the considerable goodwill it enjoyed previously at the UN and it may, initially at least, have caused some undermining of the international framework of human rights protection. Until recently, Australia's remarkably strong human rights record has acted as a beacon for other nations, particularly those in its immediate region. The withdrawal of co-operation that its recently announced measures represent, can serve only to provide succour to other nations with human rights records considerably less admirable than our own. As the Head of the United Nations' Treaty Section remarked upon the announcement of the initial governmental review:

> It is important to remember that criticism is not levelled for the sole purpose of criticising a country. The criticism is levelled for the purpose of improving in this case the human rights framework that is applicable to all countries in the world, and the ultimate loser would be the international human rights framework

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[35] As the former Human Rights Commissioner, Professor Chris Sidoti, remarked in evidence before the Joint Committee on Foreign Affairs, Defence and Trade:

> Over the last two years, Australia has been criticised repeatedly by every one of the six human rights treaty committees for shortcomings in our performance. Those shortcomings are not necessarily the performance of the present Australian Government. Many arise from historical factors the present Government inherited. But that fact does not take away from the defensive hypersensitivity of the present Government to criticisms when they have been delivered…. Not once has a treaty committee expressed a view on a particular Australian human rights issue that is at variance with the views expressed previously and repeatedly by the Australian Human Rights Commission itself and human rights groups within Australia. The simple fact is that if Australian governments had listened to the official body set up by the parliament to advise on these matters, then the international treaty committees would have had no cause to criticise Australia. It is very much a matter of blaming the messenger in the attacks we have seen on the treaty committees. (Joint Standing Committee on Foreign Affairs, Defence and Trade (United Nations Sub-Committee), Reference: *Australia's relations with the United Nations in the post Cold War Environment*, 22 March 2001, p.537.

> if a country were not to take such criticisms seriously…and necessary action taken domestically. [36]

4.4 The second stage reform initiative

In the furore that followed the Ministerial announcement of the Government's campaign for UN reform, a more positive component of its program was overshadowed. That component comprised the launch of a diplomatic initiative to achieve constructive reform of the UN committee system. The shape of this initiative was unclear at the time but was fleshed out six months later when the three Ministers met with the media again to inaugurate the second phase of the reform endeavour.

On the 5th April 2001 the Government announced a series of measures designed to advance its UN human rights reform agenda. The long term aim of this portfolio of initiatives was to achieve demonstrable improvements in the operation of the committee system and the 'cause of international human rights'. The immediate priority was to find ways to ease the administrative burden on committees and nations reporting to them. The key elements of the portfolio were as follows.

- A Ministerial meeting to be hosted by Australia at the time of the UN General Assembly in 2001 to stimulate the political momentum for reform.
- Three workshops over three years to look at practical ways of addressing key reform issues including the streamlining of the operation of committees, improving co-ordination between committees, and developing a more effective institutional framework to create a stronger and more responsive treaty monitoring system.
- A drive by the Australian Government to have an Australian representative elected to the UN Human Rights Committee.
- An endeavour to press for additional resources for the Office of the High Commissioner for Human Rights, including for the treaty bodies, from the UN core budget.
- A continuation of Australia's efforts to encourage countries in South East Asia and the South Pacific to sign and ratify the six core human rights instruments.

These measures, the joint statement concluded,

> …reflect Australia's commitment to achieving a human rights system that can better advance the cause of international human rights by targeting offenders and engaging more constructively in dialogues with countries which, like Australia, take their obligations seriously. [37]

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[36] Dr P. Kohorna, Head, Treaty Section, United Nations, interviewed on the ABC's AM Program, 31 March 2000.

[37] Minister for Foreign Affairs, Media Release, Australian Initiative to Improve the Effectiveness of UN Treaty Committees, 5 April 2001; and see further Interview with Minister for Foreign Affairs, 'Australia Softens Stand on UN Treaty System', on ABC's PM program, Thursday 5 April 2001

It is interesting to note in relation to this latter statement that the Government sought to draw a clear line of demarcation between countries it believed were involved in substantial abuses of human rights and other democratic nations whose human rights records required dialogue rather than condemnation. I return to this theme presently.

Australia was successful in its diplomatic campaign to have an Australian representative, Professor Ivan Shearer, elected to the Human Rights Committee. It has not convened the promised Ministerial meeting on treaty reform and appears unlikely to until at least September 2003. However, in June 2001 the Government did host the first of the three workshops foreshadowed in its statement. It is at these once yearly meetings that the principal work on effecting reform of the UN committee system appears to have been conducted.

The focus of this first workshop, convened in Geneva at the same time as the annual meeting of UN committee chairs and members, was on discussing practical improvements to committee operations. The workshop was attended by representatives from approximately 20 nations, most of whom were middle to senior ranking diplomats. In short it was concerned with promoting greater efficiency. The principal items on the agenda of the meeting were:

- the production of shorter, thematically constructed reports to each committee the length of which might be limited to 75-100 pages rather than the much more voluminous documents required when describing the reporting country's compliance article by article;
- better co-ordination of reporting requirements between committees to avoid the problem of duplication, overlap and documentary overload;
- the creation of greater flexibility in reporting procedures;
- the establishment of manageable time frames for the production of periodic reports and co-ordinated timing between committees to avoid reporting responsibilities to a number of committees falling due at the same time; and
- the initiation of measures to deal with the burgeoning problem of non-reporting by many states and late reporting by many more including, for example, the consolidation of reports where two or three had not yet been submitted.

The second workshop hosted by Australia took place in June 2002 with similar middle-level representation. The principal focus of discussion at this workshop was inter-committee consistency. A number of measures aimed at achieving greater procedural consistency were discussed, including:

- the provision by committees of prior notice of questions;
- shorter, more structured meetings permitting members, for example, to pose questions but not make statements;

- enhanced consistency of meeting procedures between committees so that reporting nations need not prepare differently for each;
- the definition of procedures for dealing with late reports including the possibility of proceeding to consider a country's human rights performance in its absence where no reports have been submitted;
- the writing of more focused Concluding Observations emphasising the relationship between criticisms made of country performance and precise treaty provisions; and
- the amalgamation of reports to committees including, for example, the possibility that a single report might suffice for all.

At the policy level, consistency was considered in relation to the following areas:

- the division of committees into country specific working groups to consolidate their knowledge and expertise;
- the establishment by committees of clear priorities in relation to the consideration of reports and action to be taken on them including, for example, the treatment of reports by urgency rather than chronology; and
- the creation of structured relationships between committees and between committees and other UN human rights agencies in order to maximise their knowledge of country specific situations.[38]

A number of points emerge from this brief consideration of the agenda pursued by these Australian convened workshops. First, the workshops have focused essentially upon procedural rather than substantive reform of the UN treaty committee system. It is unclear, therefore, how the workshops, helpful though they might be, are suited to meet the principal objections to the monitoring system raised by the Government following its sustained criticism by CERD.

Secondly, the workshops themselves have been constructed as a forum for discussion rather than decision-making. The idea is that like-minded nations can meet and discuss the problems they experience in common, together with committee Chairs and members when they are available. The exchange is no doubt valuable but its ultimate success relies principally on the committees themselves, and other human rights organs such as the UN High Commissioner for Human Rights, the UN Commission on Human Rights and the Economic and Social Council, taking tangible steps to alter the system. Sensibly, the workshops have been held at the same time as meetings of Committee chairs and there is likely therefore to be some carry over from workshop discussions to the deliberations of the Chairs and committees themselves. But the process is osmotic

[38] The information obtained in this section was provided in interviews with officials of the Department of Foreign Affairs and Trade and the Attorney-General's Department. See also Joint Standing Committee on Foreign Affairs, Defence and Trade, Reference on 'Australia's relations with the United Nations', Transcript of Hearing, July 2, 2002.

rather than concerted. Consequently, the contribution of the workshops is likely to be modest at best.

Thirdly, the workshops involve discussions by middle-ranking diplomatic representatives. Their influence may be considerable but their clout must be doubted.

Fourthly, then, it is not apparent from the Government's twin announcements, how exactly it proposes to achieve the 'complete overhaul' of the committee system that it has foreshadowed. While the small steps taken to improve Australia's engagement with the system are welcome they have not yet advanced matters very far and are unlikely to. Certainly, the positive components of the reform program pale into insignificance by comparison with the measures taken at once to denounce and disengage from the system. It is reasonable to conclude, therefore, that there is more than a strong element of window-dressing in the workshop exercise. This evident contrast between minimal engagement and substantial disengagement is pursued in more detail in the section which follows.

5. Australia's Case for the Reform of the System

5.1 Introduction

In April 2001, the Canadian academic Professor Anne Bayefsky, produced a comprehensive report on the UN Human Rights Treaty System commissioned by the UN High Commissioner for Human Rights. The 250 page report, entitled *The UN Human Rights Treaty System: Universality at the Crossroads*, contained a comprehensive analysis and critique of the operation of the UN System including the operation of its treaty monitoring committees.[39] In her report, Professor Bayefsky identified a number of critical defects in the UN's institutional mechanisms for the promotion and protection of human rights. The most important for the purposes of the discussion in this paper were the following.

- There remain considerable lacunae in member states' participation in the treaty system. Significant numbers of states had not ratified the six relevant treaties and an even greater number had not ratified the individual complaints procedures. Countries in the Asian region had fewer ratifications for each treaty than nations from any other regional group.

- The participation of States' parties in the treaty system equated only distantly with their adherence to the substance and procedures of the treaties. In other words, signing on to the treaties did not mean that nations complied with the obligations assumed in accordance with them.

- There were major problems associated with the effective implementation of the treaties. Some of the critical difficulties associated with the subject matter considered in this paper, for example, were that states failed to create national mechanisms for treaty implementation, failed to produce country reports, failed to produce adequate reports and failed to remove impermissible treaty reservations. In turn, the committees themselves had failed to consider reports in a timely manner, lacked comprehensive information on which to base their opinions and the resources to generate them, produced inadequate concluding observations, failed to encourage individual complaints and failed to follow-up recommendations that had been made for improvements in national human rights performance.

- There existed an almost unbridgeable gap between universal rights and remedies. As to this latter problem, Professor Bayefsky opined that:

  If rights are not followed by remedies, and standards have little to do with reality, then the rule of law is at risk. The extent of shortfalls in the implementation of treaties now threatens the integrity of the international legal regime. Ratification for a very large number of participants in the treaty system

[39] Bayefsky A (2001), *The UN Human Rights Treaty System: Universality at the Crossroads*, Report prepared for the UN High Commissioner on Human Rights, April 2001, available on the web at www.bayefsky.com.

> has become an end in itself. The large number of ratifications reflect the widely-held view by states that there are not serious consequences associated with ratification. The price of joining has generally been appearing relatively infrequently, before a small number of individuals, in comparatively remote sites in Geneva and New York, for a brief period of time taken up by frequent monologues by state representatives or committee members. Many states parties ratified precisely because the international scheme was evidently dysfunctional and the lack of democratic institutions at home made the likelihood of national consequences comfortably remote.[40]

The Minister for Foreign Affairs was quick to highlight those aspects of the report that appeared to support his case for UN treaty committee reform. The report, his media release stated, had made clear the burgeoning problem of reporting, the absence and late submission of reports by many state parties, rudimentary follow-up action by the committees themselves and a disproportionate focus on the human rights conditions of some countries, notably Western countries, as opposed to others in which it was well-known that large scale human rights abuses occurred. Professor Bayefsky's report, the Minister concluded:

> provides a most useful analysis of the problems facing the UN treaty committee system. Many of the suggestions she made for improving this situation could be discussed at the three workshops Australia will convene over the next three years and the informal Ministerial meeting we will host…in the margins of the United Nations General Assembly.[41]

As will be demonstrated in the body of this section, this was a politically opportunistic statement, selectively choosing those aspects of a comprehensive and wide-ranging report on the UN system focussed on strengthening the UN human rights system substantially. In the body of the report, many of the arguments put forward by Australia as justifying its stance are clearly dismissed and Professor Bayefsky herself expressed dismay at the political use made of her work by the Government[42]. Having said this, however, the Bayefsky report demonstrates beyond doubt that the UN treaty committee system is in urgent need of reform and in so far as the Australian Government supports that general position it should be given credit. In the following section the Australian Government's particular criticisms of the UN Treaty Committee system are described and evaluated.

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[40] Ibid p.7.

[41] Minister for Foreign Affairs, Media Release, 'Australia's Criticisms of the UN Human Rights Committee System Validated by New Report', 21 May 2001.

[42] Quoted in the *Sydney Morning Herald* in an article by Mark Riley, 'No excuse for Howard's UN attack', 23 June 2001, Professor Bayefsky said:

> if democratic countries like Australia don't take a leadership role in responding to the very findings of violations against them, then how can they expect other countries with much worse records to do better?

5.2 Assessing Australia's criticisms of the treaty system

The Howard Government has levelled four principal criticisms at the UN's human rights monitoring committees. First, the committees have exceeded their mandates in their concluding observations on Australia's conformity with its international obligations. Secondly, the committees have tended to give too much weight to the voice of non-governmental organisations critical of the Government's stance. Thirdly, the committees have been biased in their approach to Australia. Fourthly, the committees have focused too much attention on criticising countries with good human rights records and not nearly enough on countries where records are considerably worse. Finally, criticism from the committees is misplaced when it is directed at democratic nations. I examine each of these propositions in turn.

(i) Exceeding the mandate

Since the Australian Government has not responded formally, except by media release, to any of the concluding observations of the UN Committees described in Section 3 it is difficult to determine the precise foundation for this criticism. There are, however, a number of matters that may properly be considered in this regard.

The Government was aggressive in its criticism of the CERD committee for venturing upon the subject of Australia's obligations under the 1951 Refugee Convention.[43] In its observations the Committee had had the temerity to recommend that Australia 'faithfully implement its obligations under the Convention as well as under the 1967 protocol thereto, with a view to continuing its co-operation with the UN High Commissioner for Refugees and in accordance with the UNHCR's Handbook on Refugee Determination Procedures'.[44] This recommendation is timorous and is largely meaningless when couched in such general language. It is difficult therefore to see why it should have provoked such stern criticism except by reference to the Government's self-evident preoccupation with respect to the asylum-seeker issue.

Nevertheless, the Government's underlying criticism in the particular case seems justified. The Committee made no explicit link between its mandate in relation to the elimination of racial discrimination and Australia's policies and practices with respect to the processing of asylum-seeker claims nor did it provide any reasoned justification for its recommendation. Its comments therefore travelled further than they should have. Many similar examples have been cited by other authors in relation to commentary on country reports apart from Australia's.

The particular example is illustrative of a more general problem with the form of concluding observations presently adopted by the UN Committees. Even a cursory reading of most of the observations is enough to demonstrate that the committees generally do not tend to relate their specific criticisms of a country's performance to the particular provisions of the treaty in relation to which a breach is said to have occurred.

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[43] Minister for Foreign Affairs, Media Release, 'Government to Review UN Treaty Committees', 30 March 2000; and see further Attorney-General, News Release, 'CERD Report Unbalanced', 26 March 2000.

[44] Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 19/04/2000. CERD/C/304/Add. 101, para 17.

Rather, the committees tend to respond in brief and quite general terms to the report and oral submissions put to them by a country's delegation. Their recommendations are cast in similarly broad terms. While this approach may be viewed as consistent with the general object of the committee process, which is to engage the country under examination in a constructive dialogue in relation to the performance of its treaty obligations, it leads often to overly generalised commentary and recommendation and, at times, to responses, as in the case under discussion, that may not be directly relevant to the committees' specific charter.

In her report, Professor Bayefsky notes that often concluding observations 'are couched in extremely general terms, thereby frustrating all participants interested in using them to advocate, or plan, or implement reforms at the national level. Too often they identify areas of concern without specifying specific laws or practices or connecting these concerns to specific recommendations.' She also notes that some committees, partly as a result of this lack of specificity, produce recommendations that step beyond the boundaries of treaty provisions.[45]

These criticisms could effectively be met if the committees ensured that:

- their observations related directly to and reflected the principal matters discussed with the state concerned;
- took care to frame their conclusions in the context of the observance or breach of specific articles of the relevant treaty; and
- framed their recommendations in terms that gave concrete guidance as to the measures of rectification that are required to ensure the state's compliance with its international legal obligations.[46]

(ii) The role of non-governmental organisations

Australia has been sharply critical of committees for relying too heavily on submissions made to them by national and international non-governmental organisations affiliated with the UN and too lightly on the reports and representations of government. It appeared particularly stung by the influence it attributed to organisations representing the interests of indigenous peoples in relation to the CERD Committee's conclusions. Here it is difficult to disentangle the issue as to the proper weight to be given to the submissions of non-governmental human rights organisations from that of the Government's belief that the committee sided unfairly with its critics. As Professor

[45] Bayefsky A (2001), *The UN Human Rights Treaty System: Universality at the Crossroads*, p.68.
[46] See to similar effect Bayefsky A *supra note 27;* Alston P (1997) *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, Economic and Social Council, United Nations, E/CN.4/1997/74; Bank R (2000) 'Country-oriented Procedures under the Convention against Torture: Towards and New Dynamism' in Crawford J and Alston P (eds) (2000) *The Future of Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press; Gallagher A (2000) 'Making Human Rights Treaty Obligations a Reality' in Crawford J and Alston P (2000) *The Future of Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press; Buergenthal T (2003) 'The Human Rights Committee' in Alston P (ed) (2003) *The United Nations and Human Rights*, Oxford: Clarendon Press.

Hilary Charlesworth said in her evidence to the Joint Committee on Foreign Affairs, Defence and Trade:

> The thrust of the press release (of August 30) was that the treaty bodies not only needed reform but that they needed reform because they are criticising Australia a bit too much…There was the implication that somehow criticism of democratically elected governments verged on the improper…I think non-government organisations…play a crucial role in bringing to light issues that even democratically elected governments might want swept under the carpet.[47]

I deal here not with the Government's concern with international criticism but rather with the more specific issue of the role that non-governmental organisations should play in UN committee deliberations. On this question there appears to be, if anything, an emerging consensus that international non-governmental human rights organisations and national human rights commissions ought to play a greater rather than lesser part in committee proceedings than they do at present. To this end the Bayefsky report quoted so favourably by the Government, concludes for example that:

> The treaty bodies have been heavily dependent on information from NGOs in preparing for the dialogue with state parties. State reports are self-serving documents which rarely knowingly disclose violations of treaty rights…Furthermore, NGOs from the national level continue to have unique information on the application of treaties to the domestic context.[48]

On this basis Professor Bayefsky argues that NGOs should be much more integrally involved in the dialogue between the committees and state parties. She proposes a partnership between the two to facilitate a greater understanding and awareness of the relevant human rights standards; a review, both nationally and internationally, of laws policies and practices against those standards; planning to improve any failure of international obligations exposed; and monitoring the implementation of national human rights planning. Recommendations of this kind are echoed universally by independent commentators on the system but are a far cry from the complaint and consequent solution proposed by the Australian Government, that is that NGOs should have less input and democratic governments more.[49]

Nevertheless, if international and national NGOs are to be accorded a more prominent role in providing an alternative source of information about countries' compliance with their human rights obligations, it would seem reasonable to ensure that the process through which such information is received and considered be formalised and procedurally fair. There are several significant problems about the way in which

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[47] Professor Hilary Charlesworth, Evidence to the Joint Committee on Foreign Affairs, Defence and Trade, 'Review of Australia's Relations with the United Nations', 21 March 2001.
[48] Bayefsky A *supra* Note 21, p.46.
[49] See for example Bayefsky A (1994) 'Making the Human Rights Treaties Work' in Henkin L and Hargrove J (1994) *Human Rights: An Agenda for the Next Century,* Washington DC; Alston P (1997) *supra* Note 28; Clapham A (2000) 'UN Human Rights Reporting Procedures: An NGO Perspective in Crawford J and Alston P (2000) *The Future of UN Human Rights Treaty Monitoring, supra* Note 28; Gallagher A (2000) in Crawford J and Alston P (2000) *The Future of UN Human Rights Treaty Monitoring, supra* Note 28.

committees acquire and deliberate upon NGO submissions at present. The most significant appear to be that consultation with NGOs tends to be ad hoc rather than formal; often addressed to individual members rather than to committees as a whole; addressed to specific issues within the expertise of the particular NGO rather than to a country's human rights performance at large; and conducted whether orally or in writing without the opportunity for reply by the states concerned. Consequently, the accuracy and cogency of this input may often be affected adversely. This is because a committee or its members may be influenced by informal information haphazardly presented; by special interests reflecting a commitment to specific human rights issues to the exclusion of a more general overview; and by information that is neither directly relevant to its central concerns nor tested against competing opinion.

The answer then is not to dismiss the valuable contribution that NGOs can and should make but, rather, to structure their input appropriately. Such a restructuring should involve, among other things, the development of open and transparent processes and procedures through which NGOs may place their views on the committee record; an invitation to NGOs to participate but in a manner that encourages them to take a holistic view of a country's human rights performance, for example through the production of 'shadow' country reports; explicit consultation with national human rights commissions such as HREOC; and the development of appropriate mechanisms through which state representatives may respond to the criticisms expressed.

(iii) Committee bias

The accusation of bias appeared to stem again from the Government's anger at its treatment at the hands of the CERD committee. The Committee's report was described as partisan and political. In his media release the Attorney-General characterised it as 'an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs'.[50]

There were a number of distinctive threads to the Government's criticism. The suggestion that too much reliance was placed on the submissions of NGOs has been dealt with in the previous section. The Government argued that the Committee's conclusions were wrong and it inferred not inaccuracy but prejudice as a result. It expressed considerable resentment and ire at the criticisms levied by the Committee at policies related to mandatory sentencing, the Stolen Generations and Aboriginal reconciliation. That ire was heightened by its lofty assertion that its self-awarded exemplary human rights record had been drawn into question in a high-level international forum.

None of these particular threads, however, is conclusive of bias. And, on the basis of the Government's public protestations, it is difficult to discern how the specific allegation is made out - except by assertion. It is one thing to dispute a committee's conclusions. It is quite another to attribute disagreement to political partisanship without further evidence or justification.

[50] Attorney-General, Media Release, 'CERD Report Unbalanced', 26 March 2000.

The self-evident reality is that there was nothing in the CERD committee's report that had not been the subject of similar debate and disagreement at home. Policies of mandatory detention have been highly contentious. The absence of any meaningful reparation for the 'Stolen Generations' has been the cause of great divisiveness. The process of Aboriginal reconciliation appears at best to have stalled and at worst to have failed entirely. The Government's amendments to the Native Title Act have attracted powerful support and heated condemnation. Every one of these policies and processes has been criticised by Australia's peak governmental human rights body, HREOC. The former Human Rights Commissioner put the matter succinctly in evidence to the Joint Committee on Foreign Affairs, Defence and Trade:

> There has not been a single issue on which Australia has received criticism from a treaty committee that has not previously been the subject of criticism by the Australian Human Rights Commission and by human rights bodies within Australia. The committees have not gone off on frolics of their own, fabricating issues to embarrass Australia…but rather have simply reflected the already repeatedly established views of existing bodies on those issues of human rights concern.[51]

It may be that such a comment would have been expected from one so actively involved in the promotion of international human rights law. But even the former Liberal Prime Minister, Mr Malcolm Fraser, weighed tersely into the debate, accompanied by other well-respected judges and lawyers. In a recent speech Mr Fraser remarked:

> It is overwhelmingly in our interest to assist the UN and its instrumentalities in establishing a rule of law which internationally can apply to the great and powerful, just as the rule of law can apply to the great and powerful in Australia. Our activities in recent times have diminished Australia and damaged the UN. On both accounts it is unfortunate…I have read the comments contained in the report of the Committee on the Elimination of Racial Discrimination. If those comments had been made by any person in Australia, the government would have had to regard them as reasoned and thoughtful. They were not offensive.[52]

The Minister for Foreign Affairs, in his media release of 21 May 2001, called on the Bayefsky report for aid in making the allegation of bias. A close reading of the relevant section of the report, however, reveals a much more complex and significantly different understanding of the issue. Professor Bayefsky does say that some committees, and in particular CERD, have treated similar countries in different depth 'in the absence of corresponding justification in terms of human rights conditions'. Clearly, where differentiation of this kind occurs without apparent reason, it should be eradicated and the measures she suggests would make a substantial contribution towards removing the problem. However, as Professor Bayefsky also acknowledges, it is difficult to disentangle the politics of differential depth of treatment from the problem of inadequate and unequal knowledge among committee members of the conditions in the

[51] Professor Chris Sidoti, Evidence to the Joint Committee on Foreign Affairs, Defence and Trade, Reference on 'Australia's Relationship with the United Nations', 22 March 2001.
[52] Fraser M (2000) *The Past We Need to Understand*, 5th Vincent Lingiari Memorial Lecture, Darwin, August 24, 2000, p. 10.

many countries that appear before them. That some reports should canvass failings in human rights observance more deeply in certain countries familiar to the members than in others less familiar, and that in some cases committee members will be influenced more forcefully than they should be by sources external to official governmental reports and oral submissions should come as no surprise. However, this latter is not conclusive of political bias but is, instead, suggestive of the need for better educational, professional and technical support for the committees in the conduct of their inquiries.

Reading the Bayefsky report as whole, it is evident that her principal concern in relation to bias does not relate, for example, to that which might concern the prejudices of East against West, or West against East to characterise one possible source broadly. Rather, her concern is properly with that bias on committees that is generated by the over-representation of governmental officials as opposed to independent experts among their membership. This bias towards government has never been mentioned in Australian dispatches. Yet, as Bayefsky observes, an average of 50 per cent of persons elected to treaty bodies were employed in some capacity by their governments, a figure that excludes members of the judiciary, tribunals or arms-length commissions and committees. There is no doubt, she concludes, that:

> this large proportion of members with direct government affiliation has affected the work of treaty bodies. In terms of appearances, members have met socially with government representatives following the dialogue but prior to the adoption of concluding observations; during treaty body sessions some members…are seen to report to missions at frequent intervals; members serving as country rapporteurs (who have a greater input into the production of concluding observations) are not infrequently from states with close ties to the state party being examined.[53] Substantively, the large proportion of the membership with close government ties has affected the consideration of state reports in the context of the questions posed, the selection of states parties for exceptional consideration, and the substance of concluding observations.[54]

Given that, according to their charter, committee members are required to be of high moral character, recognised competence in human rights or in the field covered by the Convention, of acknowledged impartiality and to serve in their personal capacity, then the bias associated with the over-representation of governmental officials is clearly a problem that requires urgent attention. One hopes that the Australian Government, in the course of its reform endeavours, will advance this view as forcefully as it does its assertion of political partisanship.

(iv) Excessive attention to the record of democratic nations

An important, persistent thread throughout Australia's criticisms of the treaty body system has been that the system has focused far too heavily on criticising the human rights performance of countries with sound democratic and human rights credentials and far too little on countries where human rights abuse is well known. The Australian

[53] It is interesting to note in this regard that the rapporteur for the CERD committee, whose report was the object of such scorn from the Australian Government, was from the United States.
[54] Bayefsky, *supra*, Note 21, p.109.

Government's response to international criticisms of its human rights record is often to dismiss it by reference to more gross abuses experienced elsewhere:

> Well, if you're comparing it (Australia's record) with arbitrary arrest, detention and execution and having your arms chopped off for belonging to the wrong political party, almost every issue in Australia pales into insignificance.[55]

This defence is linked with the related assertion that Australia's human rights performance should be regarded as beyond question internationally because its political system is democratic and its legal system is characterised by the rule of law.

> …in the end most of these issues, indeed all of them, in the eyes of most Australians, should be resolved in Australia. The question of whether the current state of native title law in Australia is fair to all Australian people, that's a matter that I think should be resolved in Australia by the representatives of the Australian people, democratically elected, and that is what has happened. It isn't really the business of a UN committee when we clearly have a democratic system in this Government (sic) and everybody's given an opportunity to put their view. It's not really the business of a UN committee to come along and say 'we think that's wrong, even though your parliament has agreed to it and we think you ought to change the law.[56]

Taken to its logical conclusion, this argument would suggest that any and all democratic countries should be exempted completely from the requirement to comply with international human rights law. One would hope that such a conclusion was not intended.

Nevertheless, both criticisms deserve to be addressed. It is plain that less attention is paid by committees than it should be to countries which abuse widely the human rights of their peoples. This is principally because such countries have not ratified international human rights conventions and so fall outside the UN committees' jurisdiction. Similarly, many countries which have ratified one or more of the treaties fail to act on their obligations under them, for example, by not providing the committee reports required. This widespread non-reporting has the perverse effect of rewarding countries that flout their obligations, since their performance is not reviewed, while penalising countries like Australia, which act in substantial compliance with their reporting obligations.[57]

It needs, however, to be borne in mind that another important reason for non-reporting or late reporting is that many developing countries which have ratified the conventions lack the resources to produce reports, particularly with the level of detail required of them. There appears to be a strong correlation between the number of overdue reports and the level of economic development in the states parties concerned.[58] It follows that

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[55] The Attorney-General, Daryl Williams, interviewed on the ABC's PM program, August 29, 2000.
[56] The Prime Minister, John Howard, interviewed on the ABC's *7.30pm* program, August 30, 2000.
[57] See Alston P (1997) *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments, supra* Note 28, p.15; Bayefsky (2001) *supra* Note 21, p.12.
[58] Bayefsky (2001) *supra* Note 21, p.9.

these countries should be provided with greater financial and expert assistance in the preparation and presentation of their reports. There is no record of Australia having been willing to assist in this regard. Clearly, too, a system of sanctions should be developed for countries which fail deliberately to report and strenuous endeavours should be made to increase the number of ratifications of international human rights instruments. The endorsement of sanctions has not yet appeared on the Government's reform agenda. It has, however, stated its intention to encourage further ratifications among countries in its immediate region. No indication whatever has been given of how this might be done and in the context of its recent statements with respect to naval intervention to turn back asylum-seekers and a doctrine of unilateral pre-emptive strikes against terrorist targets in neighbouring countries, the cause is likely to have been set back significantly.

It is understandable that democratic nations like Australia might be irritated at the consequent disproportionate attention paid to their human rights performance. However, it does not follow at all that the presence of democracy entitles Australia to any form of special treatment or advantage. In and of itself majoritarian democracy provides no guarantee against human rights infringement. Where, then, such infringements are identified, it is entirely appropriate that the monitoring bodies established under international laws to which Australia has freely acceded, should direct the relevant Government's attention to them and request that they be ceased and redressed. Further, many Western democratic nations, including Australia, have not exactly been ideal UN citizens themselves. As Professor Philip Alston has observed:

> The problem with this sort of analysis is that many of the democratic states…have steadfastly resisted the strengthening of the system…have refused to withdraw reservations subject to sustained challenges, have prevented additional resources flowing to the system, have themselves failed to report for a decade or longer, have refused to heed all of the recommendations directed at them, or have refused to accept some or all of the various international complaints procedures.[59]

Regrettably, there is not a single one of these criticisms that does not apply to the actions of the present Australian Government.

Further, criticism by UN committees may have the effect of encouraging democracy in those countries that are inclined towards it. This enterprise is in no way assisted by strongly stated assertions that existing democracies are, in some way, above international rebuke.

Finally this argument for 'democratic exceptionalism' is profoundly corrosive of the universality which should and must properly characterise the international human rights system.[60] The better and more principled position should be that because of their foundational belief in democracy, the rule of law and the fundamental importance of

[59] Alston P (2000) 'Beyond 'them' and 'us': Putting Treaty Body Reform into Perspective', in Crawford J and Alston P (eds) (2000), *supra* Note 28, p.520.
[60] See Otto D (2001) 'From 'Reluctance' to 'Exceptionalism': The Australian Approach to Domestic Implementation of Human Rights', *Alternative Law Journal,* 26(5), p.219.

human rights, nations like Australia should take the lead, internationally and universally, in strengthening the observance of human rights and the institutional mechanisms designed to achieve that end rather than taking bats and balls and retiring to the sidelines. In its review of Australia's relationship with the UN, the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, after considered deliberation, reached a very similar conclusion:

> The committee believes that it is this unwillingness on the part of states where violations are rife that behoves more open countries like Australia to demonstrate that openness and scrutiny is both tolerated and tolerable. Some members believed that, in its reaction to treaty body criticism in March 2000, Australia did not do this.

Quoting Professor Sidoti, the Committee concluded that:

> One of the reasons why Australia historically has had a good reputation in UN human rights circles is that we are seen as having been more honest than most. Australian representatives, on behalf of our government, repeatedly have been prepared to talk about our shortcomings. The best way to ensure fair treatment by treaty committees…is to ensure that our country report is honest, balanced and represents a range of views about particular issues.[61]

[61] Parliament of the Commonwealth of Australia, Joint Committee on Foreign Affairs, Defence and Trade, *Australia's Role in UN Reform*, June 2001, p.149.

6. The Wider Case for UN Treaty Body Reform

6.1 Further observations on the Government's reform agenda

The analysis in the previous sections of Australia's criticisms of the UN Treaty Body System lead one to a number of conclusions. There is some substance to the concerns expressed by the Howard Government. Too often, however, the analysis upon which these concerns are founded is partial, incomplete and regrettably self-serving. Further, the prescriptions that derive from the analysis are in practice unlikely to have any significant impact in addressing the most important, underlying problems that beset the system. This is pre-eminently so when the prescription, as in the case of the advancement of a form of 'democratic exceptionalism', tends towards Australia's disengagement from the system rather than in favour of its more intensive participation in pursuit of a more independent and effective international human rights monitoring regime. This tendency towards exceptionalism and disengagement has been the subject of widespread domestic and international criticism, not least by the UN's High Commissioner for Human Rights, Ms Mary Robinson, who remarked that:

> I believe that there is room for further improving the international treaty body system. I'm the first to say that I would welcome support for greater resourcing and greater opportunity to improve the quality of the work of treaty bodies. But the universality of the whole approach is a very important principle. So, in a way, the UN itself is putting forward the reform and strengthening of the system and the importance of the universality of it. I think, therefore, that it would be tragic if a country like Australia, because it has been criticised by a treaty body, should respond in an over defensive way… Australia, up to now, has had a very good record. [62]

Ms Robinson's sentiment has been echoed within Australia by the Joint Committee on Foreign Affairs, Defence and Trade. Concluding its examination of Australia's participation in the UN's human rights committee system, the Committee urged the Government to adopt a leadership role that was forceful, constructive and engaged:

> Australia, as a democratic country committed to open debate, should demonstrate by example its belief in the validity/legitimacy of the international scrutiny of human rights by encouraging other member states to ratify the conventions and participate fully in the processes of the Human Rights Commission; by supporting financially the Commission and its committees; and, in particular, by accepting as legitimate, the right of committees to criticise all governments in the system. Of course, it is also the right of governments to reject such criticism. [63]

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[62] Mary Robinson, UN High Commissioner for Human Rights interviewed on the ABC's *7.30 Report* program, 29 August 2000.
[63] Parliament of the Commonwealth of Australia, Joint Committee on Foreign Affairs, Defence and Trade, *supra* Note 42, p.153-154.

The Committee recommended therefore that the Government encourage member states to provide significantly increased funding to the UN treaty bodies and to pursue their reform positively and constructively with all the member States of the UN.

Lastly, by way of introduction to the wider reform of the system, it needs to be observed that with one minor exception the Howard Government has not adopted the practice of responding formally to the committees' conclusions.[64] It has confined its responses to media releases attacking the treaty system and aspects of committee reports. Most remarkably, in not a single instance has it accepted the substance or legitimacy of any of the committees' criticisms or concerns. It should come as no surprise, therefore, that Australia's reputation as being in the vanguard of the enhancement and protection of human rights has been significantly diminished internationally.

None of this, however, detracts from the argument that the UN treaty body system is in urgent need of reform. The essential question, then, is what shape this reform should take. There have been many studies of this question of which the Bayefsky report is the latest and most comprehensive. Their conclusions cannot possibly be synthesised and summarised here. What follows, therefore, is a thumbnail sketch of the fundamental problems that beset the system and some broad-brush suggestions about how these might most appropriately be addressed. Its purpose is to place the preceding discussion in context and to provide a suggested direction for change not only to government but also to others in the Australian community with a shared interest in the pursuit of an enhanced institutional framework for the implementation of international human rights law.

6.2 The core problems

The monitoring Committees established to act as guardians of the human rights treaties to which they relate have three principal functions. They request and consider State reports, they receive and consider State communications and they receive and make recommendations with respect to individual complaints. Speaking generally, the purpose of the monitoring process is to create a dialogue between the Committees and States parties with a view to improving the latter's levels of compliance and reducing the need to resort to State or individual complaints. The purpose of the communications process is to attempt to resolve State and individual complaints concerning alleged infringements of treaty provisions.[65]

The monitoring process established differs from a judicial one in several important respects. [66] The Committee members are elected by the States parties and are supposed to serve as 'experts' in their individual capacities. Most have a particular expertise in international human rights law but the degree to which they act independently of the

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[64] The Australian Government provided an official interim response of one page to the Human Rights Committee's report which stated that the Government was 'giving careful consideration to the views of the Committee' and would provide a detailed response 'as soon as possible.' Apparently, the Government has since provided a more detailed response but this has not been made public.

[65] See Alston P (1992) 'Critical Appraisal of the UN Human Rights Regime' in Alston P (1992) *The UN and Human Rights*, Oxford: Clarendon Press.

[66] See further Cassese A (1986) *International Law in a Divided World*, Oxford: Clarendon Press, Chapter 8.

views of their sponsoring governments varies. Except in the case of individual complaints, an aggrieved party does not initiate proceedings. Instead, a discussion takes place founded upon the periodic progress reports the Committees require States parties to tender. With very limited exceptions, oral evidence is taken only from the State party whose report is being considered. Those who advocate an opposing perspective such as international and domestic human rights NGOs may, before certain committees, submit written comments on a party's report but are not generally invited to speak. The outcome of the process does not involve the making of rulings or determinations. Rather, it consists of a written response by the Committee to the relevant State report together with generally stated observations and recommendations for further action. No clear mechanism has been developed to follow-up Committee observations and recommendations.

The procedures for the receipt and determination of individual complaints, for example under the Optional Protocol to the ICCPR, also possess features that depart significantly from the judicial or quasi-judicial.[67] Committee members serve part-time and not infrequently hold senior positions with the national government by which they have been nominated thus creating potential conflicts of interest. The Committee deals with individual complaints only on the basis of written submissions. These are provided solely by the parties. Committee meetings on complaints are held in camera and the pleadings are regarded as confidential. The Protocol contains no explicit provisions about the effect of the Committee's legal views or about any remedy that may be afforded.

It will be apparent from this brief comparison that Committee monitoring procedures fall well short of those which would normally be considered appropriate for securing States' compliance with their international treaty obligations and hence with a 'thick' rule of international law. Similarly, the protocol procedures are quite inadequate to achieve the transparent, fair and effective resolution of individual human rights complaints. This is not altogether surprising. The entire system is one that represents a compromise between those states that, at the time the system was devised, favoured strong international measures and those that emphasised the primacy of national sovereignty and responsibility. Consequently, there was never any question that an international judicial system should be established to hear and determine human rights disputes. Instead, a process of reporting, monitoring, individual complaint and recommendation was established. The compromise has clearly brought significant problems in its wake.

To this catalogue of difficulties a number of political and administrative deficiencies may also be added.[68] The effectiveness of the monitoring procedures has been hampered significantly by many States' recalcitrance and tardiness in producing their periodic reports. The Committees themselves have been starved of adequate time and resources to undertake their supervisory functions in the detail and with the seriousness they

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[67] See Steiner H (2000), 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee', in Alston P and Crawford J (eds), *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press.

[68] See Crawford J (2000) ' The UN Human Rights Treaty System: A System in Crisis? In Alston P and Crawford J (eds) *The Future of UN Human Rights Treaty Monitoring.*

demand. Committees have been reluctant to engage in trenchant criticisms of States, even where such criticisms may be appropriate, for fear of alienating not only the particular States concerned but others whose cooperation is valued or whose entry into the system is desired.

The individual complaints procedure has had similar problems in attracting reasoned and helpful responses from States complained against. There is a considerable backlog of cases to be considered which, because of the delay, lessens significantly the impact of any written views it may express in any individual case. Most significantly, the disparity between the well-known extent of human rights violations that occur across the globe and the veritable trickle of petitions received under the complaints procedure provides ample evidence that it lacks credibility and impact.

Taking all this into consideration, Professor Bayefsky summarised her conclusions regarding the present state of the system in the following terms:

> The gap between universal right and remedy has become inescapable and inexcusable, threatening the integrity of the international human rights legal regime. There are overwhelming numbers of overdue reports, untenable backlogs, minimal individual complaints from vast numbers of potential victims, and widespread refusals of states to provide remedies where violations of rights are found. The post of United Nations Human Rights Commissioner was constituted decades after most of the human rights treaties were adopted. Treaty body after treaty body was created, without a relationship to the High Commissioner, and without a relationship with each other. The result has been a burgeoning reporting burden, duplication of procedures, little effort to synchronise substantive outcomes, and rudimentary follow-up processes and responsibilities. In the meantime, treaty body members have struggled to preserve their independent expert status in a highly politicised UN environment, which has populated their numbers with many government surrogates and grossly under-financed their work. [69]

Even from this brief analysis one may be tempted to conclude that the UN human rights treaty monitoring system is irredeemably flawed.[70] Stymied by the contemptuous attitudes of States, debilitated by compromised Committee membership, undermined by a lack of institutional support and resources, and shunned by potential complainants across the globe, the capacity of the system to effect the commitment to accountability and to the protection of fundamental human rights required by the international rule of law would appear to be radically compromised.

Yet it would be a mistake not to appreciate the magnitude of the difficulties facing the international community in securing the compliance of States with a regime of international law designed of its very essence to constrain the exercise of their power

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[69] Bayefsky (2001) *supra* Note 21, p.(i).

[70] For powerful expressions of this position see for example Bayefsky A (1994) 'Making the Human Rights Treaties Work' in Henkin L and Hargrove J, *Human Rights: An Agenda for the Next Century*; and Robertson G (1999) *Crimes Against Humanity: The Struggle for Global Justice*, Allen Lane, the Penguin Press.

and to generate global condemnation for its misuse. Nor should it be forgotten that, taking a longer-term perspective, much though not nearly enough has been achieved. As the former rapporteur of the Committee on Economic, Social and Cultural Rights, Professor Philip Alston has correctly and cogently observed:

> The human rights treaty system has come a very long way in a relatively short time. As recently as 1969, there was not a single human rights treaty body in existence. States were extremely reluctant to subject their human rights record to any sort of external scrutiny. The terms agreed in the text of the several treaties that had been adopted envisaged a minimalist approach to monitoring. No treaty-based individual complaints system existed and the prospects of any coming into force were not considered good. The only human rights reporting exercise that had been tried had yielded almost nothing. Thirty years later, the system has developed so rapidly that it has problems of which human rights proponents in earlier eras could only have dreamed. Those problems are certainly considerable, but they must be viewed against the background of the historical evolution of the system as a whole. [71]

6.3 Key directions for reform

Given the staunchly realist orientation of existing political elites, the idea that immediate, radical reform of the system is feasible is questionable. Sudden, sweeping reform would be more likely than not to generate further political reticence, discourage new ratifications, engender additional treaty reservations, provoke frank refusals to cooperate, and ultimately lead to state withdrawals from the system in its entirety. Consequently, a more cautious and practical approach to reform would appear to be warranted. Much could be done to strengthen the existing system procedurally and administratively without generating profound alienation from it.

In the short to medium term, then, I believe the following suggestions for reforming the monitoring process should be considered.

- The Committees' work should be far better coordinated. More regular, executive meetings of Committee chairs and members should be organised and a concerted drive should be initiated to achieve conformity, coherence and co-operation in committee processes and procedures.

- A greater degree of coordination is also required between committees and other UN human rights agencies[72]. The Commissioner for Human Rights initiates studies and dispatches fact-finding missions to report on immediate and continuing patterns of human rights abuse recently, for example, in East Timor. These studies and reports should be fed into the Committees' deliberations as a matter of course. The Committees' views and recommendations similarly should inform the work of the Commission on Human Rights and the United Nations

[71] Alston P (2000) 'Beyond Them and Us: Putting Treaty Body Reform into Perspective' in Alston P and Crawford J (eds) (2000), *The Future of UN Human Rights Treaty Monitoring*, Cambridge, Cambridge University Press.
[72] See Samson K (1992) 'Human Rights Co-Ordination within the UN System' in Alston P (ed) (1992) *The UN and Human Rights*, Oxford: Clarendon Press.

Economic and Social Council.

- The system of electing Committee members should be reformed to ensure that they are without exception expert and impartial. The proportion of members who are government officials should be progressively and significantly reduced.

- The Committees' agendas should become more focused and selective. The routine examination of cursorily produced country reports should be replaced by specific requests to nominated countries to provide answers to carefully framed, pre-determined questions.

- The sources of information upon which the Committees rely should be broadened concomitantly. The UN should authorise Committees to send their own fact-finding missions where such a course of action is deemed necessary to respond to suggestions of present and widespread human rights abuse. National Human Rights Commissions and affiliated NGOs should be accorded standing to appear and give evidence before Committees concerning the human rights performance of nations where progress is under examination.

- The entire system must be given adequate human and financial resources to undertake the critical task in which it is engaged.

- Serious consideration should be given to the amalgamation of all six committees into one which would meet throughout the year, rather than as now infrequently and for short, relatively unproductive periods. An amalgamated committee with new, consistent and procedurally fair methods of operation would provide greater certainty, predictability and efficiency to reporting nations and, at the same time, facilitate the development of concentrated expertise and conspicuous independence among the committee's membership. In supporting such an option Professor Bayefsky has concluded that:

  Six different working methods, documents, practices, rules of procedure and reporting guidelines do not serve users. There is substantive overlap of treaty rights and freedoms and inevitable overlap of reporting a dialogue. Examination of a single state in the light of all human rights information encourages a coherent understanding of problems and needs. It means the concrete application of the 'universal, interdependent, and interrelated' nature of human rights…Consolidation would conform to the overall goal of modern UN reform which seeks to adopt a global approach to the needs of each country.[73]

- The individual complaints procedures could also be altered similarly and constructively. To avoid unnecessary duplication and confusion, a single, separate Committee to hear and determine complaints should be established. Care should be taken to ensure that elected members possess the relevant legal qualifications and well-founded reputations for impartiality. Committees should possess the capacity to pick and choose between communications to ensure that

[73] Bayefsky (2001) *supra* Note 21, p. (ii).

> it deals as a matter of priority with those relating to serious allegations of human rights abuse and those that are most likely to create significant legal precedents. Their hearings should be open and capable of receiving oral as well as written evidence. They should be able to appoint *amicus curiae* and afford standing to affiliated civil society organisations and other parties which may provide evidence of direct relevance to the resolution of the complaint. Once again they will need to be provided with the resources necessary to complete its work effectively.

Were the Australian Government to embrace a program of reform as comprehensive as this one, designed not just to tinker at the edges of committee procedure but rather to strengthen the capacity of the international human rights system to monitor and evaluate the performance by all nations of their international human rights obligations, then perhaps its pretensions towards leadership and continuing respect in the field might be worthy of consideration.

It is highly unlikely, however, that this is the reformist outcome that the Howard Government presently desires. For such a reformed system would possess greater power, credibility, expertise and independence in examining Australia's human rights record, together with that of every other UN member nation. This enhanced power would progressively be assumed at the very time that the present Government appears ever more inclined to disengage from its commitment to international human rights law and associated institutions. Why this is so is the subject of the following section.

7. Towards Democratic Exceptionalism: Australia's Disengagement from International Human Rights Law

7.1 The background

The Howard Government's attack on the UN human rights institutions did not occur suddenly and without warning. The ground had been laid in speech and action well before the review of its working relationship with UN treaty bodies was announced. That Australia would determine its own course and reject critical intervention by international institutions had been made clear almost from the outset of the Government's term. Its view has been expressed many times in a form of which the following quotation from the Prime Minister has been typical:

> Australia decides what happens in this country through the laws and the parliaments of Australia. I mean, in the end, we are not told what to do by anybody. We make our own moral judgments…Australia's human rights reputation compared with the rest of the world is quite magnificent. We've had our blemishes and we've made our errors and I'm not saying we're perfect. But I'm not going to cop this country's human rights name being tarnished in the context of any domestic political argument…Traditionally these matters are the prerogative of states.[74]

The Foreign Minister, Mr Downer has been even more blunt. Referring to UN sponsored criticism he told the ABC that:

> If a UN Committee wants to play domestic politics here in Australia, then it will end up with a bloody nose.[75]

Mr Downer has similarly been fond of lashing the Opposition in Parliament for purportedly siding with international institutions against Australia's 'national interest.'

The first sign of the new Australian Government's attitude towards closer engagement with international human rights law came early in 1997 when, because of a clause requiring compliance with human rights norms, it refused to sign a legally binding framework agreement with the European Union which would have formalised the diplomatic and trading relationship between the two. After months of negotiations, the EU agreed finally to a non-binding joint declaration, but the agreement came with considerable criticism of Australia's position from various European Governments and Ministers. Australia was the only Western trading nation in the world to take this approach to EU negotiations.[76]

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[74] The Prime Minister, Media Release, 18 February 2000.
[75] The Minister for Foreign Affairs, Quoted on the ABC's *7.30 Report* program, 29 August 2000.
[76] See further Einfeld, Justice Marcus (2000) 'Rights, Obligations, Responsibilities: The Human Dimension', Paper Delivered to the Conference on *Asia-Pacific Governance 2000*, Griffith University 2000.

Another clear signal emerged when a year later the Government blocked the visit of the UN's Racism Rapporteur, then reneged, and finally rejected his report out of hand.[77] Since then, the Government's attitude to international scrutiny of its human rights performance has been generally dismissive or hostile. This orientation persists, despite some minor exceptions to the contrary. Four recent examples bear out the point.

First, the Government delayed a request from the United Nations Working Group on Arbitrary Detention to visit its immigration detention centres for several years. It agreed finally to such a visit only when it coincided with the permission given to the representative of the High Commissioner for Human Rights, Justice Bhagwati, to undertake a specially requested evaluation of conditions in the camps in May 2002. The response to the High Commissioner's request had been similarly delayed, although on this occasion only for a period of several months. Justice Bhagwati's reasoned conclusion that the 'human rights situation of persons in immigration detention in Australia is a matter of serious concern' and the many examples provided to justify the it was summarily and aggressively rejected by the Minister for Immigration, Mr Ruddock. The UN Working Group's identical conclusion met a similar fate. In public debate the grounds for rejection related principally not to the substance of these reports' findings which were unexceptional but instead to procedural flaws and minor factual inaccuracies which were then capitalised upon in the popular press in an attempt to discredit the reports and their recommendations as a whole.[78] In fact and in substance, the conclusions of the Bhagwati report, for example, did not differ significantly from similar investigations conducted domestically by the Commonwealth Ombudsman, HREOC and the Joint Committee on Foreign Affairs, Defence and Trade.[79]

The second example concerns Australia's failure to support a new Optional Protocol to the International Convention Against Torture. The Optional Protocol, which would have permitted UN representatives to visit a state's prisons and detention centres without first providing notice, was discussed at the UN's Economic and Social Council in July 2002[80]. The amendment was adopted by a substantial majority of states on the Council but the Australian Government voted against it. The only other countries to do so were China, Cuba, Egypt, Japan, Libya, Nigeria and Sudan. This is not normally the international human rights company that this country is accustomed to keeping.

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[77] The Rapporteur's Report is contained in UN.Doc: E/CN.4//2002/24/Add.1. The Australian Government's Response was contained in a Joint Media Release by the Minister for Foreign Affairs and Minister for Immigration and Multicultural Affairs, 'UN Report has no Credibility', 22 March 2002.

[78] Report off Justice P.N Bhagwati, Regional Adviser for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia, 24 May-2 June 2002, *Human Rights and Immigration Detention in Australia*, 31 July 2002; for a Government response see Minister for Immigration and Multicultural and Indigenous Affairs, Media Release, 'Rebuttals to Statements made by UN Human Rights Commissioner's Envoy, Justice Bhagwati on ABC's *Lateline* on 31 July 2002', 2 August 2002.

[79] See Commonwealth Ombudsman's *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Centres,* 2001; Parliament of Australia, Joint Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, Canberra, June 2001; Human Rights and Equal Opportunity Commission, *National Inquiry into Children in Immigration Detention*, 2003.

[80] Commission on Human Rights, *Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 58th Session, Annex, UN Doc E/CN.4/RES/2002/33 (2002).

Predictably, the decision attracted vigorous international and domestic condemnation. An editorial in *The Australian* concluded that:

> By rejecting the anti-torture protocol, Australia sends a bad message about our concern for human rights, a message that contravenes our historically outstanding human rights record. The detention centre policy blemishes that record and, as we have argued before, the best way of clearing that record is to close the centres…The Government would also do well to question its defensive attitude to the UN. The UN's attempt to establish a practical means of opposing torture through the independent inspection of prisons may be imperfect, but is still worth supporting. Australia gets no credit for taking the stance that it has. [81]

The third example relates to Australia's treatment of applicants for refugee status who arrive without permission on our shores. The measures Australia is required to take in processing, hearing and determining such applications are set down broadly in the 1951 International Convention on the Status of Refugees and its 1967 Protocol. In doing so, Australia has in the past developed a generally co-operative relationship with the United Nations High Commissioner for Refugees. More recently, however, it has sought consciously and actively to evade its responsibilities under the International Convention, for example by adopting the expedient of the so-called 'Pacific Solution' and by enacting draconian border protection legislation. It has also breached its international obligations under the Convention both substantively and procedurally.

There is a great deal of recent work, some of which is cited below, that has elucidated the nature of Australia's continuing non-compliance with both the spirit and the letter of the Convention and there is no space here to reiterate it. [82] The Australian Government's response to such international and national legal criticism, however, has been typically either to dismiss it or to argue that the provisions of the Convention itself ought radically to be reformed. There is in fact some merit to the latter position. But the fact that the Convention is in need of reworking does not constitute a licence to evade or avoid its current, internationally agreed upon, requirements. The tough Australian position has seen a deterioration in the relationship between the Government and the UNHCR that mirrors that between Australia and the six human rights committees.

The fourth example is constituted simply by the fact that Australia has become the sole remaining nation opposing the incorporation of a right to 'self-determination' in

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[81] *The Australian*, Editorial, 27 July 2002.

[82] What follows is a brief selection of significant recent work: Crock M (1998) *Immigration and Refugee Law in Australia*, The Federation Press; Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas – Detention of Unauthorised Arrivals,* Commonwealth of Australia, 1998; Parliament of Australia, Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination o f Australia's Refugee and Humanitarian Determination Processes*, June 2000; Refugee Issue, *University of New South Wales Law Journal*, Vol 23(3) 2000; US Committee for Refugees, Country Report on Australia, 2001; McMaster D (2001) *Asylum Seekers: Australia's Response to Refugees,* Melbourne University Press, 2001; MacCallum M (2002) 'Girt by Sea: Australia, the Refugees and the Politics of Fear', *Quarterly* Essay, No.5 2002 and the vigorous replies in *Quarterly Essay, No.6* by Phillip Ruddock and John Hirst; Mares P (2002) *Borderline: Australia's Treatment of Refugees and Asylum Seekers*, Second Edition, UNSW Press; Taylor S (2002) 'Guarding the Enemy from Oppression: Asylum Seeker Rights Post September 11', *Melbourne University Law Review,* Vol26(2); Crock M and Saul B (2002), *Future Seekers: Refugees and the Law in Australia*, The Federation Press.

negotiations towards a new UN statement on the rights of indigenous peoples. Instead it persists with the entirely unsupported position that any such entitlement should be described as one to 'self-management'. This position plainly undermines one of the three fundamental pillars of the Universal Declaration of Human Rights.[83]

These examples, together with the discussion that has gone before demonstrate, if nothing else, that in relation to international human rights law generally and the UN institutions created to monitor it specifically, Australia's stance may properly be characterised as severely critical, legally indefensible and highly nationalistic.

As Professor David Kinley and Penny Martin concluded recently:

> The aggregate of these ploys – the stressing of form over substance, the questioning of the integrity and professionalism of human rights bodies, and above all, the adopting of an attitude that borders on a dismissive disregard of international opinion which differs from that of the Australian Government – has been the construction of an argument that Australia should not be subject to the scrutiny of international human rights mechanisms. An air of Australian inviolability pervades the talk of those who propagate or believe this argument, which, even if not directly intended, is nonetheless dramatically misleading, especially in respect of our obligations under international law. [84]

Simply to say this, however, and to describe its manifestations is inadequate without engaging in the more speculative but nevertheless crucial task of endeavouring to understand not only how but also why it has all come to this. The remainder of this section is devoted to teasing out some of the more significant threads that may assist in addressing the question.[85]

7.2 In the political realm

The most obvious answer is that the Australian Government's stance, characterised by its belief in the nation's 'inviolability' or 'democratic exceptionalism', is generated by its opinion that international criticism of its compliance with international human rights treaty obligations is simply incorrect. Such a belief, however, has to be maintained in the face of the increasing intensification of international political criticism of the present Government's human rights record, the power of international legal argument that contradicts the Government's positions and the substantial conformity of international and domestic expert opinion on the key issues in dispute, particularly those that relate to the human rights of Australia's indigenous peoples and asylum-seekers. By no means is this to deny that some UN criticism has been misplaced and that occasionally some mandates have been exceeded. Nevertheless, the Government's refusal to acknowledge even the most minor infraction of its international obligations in the face of such

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[83] See 'Standoff on Indigenous Rights', *The Age*, December 26 2002.
[84] Kinley D and Martin P (2002) 'International Human Rights Law at Home: Addressing the Politics of Denial', *Melbourne University Law Review*, 26(2), p.466 at 471.
[85] In clarifying the thoughts that follow I am indebted to discussions with many friends and colleagues including Clive Hamilton, Ramona Koval, Barry Jones and my colleagues at La Trobe University, John Carroll, Joseph Camilleri and Robert Manne.

informed and persistent criticism would appear to require a more extensive and persuasive explanation of its anti-internationalism.

A second perspective might, in the alternative, cast the issue in the context of domestic political disagreement. An argument might fairly be made that the present Government's sustained repudiation of criticism by UN treaty bodies represents a form of 'wedge politics'. Wedge politics occurs when a stance taken by the Government has the effect of dividing the traditional blue-collar supporters of the opposition Labor Party from those of its socially progressive wing. The social progressives may reasonably be anticipated to support Australia's engagement with the UN while blue-collar affiliates could be expected to be less impressed by 'foreign' condemnation. The adoption of a political stance calculated to divide the Opposition clearly will be to the Government's electoral advantage as the debate surrounding the 'Tampa' and the *Border Protection* legislation so clearly demonstrated during the 2001 election. And, in the journalist Paul Kelly's words:

> Howard's wedge between the middle-class tertiary-educated ALP voter and the old working-class Labor loyalist is the tactical essence of his Prime Ministership. In this sense, 2001 was not a fluke but the culmination of his strategy that has been operative since 1996. [86]

There is also a longer-term dimension to this party political analysis. The rise of the Howard Government, as Professor Robert Manne has argued eloquently, has coincided with the progressive destruction and then disappearance of the social democratic political agenda from the Australian political landscape. [87] One part of that agenda, identified principally with the Labor Party, has been an active engagement with international law and international institutions. From Evatt, who had been the President of the United Nations General Assembly, through Whitlam, who ratified numerous international human rights and environmental treaties and implemented their provisions in domestic law, to Gareth Evans, who argued forcefully for greater Australian participation in UN forums and for the constructive reform of the international body itself, the Labor Party has had a post-Second World War tradition of active involvement in the development and domestic implementation of international law. With the possible exception of the Fraser Government, the Liberal-National Parties have not shared such a stance. It should come as no surprise, then, that the crevice between internationalism and nationalism in the sphere of human rights should have been re-opened and emphasised along a conservative, social democratic dividing line in the current, increasingly globalised environment.

At home, the Howard Government has shown scant respect for domestic institutions which, on human rights or other similar grounds, have sought to stand in the path of its hard political agenda. In its first budget, it slashed the funding of HREOC by 40 per cent over three years. Later it refused to reappoint Sir Ronald Wilson as its President and then initiated structural reforms that have had the effect of significantly weakening

[86] Kelly P (2002) 'Comfortable in the Lodge', *The Australian*, December 18 2002.
[87] See Manne, Robert (2001) *The Barren Years: John Howard and Australian Political Culture*, Text Publishing.

the organisation's capacity to undertake wide-ranging inquiries into aspects of Australia's human rights performance.

The story is similar with the Courts. Where Courts, such as the High Court in relation to Native Title, or the Federal Court in relation to refugee claims, have made decisions not to its liking, the Government has engaged in criticism of their performance so severe as to strain dramatically prior constitutional conventions as to the relationship between the Executive and Judiciary. Then, by legislation it has succeeded either in reversing their decisions or excluding the judiciary progressively from the review of administrative decision-making. The constraints and cuts inflicted upon related, previously respected institutions such as the universities and the ABC have been similar in magnitude and purpose. If socially valued domestic institutions of this character have fared so badly, it is again unsurprising that international institutions should have suffered a similar shellacking.

Yet a troublesome conundrum remains. It might have been thought that the Government's sustained assault on national and international human rights institutions in particular, and upon human rights protections in Australia more generally, could have courted significant adverse electoral consequences. After all, human rights are in theory shared by all to the advantage all. Yet plainly, any such predicted adverse outcome has not been reflected in practice. If anything, the reverse has been the case. In the domestic arena, there are two principal reasons which may serve to explain why this has been so.

First, public reaction to the Government's actions with respect to human rights is moulded largely by the Government's political presentation of its conduct, in other words by its spin. As has been pointed out on many occasions with respect to public perceptions of the plight of those seeking refuge from persecution, community attitudes are shaped significantly by the language used to describe often desperate parents and their children. My own language in the previous two sentences, for example, had it been adopted by political leaders and public authorities, might have evoked considerable sympathy and compassion for the plight of those whose lives, freedom or security may have been at risk. Their portrayal by contrast as 'illegals' (which pending determination of their claims they are not), 'queue jumpers' (which in the absence of orderly and accessible queues they cannot be), 'mortally callous parents' (which those accused of throwing their children overboard were proven not to be) and even as potential 'terrorists' (the likelihood of which is infinitesimal) changes domestic perceptions very markedly. The same is true of similar, highly prejudicial representation of national and international human rights institutions.

Secondly, 'human rights talk' has never been a well established part of the Australian political lexicon. [88] In this country, what might be understood internationally as the pursuit and protection of individual human rights is understood more viscerally as entitling people to a 'fair go', or as doing better for 'battlers', or 'living in a great country', or simply as 'getting it right or getting it wrong.' In this context, the Government in recent years has sought consciously to identify talk of human rights,

[88] See, for example, Charlesworth H (1998) 'The Australian Reluctance About Rights' in Alston P (ed) (1998) *Towards an Australian Bill of Rights*, Centre for International and Public Law (ANU) – Human Rights and Equal Opportunity Commission.

particularly in the sphere of anti-discrimination law, with a form of political correctness or, even worse, as something that is the province of and promoted by a so-called and governmentally defined 'elite.' Having engendered this perceptual shift, it has become politically feasible and widely popular to condemn institutions that hold the support of this presumed elite and which are seen as embodying not only politically correct but imported opinion. In its stead, the Government's manufactured view, a down to earth, monochromal and parochial notion of national unity and a purported concern for the forgotten (principally Anglo-Saxon) peoples, has gained the ascendancy. The stratagem has been a stunning public relations success.

7.3 The public realm

Deft political manipulation of this nature, however, cannot be successful unless it falls upon fertile electoral ground. That the political leadership, on both sides of the spectrum, should engage in such an opportunistic recasting of political debate in linguistic terms that suit its electoral ambitions is as common as it is unsurprising. The more interesting and significant question, however, is why the Government's anti-internationalist stance in relation to human rights law and its implementation should have resonated so strongly in the wider Australian community. The answer, it seems to me, lies at least in part in deep-seated feelings of insecurity. The causes of this national insecurity are manifold but there are two components of particular significance in the context of this paper's discussion: economic insecurity and physical insecurity and their roots in world-wide, extra-national currents of events.

Taking economic insecurity first, it is clear, as many commentators have observed, that global economic policies and trends are as important in determining national economic performance and direction as is national economic policy, if not more important. Under the influence of international economic institutions such as the World Trade Organisation and the International Monetary Fund and other private international institutions such as international banks and rating agencies, neo-liberal rather than economically interventionist policies have become prevalent in Australia and elsewhere in comparable western economies. These policies have adopted fiscal austerity, privatisation, competition and free markets as their mantras.

While generally successful in enhancing overall economic performance, these measures and their associated institutions have created significantly greater distance between those who have benefited and those who have suffered as a result. [89] The gap between rich and poor has widened substantially. The numbers of losers have exceeded the numbers of winners significantly. Consequently, in an increasingly greater proportion of Australian society, the feeling of economic insecurity has increased.[90] Among other things this insecurity has been generated tangibly by such personalised dislocations as the decline in full-time work and the rise of casual employment, the loss of the sense of

[89] See Argy F (1998) *Australia at the Crossroads: Radical Free Market Reform or Progressive Liberalism*, Allen and Unwin; Galligan B, Roberts W and Trifetta G (2001) *Australians and Globalisation*, Cambridge University Press; Shiel C (2001) *Globalisation: Australian Impacts,* UNSW Press; and more generally Stiglitz J (2002) *Globalisation and Its Discontents*, Penguin: Allen Lane.
[90] For extensive focus group research underpinning this conclusion see Megalogenis G (2002) 'The Million Voters Who Matter', Weekend Inquirer, *The Australian* December 21-22, 2002 and more generally Pusey M (2003) *The Experience of Middle Australia*, Cambridge University Press.

lifelong career and single institution employment, the rise of a class of working poor, middle class-middle age retrenchment, massive corporate public sector downsizing, still high levels of unemployment particularly amongst young people and an increasing burden upon governmentally sponsored social security.

In times like these, it is natural for people to seek out someone or something to blame and to look for political leadership that appears to offer economic relief, clear direction and a measure of national control. Despite generally positive economic credentials, before the last election the Howard Government was in electoral difficulty precisely because it appeared to be in thrall to globalisation rather than standing for ordinary Australians against it. One consequence, of course, had been the rise of Hansonism.[91]

It became imperative, then, for the Government to give the impression of distancing itself from such manifestations of globalisation as it thought might be unpopular and to appear to reassert national control over such disturbing international threats and trends as it could. Unwilling to disengage itself from the web of international treaties and commitments it had entered into with respect to global trade and development, it chose deliberately to displace the fear of international economic governance on to agencies of international social development, of which the UN human rights treaty bodies were one. And nationally, the fear of economic insecurity, particularly at the most disadvantaged end of the economic spectrum, was skilfully displaced on to the largely manufactured threat of alien peoples arriving by sea without permission and in search of asylum. This entitlement, if granted, could only lessen the opportunities of ordinary Anglo-Saxon Australians to pursue their economic interests as best they could in adverse and uncertain conditions.

Physical insecurity, constituted by the threat of terror, has added a powerful new dimension to the politics of anti-internationalism. After September 11, Australia's defence and strategic situation altered dramatically. I leave the details to more expert foreign policy commentators. What appears clear, however, is that following the dreadful events of that day, the Howard Government's principal foreign policy orientation, one that focused less intensively than under the Keating Government on engagement with Asia and more on the reinvigoration Australia's relationship with the US, has been significantly accelerated and accentuated. There has been a re-emergence of the Australian Government's perception of itself as the region's 'Deputy Sheriff'. There has been unwavering support for American foreign policy, particularly in relation to the 'War Against Terror', the overthrow of the Afghani regime and most recently military action against Iraq. The identification of American with Australian strategic interests has been almost complete.

More relevantly, for the purposes of the present discussion, both the US and Australian Governments have been increasingly dismissive of the role of the UN, under its Charter, as the principal mechanism for the maintenance and protection of international peace and security. The embrace by both of a new doctrine of justified 'pre-emptive strikes', and the posturing of both about the necessity of altering the United Nations Charter to permit such unilateral warlike action, is the cardinal example of this particular shift in

[91] Ibid.

strategic orientation. Such a strategic departure from the UN, although not without some reason in a more fraught, international security environment, has also spilled over into both nations' perceptions and acceptance of international scrutiny by the UN under its Charter and associated security treaties and humanitarian conventions. Unilateralism rather than multilateralism is in the ascendant. The US has made it clear that a positive relationship with the world body will be maintained only to the extent that the UN takes heed of American policy and political attitudes, not only as they apply within the US but also in the wider world. In the absence of UN endorsement, as illustrated so vividly by the decision to declare war on Iraq, America will go it alone. Australia has now adopted a symbiotic stance and its repudiation of the authority of the UN human rights treaty body system is one, consequential casualty.

The US has never been a good UN citizen. It has for years not made its designated financial contribution, leaving the organisation without the resources to operate effectively. It does not recognise the jurisdiction and authority of the International Court of Justice. It has failed to ratify a raft of international human rights and environmental conventions. It was a signal absentee from the list of nations establishing the International Criminal Court to try those alleged to have committed crimes against humanity. Following the recent Afghani conflict it has effectively exempted itself from the operation of international humanitarian law. In going to war against Iraq in the absence of a specific Security Council resolution sanctioning the action, it may have taken itself beyond the rule of international law altogether. In all this, it has differed markedly from the attitudes of its democratic, Western European allies. In its boyish eagerness to court American favour, it is now plain that the Howard Government has determined that it is acceptable for its behaviour to be informed by a similar sense of patriotic inviolability.

This stance is also to its political advantage. Whether rightly or wrongly, many Australians have been persuaded that we are 'at war with terror', with all that the term 'war' conventionally entails. This is despite the fact that the eradication of terrorism is a global conflict of a qualitatively different kind. The sense of insecurity that derives from this diffuse belief, an insecurity intensified tragically by the bombings in Bali and now conflict in Iraq, has hardened popular resolve for national self-protection and action. National security, aggressively pursued, has leapt to the top of the domestic political agenda. In the broader electorate it follows that decisiveness, force and even stridency in government are qualities to be admired.

In the national arena, according to this view, these qualities can be obtained neither by 'flipping and flopping', the spin-created label so successfully but inaptly applied by the Howard Government to the Beazley-Crean Opposition over border protection, nor by any appeal to constitutional and democratic values in the quest for balance between tough new security measures and the preservation of civil liberties. In the international arena, similarly, decisiveness is unlikely to be advanced by engagement with prolonged multilateral negotiations often characteristic of UN forums, including those concerned with human rights. Neither is force accumulated by relying on UN sponsored, military intervention characterised, sometimes fairly sometimes unfairly, by divided leadership and competing strategic objectives.

Instead, the Howard Government has perceived acutely, at least for the time being, that a strategic shift from the UN to the US, from Asia to the West and from multilateralism to unilateralism is the course most likely to garner maximum popular support and drive its wedge further into the heart of its political opposition, particularly the socially progressive wing.

All this brings with it yet another more prosaic but no less important political asset. A strategic re-orientation from Asia to America takes the majority of Australians, in a time of perceived crisis, back to familiar cultural ground. This story we are told is that we are in this together with friends 'like us'. We are joining forces again with Americans and Britons to defend our values and our systems against others with whom culturally we do not identify so readily, if at all. It's the 'West versus the Rest'. It's Aussies versus the refugees. And that's how the Prime Minister likes it. As Paul Kelly noted, recent international events have allowed Howard to revert to type:

> To his nostalgic nationalism, legendary stubbornness and Anglo-Celtic cultural chauvinism, once seen as anti-vision negatives, (these have) now melded into a formidable leadership profile. Howard is the same man but a better politician.[92]

It is down this patriotic, Anglo-Celtic yellow brick road that so many Australians now flock to follow him as their futures seem more uncertain and their outlook becomes more fearful. The road may be less tolerant, it may be less diverse; it may be less accommodating of indigenous and ethnic difference within Australia; [93] it is certainly less respectful of cultural difference in our immediate region; and it is highly likely to be corrosive of the international legal regime so patiently and co-operatively constructed since the Second World War; but it's 'ours' – and it has struck a golden electoral chord.

The political advantages of charting this Anglo-Celtic course in the short term are obvious. The Hansonite vote has been delivered. In the medium to long-term its damage to inter-cultural harmony at home and international respectability abroad may be incalculable. In the latter context, Stephen Fitzgerald has remarked pertinently:

> Whatever statement contemporary foreign policy might be said to make about Australia, it is not one of great internationalist or humanitarian causes…The statement foreign policy makes today is one of narrow nationalism and the doctrine of the self…it is not tempered by government commitment to wider horizons, interests beyond the self, enlargement of the liberal and humanitarian agenda, altruistic causes, high standards of ethical conduct and public policy formed out of public debate…This has been quite openly and frankly articulated in major statements by Australian political leaders.[94]

The absence of principled, long-term thinking of this kind is profoundly to be regretted.

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[92] Kelly, Paul, 'Comfortable in the Lodge', *The Australian*, 18 December 2002.
[93] See for many contemporary examples: Neill, Rosemary 'The Ghosts of Prejudices Past: The Spectre of the White Australia Policy haunts Our Christmas', *The Australian*, December 20, 2002
[94] FitzGerald, S (2002) 'A Different View', *The Diplomat*, Vol 1(5), pp.26-27.

Finally, looked at even more broadly, the current predilection in foreign affairs for a new unilateralism, exemplified by the recent action in Iraq, may have consequences of enormous significance and severity for global peace and security. This strike and others that may follow, initiated outside the framework of the Security Council, may spell the end of the UN's role in contributing effectively to international peace and security, and signal the decimation of the authority of international law, including international humanitarian and human rights law. Instead we may enter a new world characterised by the unregulated, unipolar, indisputably powerful leadership of the US with all the attendant dangers and unpredictable outcomes such a concentration of power will inevitably generate for everyone, whether inside Australia or out.

Yet this is the direction in which the political tide runs and locally its waves are ones that the Howard Government has surfed with exquisite skill, despite their immense, inherent perils. In this environment, the repudiation of the competence and authority of UN bodies can only be expected to persist and worsen to the detriment of the international rule of law and, if I am right, ultimately to our common humanity.

The task, then, of redirecting this tide is formidable. Its nature was aptly summarised by former Prime Minister, Malcolm Fraser, in his recent book *Common Ground*:[95]

> Finally, the rule of law, if it is to mean anything, must apply to the powerful as well as the weak – to democracies as well as dictatorships. And until we can establish a system of international law, which is universal, we have government by the powerful, government by the wealthy. If that is not checked it will lead to chaos…How to establish an international system of international law that all countries, even the most powerful, will respect, may be the greatest challenge to be faced this century. But with all its complexities and difficulties, it must be met if we are to get to a civilised community of nations. Clearly, there is still a long way to go.

It is in this context, that the Howard Government's opportunistic repudiation of the domestic relevance of international human rights law and its attendant window-dressing, should ultimately be understood. This is not just about committees and critics. It is about Australia's deeply regrettable retreat from a position of leadership in the quest for international governance by law and for a more tolerant and civilised system of international relations.

[95] Fraser, M (2002) *Common Ground: Issues that Should Bind and Not Divide Us*, Viking Penguin, p.126.

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