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PROTECTING HUMAN RIGHTS AND COUNTERING TERRORISM: AUSTRALIA'S CONTRADICTORY APPROACHES TO IMPLEMENTING ITS INTERNATIONAL LEGAL OBLIGATIONS

Dianne Otto*

I. INTRODUCTION

Australia has consistently resisted adopting legislation that would directly and comprehensively implement its legal obligations pursuant to multilateral human rights treaties, adopting a “dualist” approach which insists that the international and domestic legal systems are distinct, and maintaining that human rights are better protected by democratic legal processes than judicially interpreted bills of rights. This approach has left many human rights very poorly protected by Australian law. In contrast, Australia’s commitment to democratic discussion and deliberation did not impede the hasty adoption of comprehensive legislation implementing its international legal obligations pursuant to Security Council resolutions aimed at countering international terrorism. This legislation has further eroded the already fragile domestic framework for the protection of human rights.

The justifications for these contradictory approaches to domestic implementation of international legal obligations are examined in this paper, and it is suggested that they may foreshadow the demise of collaborative international law-making and, in its place, the rise of “hegemonic” international law.¹ I begin by examining the inadequacy of Australia’s “indirect” methods of human rights implementation. Then I describe some of the legal and political strategies that have been adopted, both domestically and internationally, in so far unsuccessful attempts to persuade a long line of governments to fully incorporate their international human rights obligations into domestic law. Australia’s very different approach to implementing its obligations pursuant to Security Council resolutions is then outlined, before I turn to the question of what this disjunction may presage for the future of international law.

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¹ See generally, Detlev F. Vagts, Editorial Comment, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001); Jose E. Alvarez, Editorial Comment, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003).

II. AUSTRALIA'S 'INDIRECT' IMPLEMENTATION OF ITS INTERNATIONAL
HUMAN RIGHTS OBLIGATIONS

From the few, but very significant, general references to human rights and fundamental freedoms in the Charter of the United Nations (U.N.),² a large body of international human rights law has emerged in the form of multi-lateral treaties, as a result of exhaustive consultative processes and painstaking drafting debates. All states have ratified at least some of these treaties, each time assuming international legal obligations to implement the treaty in good faith and to report periodically on the measures they have adopted to give effect to their obligations. While Australia has ratified all but one of the major human rights treaties and their various optional protocols,³ the human rights treaty monitoring bodies have, without exception, expressed concerns about its failure to fully incorporate its international legal obligations into domestic law.⁴ Indeed, Australia stands alone among western states in not having a bill of rights – legislative or constitutional – at the federal level.⁵ Despite this lack, successive governments have claimed that the domestic system for the protection of human rights is exemplary, “second to none” according to the Attorney-General in 2001.⁶

The claim of excellence is justified in two main ways. First and foremost, it is defended in terms of Australia's democratic credentials.⁷

² U.N. Charter arts. 1(3), 13(1)(b), 55, 62(2), 68.

³ The only exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, G.A. Res. 45/158, Annex, U.N. Doc. A/45/49 (July 1, 2003). The former conservative Australian Government of Prime Minister John Howard refused to ratify the Optional Protocol to Convention on the Elimination of Discrimination Against Women (CEDAW) and the Optional Protocol to the Convention Against Torture (CAT). However the current Labour Government of Prime Minister Kevin Rudd has now ratified them.

⁴ See, e.g., U.N. Econ. & Soc. Council, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* ¶ 11, U.N. Doc. E/C.12/AUS/CO/4 (May 22, 2009); Int'l Covenant on Civil & Political Rights, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* ¶ 8, U.N. Doc. CCPR/C/AUS/CO/5 (May 7, 2009); U.N. Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia* ¶ 9, U.N. Doc. CAT/C/AUS/CO/3 (May 22, 2008).

⁵ The possibility of adopting a legislative bill of rights at the federal level is currently under consideration. The results of the National Human Rights Consultation are due to be released on 30 September 2009. See The National Human Rights Consultation, <https://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Home> (last visited Feb. 8, 2010).

⁶ News Release, Daryl Williams, Attorney-General, CERD Report Unbalanced (Mar. 26, 2000).

⁷ Joint Media Release, Alexander Downer, Minister for Foreign Affairs, Daryl Williams, Attorney-General, & Philip Ruddock, Minister for Immigration and Multi-Cultural Affairs,

The view has long been held that the system of representative democracy and responsible government provides better protection for human rights than an “unaccountable” and “unelected” judiciary interpreting the rigid wording of bills of rights.⁸ The second main justification has been that, when politics fail, the common law can be relied upon to protect basic human rights, despite its well-recognized shortcomings in this regard.⁹ Other rationales for failing to incorporate human rights treaty obligations directly into domestic law include an enduring commitment to utilitarianism and deference to federal constitutional arrangements,¹⁰ which give Australian states substantial powers in many of the areas covered by the human rights treaties.

This deference is a matter of politics rather than law because the federal government clearly has the constitutional power to implement its international legal obligations.¹¹ However, none of these reservations have prevented the federal government from adopting legislation that comprehensively implements its counter-terrorism obligations, as determined by the Security Council. Yet they remain firmly in place when it comes to human rights obligations. As the government explained in its report to the Committee on Economic, Social and Cultural Rights in 2000, “[i]n many cases, rights are more readily promoted by less formal processes, often associated with inquiry, conciliation and report.”¹² This preference for non-judicial processes is what I refer to as Australia’s “indirect” implementation of its international human rights obligations.¹³

Given the continuing commitment of Australian governments to indirect methods of human rights implementation, you might reasonably expect there to be enhanced opportunities for democratic participation in decision-making about human rights, including informed and vigorous community debate about their enjoyment. You might also expect well-

Improving the Effectiveness of United Nations Committees (Aug. 29, 2000), available at http://www.foreignminister.gov.au/releases/2000/fa097_2000.html.

⁸ See SIR ROBERT MENZIES, *CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH* 54 (1967) (providing a classic exposition of this view).

⁹ NICK O’NEILL & ROBIN HANDLEY, *RETREAT FROM INJUSTICE: HUMAN RIGHTS IN AUSTRALIAN LAW* 85–103 (1994).

¹⁰ Hilary Charlesworth, *The Australian Reluctance about Rights*, 31 *OSGOODE HALL L.J.* 195, 201, 211–15 (1993).

¹¹ *Commonwealth v. Tasmania*, (1983) 158 C.L.R. 1 (Austl.).

¹² Int’l Covenant on Econ., Soc. & Cultural Rights, *Third Periodic Report: Australia*, ¶ 21, U.N. Doc. E/1994/104/Add.22 (July 23, 1998).

¹³ Dianne Otto, *Addressing Homelessness: Does Australia’s Indirect Implementation of Human Rights Comply with its International Obligations?*, in *PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS* 281 (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., 2003).

developed and well-resourced non-judicial mechanisms for promoting and monitoring Australia's international human rights obligations domestically, like human rights commissions, ombuds offices, policy coordination networks within government bureaucracies, active scrutiny of bills committee within parliaments, and many human rights non-governmental organizations (NGOs) actively monitoring the government's implementation. Yet sustained parliamentary and community debate about human rights in Australia is rare.

The Australian Commission on Human Rights (formerly the Human Rights and Equal Opportunity Commission), established in 1986 as Australia's primary human rights institution and entrusted with overseeing the implementation of its human rights obligations,¹⁴ is poorly resourced, and governments have paid only sporadic attention to its advice over the years. The definition of "human rights" for the purposes of the Commission is limited to the international instruments appended to the legislation that established it, which includes only two of the eight international human rights treaties Australia has ratified—the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Rights of the Child ("CRC"). In the event that the Commission is unable to conciliate complaints alleging violations of the appended human rights instruments by federal authorities, it can only report the case to the Attorney-General, who is under no obligation to take any action.

The national Ombuds office is not explicitly empowered to investigate complaints about human rights abuses. At one time Australia's national consultative and policy-coordination machineries developed through the 1970s and 1980s were world renowned,¹⁵ but they were gradually dismantled during the 1990s. Parliamentary committees empowered to scrutinize intended federal legislation play a very important role in Australia, yet none of them are explicitly mandated to check legislation against Australia's international human rights obligations. Finally, while the human rights awareness of the Australian community is slowly increasing, the population in general remains ignorant of Australia's international human rights obligations and the criticisms made by the human rights treaty bodies about their implementation.

In short, when measured against its own preferred method of indirect implementation, there are fundamental problems with Australia's compliance with its international human rights obligations,

¹⁴ Human Rights and Equal Opportunity Commission Act §§ 10A-11 (1986) (Austl.).

¹⁵ See, e.g., Rhonda Sharp & Ray Broomhill, *Budgeting for Equality: the Australian Experience*, FEMINIST ECON., Mar. 2002, at 25.

as the treaty bodies have observed. However, even if the best systems of indirect implementation were in place, it is likely that many problems of inadequate implementation would remain—especially in relation to ensuring effective independent review of individual complaints and provision of adequate remedies in the event of a violation.

III. THE LIMITED IMPACT OF STRATEGIES TO CHANGE AUSTRALIA'S METHOD OF HUMAN RIGHTS IMPLEMENTATION

There have been many attempts to persuade the Australian government to directly incorporate its international human rights obligations into domestic law. I will briefly outline two of them: international “shaming” and, more recently, the adoption of legislative bills of rights at the state and territory levels of government. In an international system that lacks the “hard” enforcement powers of a compulsory court system and law enforcement agencies, the primary method of holding states accountable is to “shame” them by drawing public attention to violations and encouraging them, through a wide range of means, to bring their domestic laws and practices into line with their human rights obligations. To this end, Australian human rights advocates have become adept at making use of international forums and monitoring mechanisms to shame the government into change. This has been done through the reporting processes and individual complaint mechanisms of the human rights treaty bodies, and by appealing to the Special Procedures established by the U.N. Commission on Human Rights (now the Human Rights Council). Unhappily, all these efforts at international “shaming” have placed a disproportionate demand on the scarce human rights resources of the international community and largely fallen on deaf governmental ears in Australia, despite the damage to Australia’s international reputation.

One of the obligations imposed by human rights treaties is to submit periodic reports to the human rights treaty bodies, by which they monitor the implementation of their respective treaties. Australian human rights NGOs, indigenous organizations, community legal centers, women’s groups, and others have developed the practice of submitting shadow or parallel reports for the treaty bodies to also consider.¹⁶ The

¹⁶ See, e.g., YWCA Australia, CEDAW NGO Report (Oct. 2, 2009), <http://www.ywca.org.au/policy/cedaw.php>; *Major NGO Reports*, Human Rights Legal Resource Centre, <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/#ICCPR> (discussing Australia’s compliance with the ICCPR and International Covenant on Economic, Social and Cultural Rights coordinated by a number of Community Legal Centres); New South Wales Council for Civil Liberties, *Australia and Torture: Torture Shadow Report* (May 14, 2009), http://www.nswccl.org.au/publications/cat_shadow.php.

parallel reports highlight human rights issues that have been dodged or down-played in the government's report, drawing the attention of the treaty bodies to pressing human rights problems and providing information that may be of assistance when they engage in "constructive dialogue" with Australian government representatives about its report. The treaty bodies have repeatedly found problems with Australia's treatment of Aborigines and Torres Strait Islanders, asylum seekers and refugees, homeless people, and others living below the poverty line. The exposure that is generated by their critical Concluding Observations brings international pressure to bear on the government and provides valuable political leverage for domestic NGOs. After a string of criticisms in late 1999 and early 2000, the conservative Howard government accused the treaty bodies of being "politically motivated" and insufficiently attentive to Australia's "unique and complex history" and its "democratic credentials,"¹⁷ assuming an attitude that is reminiscent of the United States' exceptionalist claims with respect to the application of international law.¹⁸

Submitting communications to the individual complaints mechanisms attached to several of the human rights treaties is the second way that international accountability mechanisms have been utilized to pressure the Australian government to more fully implement its international human rights obligations. As of 30 June 2008, sixty-nine complaints against Australia had been formally concluded, nineteen of which found Australia to be in violation of its international obligations. This number of complaints is the third highest concluded against any state. Yet the Australian government has not acted promptly on most of the findings of violations by the treaty bodies which, although not legally binding, are highly persuasive.

Third, Australia has responded positively, though not always promptly and enthusiastically, to many requests from human rights "Special Procedures" to visit the country and investigate complaints for themselves. Many of these independent experts have found egregious human rights violations. For example, the Special Representative of the High Commissioner for Human Rights visited the Woomera immigration detention center in 2000 and found that the situation of detainees "could, in many ways, be considered inhuman and

¹⁷ See Joint Media Release, *supra* note 7.

¹⁸ Dianne Otto, *From 'Reluctance' to 'Exceptionalism': The Australian Approach to Domestic Implementation of Human Rights*, ALT. L.J. Oct. 2001, at 219.

degrading.”¹⁹ This visit was followed up two years later by the U.N. Working Group on Arbitrary Detention, which found endemic despair and depression due to the harsh and oppressive conditions in the mandatory detention centers.²⁰

The UN Special Rapporteur on Adequate Housing visited in 2006 and found a “serious national housing crisis” that impacted particularly on vulnerable people and low-income households.²¹ Recently, the Special Rapporteur on the Rights of Indigenous Peoples expressed concern at the continuing “serious disparities between indigenous and non-indigenous parts of society.”²² Of particular significance was the report of the UN Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism, which criticized Australia’s anti-terror legislation, adopted since 9/11 in fulfillment of its obligations under a number of Security Council resolutions, as over-broad and inconsistent with a number of Australia’s human rights obligations.²³ Yet, as with the advice provided by the treaty bodies, these reports have been largely ignored by the federal government.

More recently, a second strategy has emerged, spearheaded by state and territory governments. It began with the adoption of a legislative charter of rights by the Australian Capital Territory (ACT) government in 2004,²⁴ and was followed soon after by the adoption of a similar charter by the Victorian government in 2006.²⁵ Similar legislation is currently under active consideration by two other states, Western Australia and Tasmania, and the federal government has just completed a national consultation about whether it should adopt a similar charter.²⁶

¹⁹ P.N. Bhagwati, *Mission to Australia: Human Rights and Immigration Detention in Australia*, ¶ 62 U.N. High Comm’r for Human Rights, available at [http://www.unhchr.ch/hurricane/hurricane.nsf/0/bc4c8230f96684c8c1256c070032f5f1/\\$FILE/Report.doc](http://www.unhchr.ch/hurricane/hurricane.nsf/0/bc4c8230f96684c8c1256c070032f5f1/$FILE/Report.doc).

²⁰ U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Working Group on Arbitrary Detention: Visit to Australia*, ¶ 36, U.N. Doc. E/CN.4/2003/8/Add.2 (Oct. 24, 2002).

²¹ U.N. Gen. Assembly, Human Rights Council, *Report of the Special Rapporteur on Adequate Housing*, ¶ 52, U.N. Doc. A/HRC/4/18/Add.2 (May 11, 2007).

²² Press Release, Special Rapporteur on the Rights of Indigenous Peoples, *Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (Aug. 27, 2009), available at <http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf>.

²³ U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 46, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005).

²⁴ Human Rights Act (2004) (Austl. Cap. Terr.).

²⁵ The Charter of Human Rights and Responsibilities Act (2006) (Vict.). This came into force progressively from Jan. 1, 2007. *Id.*

²⁶ See *supra* note 5 (discussing the possibility of adopting a legislative bill of rights at the federal level).

While there have previously been a number of unsuccessful attempts at introducing legislative bills of rights at the federal and state levels, the recent developments followed an extended period of mounting international and national criticism of the federal government's disregard for human rights (so shaming has its place), and community consultation processes that found widespread support for such developments. Substantially similar, these two pieces of legislation have certainly broken the political log jam. They introduce what has been called a "dialogic" model,²⁷ designed to promote dialogue between the three branches of government, and between the government and the community, about the protection of human rights. Parliamentary sovereignty is maintained by leaving final decisions about human rights protections to the legislature.

In Victoria, as a result of the new Charter of Human Rights and Responsibilities Act, new legislation must be accompanied by a human rights "statement of compatibility" prepared by the Attorney-General,²⁸ and the courts must interpret laws to be consistent with the Charter as far as possible.²⁹ The Victorian Supreme Court may make a "declaration of inconsistent interpretation" if it cannot interpret legislation consistently with the legislative charter, but this does not affect the operation of the law.³⁰ The issue is left to be considered by the legislature, and the Attorney-General is required to respond to the finding in Parliament within six months.³¹ The legislative charters are confined to the rights in the ICCPR and do not create an independent "cause of action" for those who believe their ICCPR rights have been violated. Rather, they make it possible for someone who has a pre-existing right to seek a remedy, in respect of actions or decisions of a public authority, to also seek injunctive or declaratory relief under the human rights legislation.³² The focus is largely about changing the "culture" of the public service to act consistently with human rights in decision-making and policy development, and to ensure legislative awareness of human rights and their responsibility to promote and protect them.

There is no doubt that the legislative charters are a worthwhile endeavor. They have already had positive effects on many people's lives, including, for example, young people in the Australian Capital

²⁷ Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75 (1997).

²⁸ The Charter of Human Rights and Responsibilities Act § 28.

²⁹ *Id.* § 32.

³⁰ *Id.* § 36(5).

³¹ *Id.* § 37.

³² *Id.* § 39.

Territory ("ACT") held in juvenile detention who have had a new facility built for them, which is consistent with Australia's obligations under the CRC.³³ However, by remaining within the tradition of "indirect" implementation, the charters are still a long way short of fully implementing Australia's international human rights obligations, although they may well be a significant first step. They do not achieve robust and comprehensive implementation that ensures governmental accountability and an effective remedy in the event of a breach.³⁴ It is most unlikely that a national bill of rights—if it is adopted in the future—will go much further.

IV. AUSTRALIA'S 'DIRECT' IMPLEMENTATION OF ITS INTERNATIONAL COUNTER-TERRORISM OBLIGATIONS

Australia's eagerness to implement its international legal obligations, pursuant to the post-9/11 Security Council resolutions, stands in striking contrast to its reluctance to fully implement its international human rights obligations. On 28 September 2001, the Security Council adopted Resolution 1373 (R1373) under Chapter VII of the U.N. Charter,³⁵ which made it binding on all U.N. member states. Unlike the exhaustive law-making processes that have led up to the adoption of multilateral human rights treaties, R1373 was adopted just forty-eight hours after the United States began informal (private) consultations on its draft with the other fourteen Security Council members. The Security Council meeting that unanimously adopted R1373 lasted only five minutes, during which there was no discussion of its content and not a single member articulated the reasons for their vote in support.³⁶

The Resolution identified "any act of international terrorism" as a threat to international peace and security.³⁷ On this basis, states were required to implement far-reaching legislative and administrative measures, including criminal sanctions,³⁸ strict financial and administrative measures aimed at individuals and organizations who are involved in or supportive of terrorism,³⁹ and more restrictive policies

³³ The Bimberi Juvenile Justice Centre is the first youth custodial facility in Australia to be designed, built and operated under Human Rights legislation. See <http://www.dhcs.act.gov.au/ocys/bimberi>.

³⁴ See Simon Evans & Carolyn Evans, *Legal Redress under the Victorian Charter of Human Rights and Responsibilities*, 17 PUB. L. REV. 264, 281 (2006).

³⁵ S.C. Res. 1373, U.N. Doc S/RES/1373 (Sept. 28, 2001).

³⁶ Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 187 (2005).

³⁷ S.C. Res. 1373, *supra* note 35, Preamble.

³⁸ *Id.* ¶ 1(b), 2(e).

³⁹ *Id.* ¶ 1(c).

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and practices in refugee status determination in order to prevent “abuse[]” of the system by “perpetrators” of terror.⁴⁰ In adopting this unusual resolution, the Council effectively reinvented itself as a legislative body.⁴¹ Unlike all previous Chapter VII resolutions, R1373 was not limited to dealing with a specific threat to international peace and security and imposed general legal obligations, which would normally only be assumed by way of consent—by entering into multilateral treaties. The opaqueness and exclusivity of the law-making process that had brought these new obligations into being was extraordinary and the obligations were themselves of unprecedented breadth.

Like many other states, Australia welcomed R1373, despite the unorthodoxy of the source of its legal obligations and their extensiveness. The Australian government joined in the frenzy of legislative activity around the world,⁴² significantly extending the reach of international law into its domestic affairs, with many grim consequences for already fragile human rights protections. Conspicuously, there appeared to be no need to have regard to the particularities of the Australian system that have prevented the government from doing likewise with its international human rights obligations.

It was an emergency, we were told, which left little time for democratic deliberation. Prime Minister Howard, commenting on counter-terrorism laws passed in 2005, acknowledged that, while the laws were unusual, they were “necessary because we live in unusual times.”⁴³ The logic seems to be that the ‘extraordinary’ threat of terrorism justifies extraordinary measures. As former Federal Attorney-General Daryl Williams argued with the introduction of the first wave of anti-terrorism laws in 2002, “[t]hese measures are extraordinary, but so too is the evil at which they are directed.”⁴⁴ This new ‘evil’ is portrayed as a threat that is qualitatively different from the type of politically, religiously, and ideologically motivated violence of earlier times; a novel

⁴⁰ *Id.* ¶ 3(f)-(g).

⁴¹ Talmon, *supra* note 36, at 176.

⁴² The Australian government’s counter-terrorism legislative package consisted of six Acts: Security Legislation Amendment (Terrorism) Act, 2002 (Austl.), Suppression of the Financing of Terrorism Act, 2002 (Austl.), Criminal Code Amendment (Suppression of Terrorist Bombings) Act, 2002 (Austl.), Telecommunications Interception Legislation Amendment Act, 2002 (Austl.), Border Security Legislation Amendment Act, 2002 (Austl.), and the Criminal Code Amendment (Anti-Hoax and Other Measures) Act, 2002 (Austl.).

⁴³ Michelle Grattan & Brendan Nicholson, *Should We be Afraid of the Terror Laws?*, THE AGE (Melbourne), Oct. 18, 2005, at 11.

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, Mar. 21, 2002, 1932 (D. Williams, Attorney-General).

type of threat which requires a new type of response. According to the federal government, transnational terrorism presents a "new kind of foe" that is not "responsive to conventional deterrents" and that "challenges us in ways which demand new and innovative forms of response."⁴⁵ Attorney-General Philip Ruddock, for instance, argued that "[t]errorism is arguably the greatest threat this nation has faced in many decades, and perhaps the most insidious and complex threat we have ever faced."⁴⁶

In Australia, as elsewhere, the new legislation brought into existence a range of "terrorism" offences,⁴⁷ adopting a wide statutory definition of a "terrorist act"⁴⁸ which, at its margins embraces certain forms of industrial action, like picketing.⁴⁹ The legislation also introduced new censorship laws, reintroduced sedition offences, and conferred extensive powers on the executive to list vaguely defined "terrorist" organizations, which are not restricted to organizations whose "principal" activities are the promotion or commission of acts of ideological, religious, or political violence. Once listed, a far-reaching set of terrorism offences can apply which essentially impose criminal liability on the entire group and others who engage in certain forms of association with the organization. While laws that allow the banning of such a broad range of groups clearly threaten the right to freedom of association,⁵⁰ and also impinge on the right to freedom of thought, conscience, and religion,⁵¹ they also violate the right to legality, which requires that everyone reasonably knows what is and is not a crime.⁵²

⁴⁵ Australian Government, Dep't of Foreign Affairs and Trade, *Transnational Terrorism: The Threat to Australia* (2004), <http://www.dfat.gov.au/publications/terrorism>.

⁴⁶ Philip Ruddock, Attorney-General, *A Safe and Secure Australia: An Update on Counterterrorism*, Speech at Manly, Sydney (Jan. 21, 2006).

⁴⁷ Bernadette McSherry, *Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws*, 27 U. N.S.W. L.J. 354 (2004).

⁴⁸ *Criminal Code Act 1995* (Cth) § 100.1.

⁴⁹ While the definition of a "terrorist act" excludes "industrial action," this is unlikely to afford any protection to picketing which has been found not to be "industrial action" under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty. Ltd. v. Nat'l Union of Workers*, (1999) 165 A.L.R. 550, 575 per Wilcox and Cooper, JJ. (with whom Burchett, J. agreed at 586).

⁵⁰ Int'l Covenant on Civil and Political Rights (ICCPR) art. 22.

⁵¹ *Id.* art. 18. See *id.* art. 4(2) (specifying that this right is not derogable in times of public emergency).

⁵² *Id.* art. 15(1). See also U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 46, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005). Criminal conduct must be prescribed by national or international law in such a way that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct." *Id.*

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Particularly in Australian Muslim and Arab communities, the legislation has fostered misunderstanding and fearfulness, which undermines its purported aims.⁵³ Many in these communities now live in fear of committing an offence under the new legislation, simply by giving to religious charities or associating with friends or relatives who may or may not be members of banned organizations.

Underlining this point are the conclusions of the Parliamentary Joint Committee on ASIO, ASIS, and DSD, which in 2005 found “no evidence” that six of the nineteen organizations listed as “terrorist organizations” under the *Criminal Code* posed “any threat” to Australian interests.⁵⁴ Further, unprecedented arrest and detention powers were conferred on security and police organizations, including the power to detain persons “suspected of having information” related to a “terrorism” offence for up to a week in largely incommunicado circumstances.⁵⁵ The unparalleled character of this legislation prompted the Secretary to the Attorney-General’s Department to observe that it introduced “a whole new area of criminal law and law enforcement procedure.”⁵⁶

The Human Rights Committee, which monitors implementation of the ICCPR, has expressed a number of concerns about the legislation, including that the new powers granted to security agencies to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods may violate Australia’s ICCPR obligations.⁵⁷ The Committee Against Torture has also expressed a number of concerns about Australia’s anti-terrorism laws and practice, including the lack of judicial review and the character of secrecy surrounding imposition of preventative detention and control orders.⁵⁸

⁵³ Security Legislation Review Committee, Report of the Security Legislation Review Committee (Sheller Report) (June 15, 2006), at 142.

⁵⁴ Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Six Terrorist Organisations*, ¶¶ 3.26, 3.35, 3.14–3.17, 3.37, 3.49 (Mar. 2005).

⁵⁵ Australian Security Intelligence Organisation Act, 1979 (Austl.) div. 3, pt. II. A recent analysis of these powers can be found in Parliamentary Joint Committee on ASIO, ASIS, and DSD, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005).

⁵⁶ R. Cornall, Secretary, Attorney-General’s Dep’t, Australian Gov’t Initiatives and Policy Directions after the London Bombings of 2005, Safeguarding Australia 2006 Conference (Sept. 19, 2006).

⁵⁷ U.N. Int’l Covenant on Civil & Political Rights, Human Rights Committee, *Concluding Observations on the Human Rights Committee* ¶ 11, U.N. Doc. CCPR/C/AUS/CO/5 (May 7, 2009).

⁵⁸ U.N. Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, *Concluding Observations of the Committee against Torture* ¶ 10, U.N. Doc. CAT/C/AUS/CO/3 (May 22, 2008).

Despite all these problems, the obligations imposed by R1373 appear to have been widely embraced, if the remarkably high rate of compliance with the obligation to submit reports to the Security Council's Counter Terrorism Committee ("CTC") on the action States have taken pursuant to R1373 is any measure. Astonishingly, by 1 April 2003, all 191 UN member States had submitted their first report to the CTC and 140 had submitted their second,⁵⁹ although implementation overall remains patchy.⁶⁰ The human rights treaty bodies can only dream about achieving such rates of reporting compliance! What is more, the CTC's practice of providing guidance and feedback on all this legislative activity seems also to have been accepted⁶¹ even though it uses the U.S.A. PATRIOT Act of 2001 as its template, rather than drawing from the world's diverse legal cultures and ensuring conformity with states' other international legal obligations, most notably those under international human rights, refugee, and humanitarian law.

The adoption of R1373 marks a dangerous shift of the locus of law-making from the General Assembly to the Security Council, a body that is patently unrepresentative, un-consultative, and lacking in transparency and accountability. Emboldened by the enthusiastic reception of R1373, the Security Council has since adopted three more legislative resolutions, two of which request the International Criminal Court to refrain from investigating or prosecuting cases in U.N. operations if they involved Americans, and obliging all member States not to take action inconsistent with that request.⁶² The third such resolution imposes obligations on States to act to prevent the proliferation of weapons of mass destruction and their delivery systems.⁶³ The widespread support for the Security Council's legislative endeavours, and the lack of concern expressed by states about this development, suggests to me that we may be on the cusp of an even more dangerous era of "hegemonic" international law-making.

⁵⁹ Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 337 (2003). Country reports are available at <http://www.un.org/sc/ctc/countryreports/Creports.shtml>.

⁶⁰ U.N. Sec. Council, Counter Terrorism Committee, *Report of the Implementation of Security Council Resolution 1373 (2001)*, U.N. Doc. S/2008/379 (June 10, 2008).

⁶¹ Alvarez, *supra* note 1, at 875.

⁶² S.C. Res 1422, U.N. Doc. S/RES/1422 (2002) (July 12, 2002) and S.C. Res 1487, U.N. Doc. S/RES/1487 (2003), (June 12, 2003). Notably, neither of these resolutions identified a threat to international peace and security, despite this being a precondition for imposing obligations under Chapter VII.

⁶³ S.C. Res 1540, U.N. Doc. S/RES/1540 (2004) (April 28, 2004).

IV. CONCLUSION — THE FUTURE OF INTERNATIONAL LAW

In conclusion, I would like to make three points. The first is that it remains highly problematic that Australia considers its democratic credentials to provide the best guarantee of the enjoyment of human rights, rather than direct implementation of its international obligations into domestic law. This position not only prevents the full enjoyment of human rights in Australia, but also brings Australia into the disreputable company of those who argue against the universality of human rights — either because they consider the system should treat democratic states differently than undemocratic states (because it is contended that the latter states are the “real” violators),⁶⁴ or because they believe that cultural, historical, and religious diversities preclude the possibility of universal norms.⁶⁵ Proponents of both these schools of thought are deeply antagonistic to the project of utilizing international law to realize the enjoyment of human rights everywhere. While politics clearly has an important role to play in the promotion and protection of human rights, my point is that political processes need also to lead to hard law, which ensures comprehensive implementation and effective remedies, or the obligatory nature of international law is undermined.

Second, the prioritization of security law over human rights law is simply not defensible if the goal is to effectively counter international terrorism. As Kofi Annan said in 2005, “respect for human rights [is] not only compatible with a successful counter-terrorism strategy, but [is] an essential element of it.”⁶⁶ The Australian government has often claimed that its counter-terrorism laws are consistent with its human rights obligations because they protect the right to life. In defence of his new laws, the former Prime Minister Howard said that “[w]hen people talk about civil liberties, they sometimes forget that action taken to protect the citizen against physical violence and attack is a blow in favour, and not a blow against, civil liberties.”⁶⁷ These laws protect human rights by securing “the greatest human right of all . . . the right to live.”⁶⁸ This justification relies on and perpetuates a climate of fear, which in turn,

⁶⁴ Anne F. Bayefsky, Panel Discussion, *The UN Human Rights Regime: Is it Effective?*, 91 AM. SOC’Y INT’L L. PROC. 460 (1997).

⁶⁵ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, *Bangkok Declaration* (Apr. 2, 1993).

⁶⁶ The Secretary-General, *Report of the Secretary-General on Protecting Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 4, delivered to the General Assembly, U.N. Doc A/60/374 (2005) (Sept. 22, 2005).

⁶⁷ John Howard, Prime Minister, Address to the ASPI Global Forces 2006 Conference — Australia’s Security Agenda (Sept. 26, 2006).

⁶⁸ *Id.*

lends support to the government's preference for coercive and discriminatory measures that illegally (disproportionately) derogate from many of its other human rights obligations. Instead, as many U.N. human rights bodies have emphasized, there needs to be an emphasis on non-coercive measures and precise criminal offences, in a broader context of promoting tolerance and respect for diversity, adopting measures to alleviate poverty, observing human rights, and addressing pressing issues of social injustice and inequality.⁶⁹

Third, it is a disturbing development that international legal obligations imposed by the unrepresentative Security Council are fast-tracked into domestic law, without regard for their impact on human rights, while the implementation of human rights obligations that have been identified through participatory international law-making processes are left to the vagaries of domestic politics. The Australian experience is an ominous sign of the possible future development of international law as hegemonic law, promulgated at the behest of the superpower members of the Security Council, rather than developed cooperatively through inclusive processes, which involve all States and international civil society. It is the legitimacy of the latter kind of law that can justify bringing international law into the domestic context, and support the realization of universal human rights, without which the related project of international peace and security will never be attained.

⁶⁹ Gen. Conference of the U.N. Educ., Scientific & Cultural Org. (UNESCO), *Call for International Cooperation to Prevent and Eradicate Acts of Terrorism* (October 20, 2001), http://www.unesco.org/dialogue/en/31C_Res_39.pdf; U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005).