

AUSTRALIA, HUMAN RIGHTS AND FOREIGN POLICY

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In the course of the recent periodic review of Australia by the UN Human Rights Committee, one of the independent experts called on Australia to grasp its opportunity — and fulfil its obligation — to become a 'AAA' human rights state.

This article responds to three issues raised by that call. First, why should Australia strive to be a 'AAA human rights state'? Second, does Australia have the characteristics and satisfy the preconditions to become such a state? And, third, what are some of the steps and measures that Australia should take, including particularly at the international and regional levels, to pursue this path if, indeed, it is a path worth pursuing?

A human rights-based approach to foreign policy

In her significant new work, *Global Good Samaritans: Human Rights as Foreign Policy*, Alison Brysk poses an important question. Why, she asks, do a small number of principled, persistent, human rights promoting states — 'Global Good Samaritans' she calls them — sacrifice their national interest to help strangers? Her simple answer is ... *they don't*.¹ Instead, she explains, such states construct and re-construct their national interest with a broad, long-term vision of a rule-based international system that values and promotes human rights, security, democracy and good governance. Global Good Samaritans, she posits, see the 'blood, treasure, and political capital they contribute to the international human rights regime as an investment, not a loss'.² They have learned to see themselves, she continues, 'as interconnected members of a global community that works best for everyone when human rights are respected'.³

Put another way, Global Good Samaritans recognise the domestic and international imperatives of: first, a rule-based international social order; second, states that adhere to those rules; and, third, a genuine multilateral commitment to tackling global problems. They recognise that, in the absence of these imperatives, urgent challenges such as climate change, poverty, financial instability and food insecurity will remain unresolved, with grave implications for global, regional and national peace, security and development.

In addition to recognising the dangers of not adopting a persistent and principled approach to human rights in international relations and foreign policy, Global Good Samaritans also see and reap the benefits of doing so. The manifold benefits of being a humanitarian

internationalist state and human rights promoter include at least the following.⁴ First, the development of a more stable and predictable international and regional policy environment. Second, enhanced international credibility and diplomatic capital. Third, enhanced policy coherence and effectiveness as human rights construct common frameworks for domestic, bilateral and multilateral policy and relations.⁵ Fourth, the development of diverse, cross-cutting international networks with other promoter states.⁶ And fifth, the ideation and mobilisation of universal, constructive national values and identities.

Could Australia be a Global Good Samaritan?

Professor Brysk's landmark study identifies a number of characteristics or 'inputs' that are said to 'equip' a state to become a principled human rights-promoting state.

First, human rights promoting states tend to be open democracies with a vibrant, active and vigilant civil society. Mature states support a strong non-government sector and welcome constructive criticism by NGOs as an opportunity to identify and collaboratively address human rights problems.

Second, human rights promoters tend to be globalised and networked. Together, these first and second attributes create the 'means and motive for internationalism'.⁷

Third, such states tend to be reasonably well developed and politically, socially and economically stable and secure. According to Brysk, at least a 'moderate threshold of development and a modicum of security ensure that state survival and welfare needs are sufficiently satisfied to allow the pursuit of long-term cosmopolitan visions'.⁸

Fourth, principled promoters generally enjoy low levels of social stratification and are often multicultural and cosmopolitan. A number of recent studies demonstrate the strong linkages between equity and participation, on the one hand, and economic development, stability and deep democracy on the other.⁹

Fifth and finally, 'another positive factor increasing the probability of internationalism is a middle power international niche'.¹⁰ Brysk notes that middle powers, particularly regional middle powers, can play a constructive international role as builders of systems and institutions. Such powers have a strong interest in multilateralism and consensus and can act as a critical

REFERENCES

1. Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (2009) 31.
2. *Ibid.*
3. *Ibid.*
4. See generally, Brysk, above n 1.
5. There is strong evidence, for example, that Canada's domestic Charter of Rights and Freedoms and its foreign policy on 'Human Rights, Democracy and Good Governance' have formed a virtuous circle and been mutually reinforcing: see, eg, Louise Arbour, 'The Responsibility to Protect and the Duty to Punish: Politics and Justice in a Safer World' (2001) 59 *Behind the Headlines* 1; Brysk, above n 1, 91, 226.
6. For example, Australia should consider joining the Human Security Network, a group of like-minded states such as Canada, Ireland, Costa Rica and Norway, formed to further develop and enact the 'human security agenda', including the 'responsibility to protect' doctrine <humansecuritynetwork.org/menu-e.php> at 29 October 2009.
7. Brysk, above n 1, 6.
8. *Ibid.* 7.
9. See, eg, Brysk, above n 1, 224. See also Iris Marion Young, *Inclusion and Democracy* (2000) and Amartya Sen, *Development as Freedom* (1999).
10. Brysk, above n 1, 7.

As a developed democracy and influential middle-power, Australia has an important leadership role to play in promoting and supporting the development of a Pacific regional human rights instrument and institution.

counterweight to global hegemony. This is particularly the case when such powers do not unswervingly belong to any coalition or bloc of countries.

In my view, Australia has what it takes to be a highly effective, principled, persistent human rights promoting state. Australia is democratic, and politically stable. It is globalised and multicultural, with an active and networked civil society. It enjoys relatively low levels of social stratification and relatively high levels of economic development. It is also a secure middle power, albeit with a strong recent tendency to position itself perhaps too closely with so called 'like-minded states' and perhaps insufficiently closely with its regional neighbours.¹¹ It is notable, but little known, that, in the development of the *Universal Declaration of Human Rights*, Australia positioned itself as an independent middle power, unaligned with any blocs. In the negotiation of this historic instrument, Australia used this position of independence to broker deals and bridge divides, advocating strongly for the inclusion, indivisibility and interdependence of both civil and political rights (thus aligning itself with the United States) and economic, social and cultural rights, including the right to full employment (thus aligning itself with the Soviet Union).¹² That is a legacy that must be re-energised.

Having made this assessment, what follows are some modest and necessarily brief suggestions as to how Australia could fulfil its potential to be a more active and influential human rights-promoter state; a potential that is, in my view, critical given Australia's position as a 'likely' middle power in the only region of the world without a regional human rights instrument or mechanism,¹³ and a region confronting significant human rights and development issues.

These proposals are structured in terms of what Australia can and should do at the international, regional and local levels and are limited to just two or three proposals in each of these areas.

What should Australia do to better promote human rights and development?

International Initiatives

Human rights promotion as a key priority of foreign policy

Australia's international, regional and bilateral approach to human rights should be persistent and principled, fearless and forceful.

At the international level, Australia should strategically position itself as an outstanding international citizen and human rights promoter, including by developing a consistent and comprehensive strategy on human rights and foreign policy.¹⁴ That policy should seek to mainstream and integrate human rights across all areas of Australian foreign policy, including aid, development, trade, investment, migration, environment, business and security. It should contain concrete measures and commitments to promote and protect human rights in the region and internationally. Such a policy could enhance Australia's international credibility as a human rights leader and build significant diplomatic capital.

Australia's Security Council candidacy

Australia's current Security Council candidacy can and should be a flagship for this approach. It is well known that Australia is seeking election as a non-permanent member of the UN Security Council for 2013–2014. A Department of Foreign Affairs brochure outlining the candidacy identifies 'Respecting human rights' as one of four key pillars of Australia's international engagement and promotes Australia as a 'principled advocate of human rights for all'.¹⁵

Historically, Australia has played a significant and constructive role in the development and operation of international human rights norms and institutions. Looking forward, Australia should commit its Security Council candidacy to the promotion and protection of fundamental rights and freedoms, including through the further elaboration of human rights standards and the strengthening of institutions and mechanisms at the international, regional and domestic levels.¹⁶

As a Security Council candidate, Australia should commit to taking a principled and consistent approach to human rights internationally and to ensuring that domestic policies and practices are human rights-compliant. Australia should use its Security Council candidacy as a vehicle to promote Australia's objectives and national interest in promoting international human rights, the rule of law and good governance.

If Australia is elected to the Security Council, it should engage the Council in effectively responding to major human rights challenges and implications, including in relation to climate change, poverty, financial instability and food insecurity. It should leverage the opportunity to enhance international and domestic policy coherence and effectiveness.¹⁷

11. In this regard, Brysk notes 'a lack of reinforcing regional support networks' as a potential impediment to Australia's becoming a Global Good Samaritan: Brysk, above n 1, 229.

12. Ashley Hogan, *Moving in the Open Daylight: Doc Evatt, an Australian at the United Nations* (2008) 39–43.

13. It is notable, in this regard, that the ASEAN states have recently agreed on the establishment of an ASEAN Intergovernmental Commission on Human Rights, albeit an institution which does not have a clear protection mandate, is committed to a principle of 'non-interference in internal affairs', and arguably lacks independence. These deficiencies notwithstanding, the establishment of the Commission is clearly a positive development.

14. For an example of a leading state in this regard, see Ministry of Foreign Affairs (Netherlands), *Human Dignity for All: A Human Rights Strategy for Foreign Policy*, <minbuza.nl/dsresource/objectid=buzab eheer:53627&type=org> at 29 October 2009.

15. See Department of Foreign Affairs and Trade (Australia), *Australia: UN Security Council Candidate 2013–2014* (2009) <dfat.gov.au/un/unga.html> at 29 October 2009.

16. It is notable that Sweden has identified the 'mainstreaming of human rights into the work of the UN Security Council and in the international arena' as a key foreign policy objective: see Parliament of Sweden, *Human Rights in Swedish Foreign Policy*, Government Communication 2003/04:20, 11 <manskligarattigheter.gov.se/dynamaster/file_archive/040301/3e2f0d255a5e3a6938c1bc0678ff7d8e/s200304_20e.pdf> at 29 October 2009.

17. Brysk, above n 1, 91, 226.

Australia should also use its candidacy and seat, if successful, to further develop and pursue a progressive international human rights agenda. There is good precedent for this. Canada used its seat on the Security Council in 1999–2000 to promote the protection of civilians (including through the adoption of significant resolutions on humanitarian intervention), engaged human rights bodies such as UNICEF and the International Committee of the Red Cross directly in the deliberations of the Council, and brought international attention to the issue of ‘conflict diamonds’ and the inter-relationship of business and human rights.¹⁸

Australia could and should similarly commit itself to a range of priorities that are both of international human rights significance and strategically aligned with Australia’s domestic and regional interests and commitments. This could include advocating for: (1) a moratorium on executions and the universal abolition of the death penalty;¹⁹ (2) the advancement of Indigenous peoples globally;²⁰ (3) the further elaboration of robust international and domestic regulatory frameworks for business and human rights; (4) progress in gender equality and non-discrimination, including reducing violence against women and children;²¹ (5) addressing the threat of terrorism in a human rights and human security framework; (6) the operationalisation of the ‘responsibility to protect’ principle;²² and (7) addressing poverty in a human rights framework, particularly in Asia and the Pacific.²³

Australia and the UN Human Rights Council

Australia should similarly take a proactive, progressive, principled and persistent approach to the UN Human Rights Council, whether as an active observer state or member. Australia has an important role in working towards ensuring the Council fulfils its mandate, and achieves its potential, as the leading multilateral forum for the discussion, promotion and enforcement of international human rights.

Australia could take two immediate concrete steps in this regard.

First, Australia should publicly commit, as a matter of national and foreign policy, to ‘competitive, genuinely-contested and principled elections for the Human Rights Council’,²⁴ in accordance with the requirements of General Assembly Resolution 60/251. As a coalition of leading national and international NGOs recently elucidated in an open letter to all UN member states, this should involve: (1) committing to only voting for those candidates whose human rights records and election pledges meet the membership requirements set forth in Resolution 60/251; (2) standing for, and encouraging others to stand for, election; (3) presenting and voting for candidates individually rather than as part of a regional slate or bloc; and (4) consulting with NGOs and civil society in formulating and evaluating pledges, commitments, human rights records and candidacies.²⁵

Second, Australia is scheduled for the Human Rights Council’s Universal Periodic Review (‘UPR’) process

in 2011. The recent periodic review of Canada demonstrated the need to ensure adequate planning and ‘open, transparent, timely and substantive engagement’ with both government and civil society in preparation for the UPR. Australia should develop a detailed plan for its report and response to the UPR, consistent with the recommendations of Canada’s Senate Standing Committee on Human Rights.²⁶ This plan should outline a process that will ensure open, transparent, timely and substantive engagement with civil society, parliamentarians, and the Australian public with respect to Australia’s human rights obligations and follow-up and implementation of UPR recommendations.

Australia’s commitment to the millennium development goals and global poverty reduction

There are very strong associations between human rights, development and poverty. As the First World Conference on Human Rights pronounced in 1968, ‘the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development’.²⁷

Giving partial effect to this statement, in 1970 the United Nations General Assembly adopted an historic resolution setting a development assistance target of 0.7 per cent of gross national income.²⁸ This target has been repeatedly reaffirmed.²⁹

The provision of development assistance is one of the key means by which a state can contribute to global development, security, stability, peace and good governance. It is one of the foreign policy vehicles through which a state can impart its values at the international level, thereby promoting the national interest. According to Brysk, the provision of foreign development assistance can also assist to create and mobilise constructive national values and identities, thereby ‘globalising’ the national interest.

In addition to being in the national interest, the imperative to provide development assistance also has a legal dimension. Under article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’), Australia is legally obliged to assist in the realisation of social and economic rights ‘through international assistance and co-operation ... to the maximum of its available resources’. The UN Committee on Economic, Social and Cultural Rights (‘CESCR’) has recognised that this obligation ‘is particularly incumbent upon those States which are in a position to assist others in this regard’.³⁰

Australia, as an Organisation for Economic Co-operation and Development country with one of the highest Gross National Incomes (‘GNI’) per capita in the world,³¹ is in a very strong position to make a significant contribution to international cooperation through foreign aid. Despite this, the ratio of Australia’s aid to GNI for 2008–09 was around 0.32 per cent, while the ratio for 2009–10 is estimated at around 0.34 per cent.³² The current government has committed to increasing aid spending to 0.5 per cent of GNI by 2015. Even this commitment, however, leaves Australia

18. Ibid 68–9. Sweden has similarly committed its term as President of the European Council of Ministers in 2009 to the prioritisation and promotion of human rights: see <manskligarattigheter.gov.se/extra/pod/?id=2&module_instance=2&action=pod_show&navid=2> at 29 October 2009.

19. Australia is a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*.

20. The Hon Jenny Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Statement on the United Nations Declaration on the Rights of Indigenous Peoples’, Parliament House, Canberra, 3 April 2009 <jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm> at 29 October 2009.

21. At the domestic level, Australia has recently adopted a National Plan to Reduce Violence against Women and their Children, <fahcsia.gov.au/sa/women/progserv/violence/nationalplan/Pages/default.aspx> at 29 October 2009, while promoting gender equality and eliminating violence against women is a strategic priority for Australia’s aid program <ausaid.gov.au/publications/pdf/women.pdf> at 29 October 2009.

22. The Hon Stephen Smith, ‘Australia Supports the Responsibility to Protect’ (Media Release, 21 July 2009) <foreignminister.gov.au/releases/2009/fa-s090721b.html> at 29 October 2009.

23. In a similar vein, see above n 14. The Policy commits the Netherlands to 100 concrete activities to advance human rights in six priority areas, being: (1) abolition of the death penalty; (2) an absolute ban on torture; (3) the relationship between freedom of religion and other rights and freedoms; (4) women’s rights; (5) children’s rights; and (6) non-discrimination on the basis of sexuality.

24. Open Letter to UN Member States: Embrace Competitive Elections to Human Rights Council, 13 August 2009 <hrw.org/en/news/2009/08/13/letter-un-member-states-embrace-competitive-elections-human-rights-council> at 29 October 2009.

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well short of the internationally-agreed 0.7 per cent target, and well behind Global Good Samaritans such as Norway (0.95 per cent), Sweden (0.93 per cent), Denmark and the Netherlands (both 0.81 per cent) and Ireland (0.54 per cent).³³

Recently, leading aid and development organisations have rightly commended the Australian Government's more coordinated action with other donors, as well as greater transparency, increased focus on basic health and education, enhanced monitoring and evaluation, granting of untied funding and improved in-country management in respect of its aid program.³⁴ However, the Australian Government's overseas aid program is inadequate when compared with the contributions of many other countries. Australia's contributions have decreased significantly since 1970 when it was equal first in the ranking of the proportion of GNI to aid. By 2006, Australia had dropped to 15th out of 22 donors, leading the CESCRC to note with regret at its recent periodic review of Australia that:

in 2008–2009 the State party has devoted only 0.32 per cent of its gross national income to official development assistance, whereas the United Nations target for ODA is 0.7 per cent of GDP for developed countries.

It is imperative that, as a country with the means (and, I would add, the motive), Australia act quickly and positively to implement the Committee's recommendation that 'the State party increase its official development assistance to 0.7 per cent of its GDP'. It is also imperative that Australia's aid and development program continues to become more closely aligned and integrated with human rights policy and commitments, including through increased resources and support for human rights institutions and norms, and the human rights capacity and capabilities of governments and civil society.³⁵

Australia, business and human rights

The further development and operationalisation of a business and human rights framework is another area ripe for Australian Leadership.

The impact and influence of corporate activity is significant, widespread and increasing. Corporations have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to impact harmfully on the human rights and lives of individuals and communities.

Despite this, there are significant governance and regulatory gaps at both the international and domestic levels between what corporations *do*, *can do* and *should*

do about human rights and responsibilities. As the UN Special Representative on Business and Human Rights recently identified, these gaps have been exacerbated by the globalisation of business without a correlate globalisation of laws and institutions. He concluded that 'the gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation'.³⁶

The Special Representative's 2008 report to the UN Human Rights Council, entitled 'Protect, Respect and Remedy', is a constructive model for addressing ways in which to impute human rights duties to business.³⁷ The Special Representative's framework sets out three duties and responsibilities. First, States are under a *duty* to *protect* human rights. Second, States have a duty to provide *access to a remedy* for breaches of human rights by third parties (such as corporations). Third, business itself has a *responsibility* to respect human rights, or at least to do no harm.³⁸

With the recent renewal of the Special Representative's mandate, there is both an opportunity and responsibility for states to further develop and operationalise this framework at the domestic and international levels.³⁹ In my view, this is a particularly important opportunity and responsibility for Australia. It is an opportunity because Australia already has highly evolved and effective legal, regulatory and prudential frameworks and institutions for business. It is a direct responsibility because there is no clear framework of human rights obligations applicable to Australian corporations in their relationships overseas with host state governments or populations. This is notwithstanding the highly globalised nature of Australian business, including that Australian corporations often operate in areas of lax or limited regulation or where host governments lack the will or capacity to monitor corporate conduct in their jurisdictions or to enforce standards. Australian companies, particularly mining companies, can have a severe impact on the human rights of people in many parts of the world, particularly the rights to food, water and health.⁴⁰

According to the Special Representative, one of the most effective means to promote rights compliance is to develop corporate cultures in which respecting rights is seen as being an integral part of doing business.⁴¹ Government is uniquely placed to stimulate the development of these cultures. By devising innovative mechanisms which harness the power of the market, and by leveraging regulatory and service-

25. Mexico announced a policy along these lines in its statement to the General Assembly in support of Resolution 60/251 on 15 March 2006.

26. Standing Senate Committee on Human Rights (Canada), *Canada's Universal Periodic Review before the United Nations Human Rights Council*, May 2009 <parl.gc.ca/40/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep02may09-e.htm> at 29 October 2009.

27. *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, UN Doc A/CONF.32/41 (1968) at [13].

28. International Development Strategy for the Second United Nations Development Decade, *UN General Assembly Resolution 2626 (XXV)*, 24 October 1970, [43].

29. The development assistance target of 0.7 per cent of GNI was most recently reaffirmed at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, held in Doha from 29 November to 2 December 2008.

30. Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations* (1990) [14].

31. World Bank, 'GNI per capita 2008, Atlas Method and PPP' (2008) <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf> at 29 October 2009.

32. AusAID, 'About Australia's Aid Program' <ausaid.gov.au/makediff/default.cfm> at 29 October 2009.

33. These figures relate to ODA provided in 2007: see David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (2009) 113.

34. World Vision Australia, *Island Nation or Global Citizen — How is Australia faring in the global challenge to make poverty history?* (2007) 14 <worldvision.com.au/Libraries/3_3_I_Australia_and_the_Pacific_PDF_reports/2007_-_Island_Nation_or_Global_Citizen.sflb.ashx> at 29 October 2009.

provision functions, governments can simultaneously encourage business entities to respect human rights and enable them to pursue their business objectives. Without limiting the scope of policy initiatives that could and should be pursued, I suggest that Australia consider at least the following soft power tools to operationalise the 'Protect, Respect and Remedy' framework for business and human rights. First, Australia should take a leadership role by adopting the Special Representative's framework as a basis for its corporate human rights policy and approach, both domestically and extra-territorially. Further, Australia should actively support and engage with the work of the Special Representative, including by officially inviting him to undertake a mission to Australia to meet with government, business, NGOs and other key stakeholders. Second, Australian governments and public authorities should move to incorporate human rights provisions in governmental contracts. Third, those same entities should conduct or require Human Rights Impact Assessments, particularly on large-scale projects. Fourth, governments and public authorities should support socially-responsible market indices and certification programs; at a minimum, governments should, for example, take such indices and programs into account as part of their procurement policy and practice. Fifth and finally, Australia should lead the development of voluntary national guidelines for business on how to act compatibly with human rights, including in their extra-territorial operations.⁴²

Regional Initiatives

Australia's human rights role in the region

Shortly after coming to office, the current Australian Government identified 'comprehensive and active engagement with the Asia-Pacific region' as 'one of the three pillars of the Rudd Government's foreign policy approach'.⁴³ As a key foundation of this pillar, Australia's role and responsibility in promoting universal observance of human rights in the region is both complex and critical.⁴⁴

Asia and the Pacific are the only areas in the world without regional human rights laws or institutions. Europe and the Americas each have a Human Rights Convention and Human Rights Court, Africa has a Charter and a Court of Human and Peoples' Rights, and the League of Arab States has a Charter on Human Rights.

Asia and the Pacific are also regions that confront significant human rights and rule of law issues, including entrenched poverty, systemic gender discrimination and inequality, inadequate health care and an increasing incidence of HIV/AIDS. The human rights implications of climate change for Asia and the Pacific could be catastrophic.

For present purposes, these remarks are confined to potential Australian policies and programs in the Pacific region, rather than addressing such initiatives in both Asia and the Pacific. The primary reasons for this bifurcation are, first, that Asia and the Pacific are extremely different regions, socially, economically and

politically and, second, that Australia has very different diplomatic relations, roles and spheres of influence in the two regions. Still, many of the guiding principles I will discuss are equally applicable across both regions.

Australia's role in promoting a Pacific human rights mechanism

As a developed democracy and influential middle-power, Australia has an important leadership role to play in promoting and supporting the development of a Pacific regional human rights instrument and institution.

Leadership comes in many forms. The leadership of a Global Good Samaritan, however, should be respectful and sensitive to context rather than a 'top down' exercise of authority. The most effective means by which Australia can promote a regional human rights culture may not be to propose a 'human rights model' (as perhaps envisaged by the terms of reference of a current parliamentary inquiry into Australia's role in promoting human rights in the Asia-Pacific),⁴⁵ but rather to integrate human rights into all of our engagements with the region.

The Prime Minister foreshadowed such an approach with his Port Moresby Declaration on Australia's relationship with the Pacific in March 2008.⁴⁶ The Foreign Minister has described this approach as being based on cooperative engagement and mutual respect; 'working and talking with, not at, our neighbours'.⁴⁷ It is notable in this regard that the Pacific Plan of 2005, adopted by the Pacific Island Forum, itself provides a constructive framework for fruitful human rights dialogue, expressing a vision of the Pacific as a:

region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values and for its defence and promotion of human rights'.⁴⁸

As the Australian Parliamentary Secretary for Pacific Island Affairs, the Hon Duncan Kerr, recently recognised, 'the Pacific is not a blank canvas on which external conceptions of human rights need be drawn'.⁴⁹

Australia's role in promoting ratification and reporting under international human rights treaties

As a first step to aiding the development of a regional human rights culture and instrument, Australia should support increased Pacific engagement with the international human rights system. Currently, the Pacific has the lowest human rights treaty ratification rate of any global region. This is despite treaties such as the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') providing clear, comprehensive, internationally accepted principles that can enhance governance and improve accountability. Through a process of periodic reporting to the UN regarding treaty implementation, Pacific states could work with independent international human rights experts to develop recommendations and strategies to improve human rights at the local level. As a longstanding participant in these processes, Australia should provide Pacific states with legal and financial

35. The Netherlands' *Memorandum on Human Rights Policy* (2001) and Canada's *Policy for CIDA on Human Rights, Democratization and Good Governance* (1996) <acdi-cida.gc.ca/inet/images.nsf/vLUIImages/HRDG2/\$file/HRDG-Policy-e.pdf> at 29 October 2009, provide valuable guidance in this regard. See generally, David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (2009) 93–114.

36. John Ruggie *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 [3] (2008).

37. *Ibid.*

38. *Ibid.* [9].

39. The mandate was itself extended to, relevantly, develop 'concrete and practical recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by or involving transnational corporations': UN Human Rights Council, *Mandate of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, Resolution 8/7 (18 June 2008) at para 4(a).

40. *Freedom, Respect, Equality, Dignity: NGO Submission to the UN Committee on Economic, Social and Cultural Rights* (April 2008) [113]–[115] <hrhrc.org.au/content/topics/esc-rights/icescr-ngo-report-australia-un-committee-on-economic-social-and-cultural-rights/> at 29 October 2009.

41. Above n 36 [29].

42. For a more detailed discussion of these proposals, see Human Rights Law Resource Centre, *Engage, Educate, Empower: Measures and Initiatives to Promote and Protect Human Rights* (Submission to National Human Rights Consultation, April 2009) 46–53 <hrhrc.org.au/content/topics/equality/engage-educate-empower/> at 29 October 2009.

43. The Hon Stephen Smith, 'Australia, ASEAN and the Asia-Pacific' (Speech to the Lowy Institute, Sydney, 18 July 2008) <foreignminister.gov.au/speeches/2008/080718_lowy.html> at 29 October 2009.

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support to ratify and implement these treaties and engage effectively and constructively with the UN.

Australia's role in building national human rights institutions

In addition to having the lowest regional level of human rights treaty ratification, the Pacific also has the smallest number of National Human Rights Institutions ('NHRI') of any region in the world, although Nauru and Samoa are both actively considering establishing such mechanisms.

There are a number of reasons for the low level of treaty ratification and NHRI establishment, including that, in many Pacific states, both governments and civil society have limited financial and human resources and lack relevant technical capacity and expertise.

While the Asia Pacific Forum of NHRIs,⁵⁰ which is hosted by Australia (and to which we have contributed approximately \$6 million since its establishment), has an important role to play in this regard, it is limited in its mandate, scope and influence. This is similarly the case with the Australian Human Rights Commission, notwithstanding the importance of its dialogue and engagement with Asia and the Pacific. As a state, Australia has a bigger role to play. As one modest initiative to build Pacific Island capacity, Australia should sponsor the establishment of an adequately resourced unit within the Pacific regional office of the UN High Commissioner for Human Rights in Suva, Fiji. This unit should promote and facilitate, first, human rights treaty ratification, implementation and reporting, second, the development of an appropriate and effective regional human rights instrument and mechanism, and, third, the development of appropriate, independent, effective and sustainable NHRIs consistent with the *Paris Principles*.⁵¹

Australia's role in promoting human rights capacity in civil society in the Pacific

It is, of course, axiomatic, that any Australian leadership on human rights recognise that there are many skilled and dedicated people already doing human rights work in Asia and the Pacific. These people should be engaged, supported and resourced. The input and participation of civil society is essential to the success of any regional program to promote human rights. Australia could make a valuable contribution by providing human rights education and training to assist governments to understand and comply with their obligations, and to empower individuals and groups to recognise and assert their rights. As one modest initiative to build Pacific civil society capacity, Australia could fund the establishment

of an Oceania Human Rights Network. This would comprise a coalition of human rights focused NGOs from the Pacific, Australia and New Zealand to facilitate dialogue, networking, capacity building and collaboration between NGOs across the region, and to work constructively with governments to promote human rights standards and institutions.

Successful implementation of such programs may pave the way for the Pacific-led development of regional human rights laws and institutions. There are strong arguments for such regional human rights conventions: they can bring localised knowledge and legitimacy to the international human rights framework and lead to the establishment of independent and well-resourced human rights bodies at the regional and national levels; all of which contributes to the practical protection and realisation of human rights at the grassroots and on the ground.

National Initiatives

The promotion and protection of human rights at home is an issue inextricably linked with our national identity and our capacity and ability to promote human rights abroad. It must therefore be a core aspect of any comprehensive and coherent foreign human rights policy.⁵²

In order for Australia to adopt not only a principled and consistent, but also effective, approach to human rights in international affairs — from the death penalty to child labour, to people trafficking, to asylum-seekers — human rights must become core business in internal affairs. No country has a perfect record on human rights, but those that take their own obligations seriously are in a much better position to promote implementation abroad.

I do not propose to rehearse the significant and entrenched substantive human rights issues that confront Australia and demand urgent attention and further action, from Indigenous disadvantage, to homelessness, to violence against women, to counter-terrorism measures, to the ongoing policy of mandatory detention of asylum seekers.⁵³ Instead, I focus on three institutional litmus tests being: first, Australia's response to the recent Concluding Observations of the UN Human Rights Committee and the UN CESCR; second, how Australia responds to the recent National Human Rights Consultation; and third, the status of Australia's national human rights institution.

44. The issue is also the subject of a joint parliamentary committee, the Joint Committee on Foreign Affairs, Defence and Trade, which has been tasked to inquire and report on 'human rights mechanisms and the Asia-Pacific': see <aph.gov.au/house/committee/jfad/asia_pacific_hr/index.htm> at 29 October 2009.

45. *Ibid.*

46. AusAID, *Port Moresby Declaration* (March 2008) <ausaid.gov.au/country/PortMorDec.cfm> at 29 October 2009.

47. The Hon Stephen Smith, 'Australia's New Approach to the Pacific' (Speech to the Australian Institute for International Affairs, Melbourne, 7 August 2008) <foreignminister.gov.au/speeches/2008/080807_AIIA.html> at 29 October 2009.

48. Pacific Islands Forum, *The Pacific Plan for Strengthening Regional Cooperation and Integration* (October 2005) 2 <forumsec.org/UserFiles/File/Pacific_Plan_Nov_2007_version.pdf> at 29 October 2009.

49. The Hon Duncan Kerr, 'Human Rights in the Pacific: Opportunities and Challenges' (Speech at Melbourne Law School, 22 July 2009) <foreignminister.gov.au/parlsec/speeches/2009/090722_pacific_hr.html> at 29 October 2009.

50. See <asiapacificforum.net/> at 29 October 2009.

51. *Principles relating to the Status of National Institutions (Paris Principles)*, UN GA Res 48/134 (1993).

52. See, eg, Brysk, above n 1, 91, 226.

53. For a useful summary of these issues, see the recent Concluding Observations on Australia by the Human Rights Committee (UN Doc CCPR/C/AUS/CO/5 [2 April 2009]) and the Committee on Economic, Social and Cultural Rights (UN Doc E/C.12/AUS/CO/4 [22 May 2009]).

Responding to UN human rights treaty bodies

About ten years ago, Australia was scrutinised by several United Nations human rights treaty bodies. Responding to concerns raised by those committees about issues such as mandatory sentencing and indefinite migration detention, then Attorney-General Daryl Williams labelled the reports as lacking in credibility and an 'insult to Australia'.⁵⁴ The then Labor Opposition welcomed the reports as 'factual' and 'balanced'.

A decade on, and with the roles reversed, the current Australian Labor Government faces a significant test of its domestic and international human rights credentials after both the Human Rights Committee and the CESCR issued their first report cards on Australia in almost a decade.

For, while the committees commended Australia on steps including the National Human Rights Consultation and the historic apology to the Stolen Generations,⁵⁵ they gave the Government just one year to report back on human rights progress in areas including immigration detention, counter-terrorism laws and violence against women.⁵⁶ The Human Rights Committee also called for an immediate re-design of the Northern Territory Intervention into Indigenous communities to conform with international human rights standards and our own *Racial Discrimination Act 1975*.⁵⁷

While the former government responded to such UN reports by attacking the committees themselves, in 2009 there are positive signs that Australia's response may be more mature and constructive this time. For starters, the Australian delegations appearing before both committees acknowledged that there are areas of profound disadvantage in Australia and that international engagement and scrutiny play important roles in identifying and addressing these areas.⁵⁸

Second, in contrast to the former government, which criticised the UN's 'over-emphasis' on information and evidence from non-government organisations, this time around the Australian Government welcomed the critical, but constructive, involvement of Australian NGOs in the reporting processes. This is crucial. As stressed earlier, Global Good Samaritans support a strong, vibrant, independent non-government sector and welcome constructive criticism by NGOs. They also recognise the importance of working with and through NGOs to identify and effectively address human rights problems on the ground.

The real test for the Government, however, will be to respond as constructively to the substance of the reviews as to the processes, as the committees expressed grave concern that the state of human rights for many disadvantaged groups in Australia remains precarious and vulnerable.

The Human Rights Committee's Concluding Observations recommended that Australia establish a mechanism to consistently ensure the compatibility of domestic law with the ICCPR⁵⁹ and establish appropriate procedures to implement Views of the Committee in individual cases.⁶⁰ In implementing this important recommendation, it is imperative

that the Government leads the establishment of a Joint Parliamentary Human Rights Committee.⁶¹ This Committee could have three primary functions. First, it could scrutinise all Bills and subordinate legislation for compatibility with protected rights. Second, it could conduct thematic inquiries into human rights issues. Third, it could monitor and report on the implementation of the Concluding Observations and Views of the UN treaty bodies themselves, together with the recommendations of the Special Procedures of the UN Human Rights Council. The UK Joint Committee on Human Rights has similar functions and is an example of a highly effective parliamentary committee. It has been described as 'one notable way in which parliamentary accountability is being enhanced'.⁶²

Recognising that the establishment of such a committee is a longer-term endeavour, in the shorter term it would be very useful to supplement this initiative with a small conference or roundtable involving relevant government officials and departments, NGOs and, where appropriate, state and territory government representatives, to discuss implementation issues in further detail. Such a conference should discuss follow up on the Concluding Observations under both the ICCPR and ICESCR, perhaps by identifying and focusing on four to five major cross-cutting themes identified by the respective treaty bodies.

Such a conference or roundtable could build on the collaborative work already undertaken in the treaty body processes by government and NGOs and develop a mutual program of action and implementation in key areas. It would also be a useful forum in which government and NGOs could share insights and also discuss approaches to forthcoming reviews of Australia by the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities and the Committee on the Rights of the Child.

A Human Rights Act for Australia

The legal protection of human rights in Australia, or rather the lack thereof, was the subject of observations and recommendations by both the Human Rights Committee⁶³ and the CESCR.⁶⁴ The Human Rights Committee noted, for example, that Australia is alone among so-called Western developed countries in its failure to enact comprehensive national human rights laws. Further, it critiqued the lack of parliamentary or judicial mechanisms to ensure that Australian law and policy are compatible with our fundamental human rights obligations and noted that the rights to equality and non-discrimination are inadequately protected in federal law.⁶⁵ Similarly, the CESCR, while welcoming the National Human Rights Consultation, emphasised that any Human Rights Act should protect the full range of economic and social rights, such as the right to adequate healthcare and housing.⁶⁶

Australia's status as the only Western democracy without a national human rights law undermines our authority and legitimacy on international human rights

54. The Hon Daryl Williams (Media Release, 19 March 1999).

55. Human Rights Committee, above n 53.

56. Ibid [1], [17], [23] and [29].

57. Ibid [14].

58. See, eg, Australia, *Opening Statement to the 95th Session of the Human Rights Committee*, 23 March 2009 at http://www2.ohchr.org/english/bodies/hrc/docs/statement/Australian_statement_HRC_090323.doc at 29 October 2009

59. Above n 53, [8].

60. Ibid [10].

61. For a more detailed discussion of this proposal, see Human Rights Law Resource Centre, *Parliamentary Scrutiny of Human Rights: Submission to Standing Committee on Procedure* (July 2009) <<http://hrirc.org.au/content/topics/international-human-rights-mechanisms/parliamentary-scrutiny-of-human-rights-submission-to-standing-committee-on-procedure-july-2009/>> at 29 October 2009.

62. Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 1, 2.

63. Above n 53, [8].

64. CESCR, above n 53, [11].

65. Human Rights Committee, above n 53, [8] and [12].

66. Above n 64, [10].

... a strong and effective [Human Rights] Commission is essential for the adequate protection and promotion of human rights in Australia and for Australia to become a genuine Global Good Samaritan.

issues.⁶⁷ If we are to have a legitimate and authoritative voice in international and regional human rights dialogues, Australia must commit to effective domestic human rights implementation, including through the adoption of a comprehensive national Human Rights Act.⁶⁸ It would send a strong message for Australia to confirm human rights as a central priority precisely at a time when the global financial crisis threatens the dignity and equality of many poor and vulnerable groups.

Of course, a national Human Rights Act would not, in itself, be a panacea to disadvantage and discrimination. It could, however, promote more responsive and accountable government, improve public services, and enshrine fundamental values such as freedom, dignity, respect and a fair go. Moreover, the incorporation of international human rights — those core minimum standards that ensure all people can live with dignity and respect — into national law could ensure that human rights are actively considered at all levels of government. Perhaps most importantly for present purposes, a comprehensive national Human Rights Act, could provide a framework for international, regional and domestic policy coordination and cohesion, creating a 'virtuous circle' in which a constructive national identity is mobilised which places human rights at the centre of its self-perception and external engagement.⁶⁹

Strengthening the Australian Human Rights Commission

In a recent speech on human rights in the Pacific, the Australian Parliamentary Secretary for Pacific Island Affairs, the Hon Duncan Kerr MP, said:

Through education, advocacy and capacity-building, National Human Rights Institutions can bridge the universal rights reflected in our constitutions, and the rights that transform every day lives. National Human Rights Institutions remind individuals, communities and governments of their responsibilities. Further, they help them fulfil them. We need to improve access, resourcing and effectiveness, and overturn attitudes which accept the infringement of human rights as a given.

Mr Kerr concluded that, 'for these reasons, the Australian Government is a strong supporter of efforts to establish and strengthen national human rights institutions in the Asia-Pacific region.'⁷⁰

While these are important and insightful sentiments, like our international and regional advocacy on legal protection of human rights, they are weakened by the situation in our own backyard.

The Australian Human Rights Commission is Australia's independent statutory human rights body. It fulfils a range of significant functions, including developing human rights education programs, advising the Australian Government on human rights, conducting research, and inquiring into and conciliating complaints of unlawful discrimination.⁷¹ Given these important functions, a strong and effective Commission is essential for the adequate protection and promotion of human rights in Australia and for Australia to become a genuine Global Good Samaritan. Two factors, however, impede the effectiveness of the Commission.

First, the Commission does not have a range of powers and functions arguably required by international human rights law and the *Paris Principles*. In particular, the Commission does not have power to: conduct formal inquiries into a broad range of matters affecting human rights across Australia; properly investigate breaches of anti-discrimination laws and human rights instruments on its 'own motion' without an individual complaint; effectively monitor compliance with conciliation agreements; or intervene 'as of right' in legal proceedings where human rights issues are raised. It is critical that the Commission's powers be expanded as envisaged above to ensure better compliance with Australia's international human rights obligations — particularly under the *Paris Principles* — and generally contribute to the improved protection of human rights in Australia.

The second factor impeding the effectiveness of the Commission is that of lack of resources. The Commission's ability to contribute to the protection and promotion of human rights in Australia depends, of course, on it being adequately resourced. Despite this, the Commission has been persistently under-funded⁷² and, on its own account, is 'significantly constrained due to available resources'.⁷³ In the most recent financial year, the Commission experienced a budget cut of approximately 12.5 per cent from the previous year.⁷⁴

It is imperative not only for the effectiveness but also the independence of the Australian Human Rights Commission that it is adequately, securely and sustainably funded. This is particularly so in the current economic climate, as the Commission's work, especially in relation to the enforcement of anti-discrimination laws, is of perhaps greatest consequence to those in the community who are most marginalised and put at risk by difficult economic conditions.

67. National Human Rights Consultation Committee, Report of The National Human Rights Consultation (2009), 278–9.

68. Report of the National Human Rights Consultation, Recommendation 18.

69. Brysk, above n 1, 225–6. Analogously, Brysk states 'Canada's adoption of its Charter of Rights and Freedoms successfully inspired international rule of law promotion efforts, which in turn contributed back to Canadian jurisprudence via developments in international human rights law': at 226. Conversely, as an example of how failure to promote human rights at home can hinder protection abroad, she claims 'Canada's lagging performance on aboriginal rights at home eventually undermined an initially promising record of principled international promotion of indigenous peoples': at 226.

70. The Hon Duncan Kerr, 'Human Rights in the Pacific: Opportunities and Challenges' (Speech at Melbourne Law School, 22 July 2009) <foreignminister.gov.au/parlsec/speeches/2009/090722_pacific_hr.html> at 29 October 2009.

71. See generally, the *Australian Human Rights Commission Act 1986* (Cth) s 11(1); Human Rights and Equal Opportunity Commission, *Annual Report 2007–2008* (2008). The AHRC is responsible for administering the following Commonwealth laws: *Age Discrimination Act 2004*; *Disability Discrimination Act 1992*; *Racial Discrimination Act 1975*; *Sex Discrimination Act 1984* and *Human Rights and Equal Opportunity Commission Act 1986*. The AHRC also has specific responsibilities under the *Native Title Act 1993* (to report on the exercise and enjoyment of the human rights of Indigenous Australians with regards to native title, a role specifically undertaken by the Aboriginal & Torres Strait Islander Social Justice Commissioner), and the *Workplace Relations Act 1996* (in relation to federal awards and equal pay, a role specifically undertaken by the Sex Discrimination Commissioner).

72. See further, Legal Aid Queensland, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Sex Discrimination Act 1984* (Submission No 26, 2008) 1.

73. Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Sex Discrimination Act 1984* (2008) [627].

74. *Ibid* [618]–[620].

Conclusion

Australia does, as shown, have the characteristics and satisfy the preconditions to becoming a Global Good Samaritan — a principled, persistent, fearless, favourless and forceful human rights promoting state. Further, it is in our national interest to become a Global Good Samaritan. For this to happen, however, will require political leadership and vision, concrete legislative and institutional reform, budgetary prioritisation, and the mobilisation of a national identity which values human rights every bit as highly as beaches, boomerangs, the

Anzac spirit and the Ashes. These modest proposals are offered to further this endeavour.

This article is based on a paper presented at the 2nd Beijing Forum on Human Rights in November 2009.

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MENTIONS

Unanimous 'Access to Justice' Senate Report released

After 10 months, 68 submissions and four public hearings, the Senate Legal and Constitutional Affairs Committee released its final report on access to justice in December 2009.

As the first inquiry of its kind since the election of the Rudd government, the committee report provides clear direction for reform. Rather than focusing on funding systems as has been the focus of past inquiries, this report focuses on peoples' *inability* to access justice.

The unanimous report makes 31 recommendations. They revolve largely around funding and incentives for the legal aid and community legal sector and are consistent with the government's 'social inclusion' agenda.

The report identifies serious long-standing gaps in our legal system and proposes new initiatives for reform. The report picks up on Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma's proposal for 'Justice Reinvestment' and recommends funding a trial of this internationally proven program. The report identifies the lack of community legal services in rural and regional areas and recommends the development of incentives to encourage lawyers to work in these areas.

The report is available at: <aph.gov.au/senate/committee/legcon_ctte/access_to_justice/index.htm>

Forthcoming conferences

February 2010

Sentencing 2010 Conference

6–7 February 2010, National Convention Centre, Canberra

National Judicial College of Australia

Contact: sentencing@law.anu.edu.au

or phone (02) 6125 6655 or 6125 2906

Mental Health Issues and the Administration of Justice

18–20 February 2010, The Langham, Auckland NZ

Australasian Institute of Judicial Administration

Contact: cle@lawyerseducation.co.nz

Website: <aija.org.au/Mental%20Health%202010/Prog&Reg.pdf>

2010 Constitutional Law Conference and Dinner

19 February 2010, Domain Theatre,

Art Gallery of NSW, Sydney

This event has been organised by Gilbert + Tobin Centre of Public Law with the support of Australian Association of Constitutional Law.

Website: <gtcentre.unsw.edu.au/events/index.asp?type=&name=644&year=2009>

May 2010

Non-Adversarial Justice: Implications for the Legal System and Society

4–7 May 2010, Hilton on the Park, East Melbourne

Australasian Institute of Judicial Administration/Monash University Faculty of Law

Contact: <najc10@ammp.com.au>

September 2010

New Frontiers: 10th National Mediation Conference

7–9 September 2010, Adelaide Convention Centre

Contact: Phil Plevin 08 8379 8222 or

<mediation2010@plevin.com.au>

October 2010

A World Without Boundaries

— Crime in the 21st Century

20–24 October 2010, Sheraton Noosa Heads,

Sunshine Coast, Queensland

12th International Criminal Law Congress

Contact: crimlaw2010@icms.com.au

Website: <crimlaw2010.com>