Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government

*Greg Carne**

I. Introduction

The Howard government's treatment of international law issues in response to international terrorism since 2001 was a significant, if understated, feature of its counter-terrorism policies and practices. This treatment of international law emerged in the situations of considerable domestic counter-terrorism legislative activity[1] involving criminal offence matters,[2] detention and questioning powers,[3] telecommunications interception and access to stored information,[4] preventative

* Faculty of Law, University of Western Australia. The author would like to thank the anonymous referee for comments on a draft of this article.

1 For example, over 40 pieces of legislation were passed by the Howard government relating to terrorism: see *Chronology of Legislative and Other Legal Developments since September 11 2001* (Parliamentary Library) <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron>. For an overview of these legislative reforms, see A Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81. Reilly nominates four phases of legislative action: 'The First Phase – The Legislative Response to the Terrorist Attacks of 11 September 2001', 'The Second Phase – October 2002: Terrorist Bombings in Bali', 'The Third Phase – 2004: Terrorist Bombings in Madrid' and 'The Fourth Phase – June 2005: The London Bombings'.

2 The Security Legislation Amendment (Terrorism) Bill [No 2] 2002 (Cth), the Suppression of the Financing of Terrorism Bill 2002 (Cth), the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth), the Border Security Legislation Amendment Bill 2002 (Cth) and the Telecommunications Interception Legislation Amendment Bill 2002 (Cth). The Criminal Code Amendment (Terrorism) Act 2003 (Cth) re-enacted the Part 5.3 Criminal Code offences to attract state referred power under s 51(xxxvii) of the *Commonwealth Constitution* to support the offences. Significant later amendments allowed the proscription of terrorist organisations without reference to a UN list (see Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth)) and the creation of an offence relating to association with a terrorist organisation (see Anti-Terrorism Bill (No 2) 2004 (Cth)).

3 Far-reaching powers of detention and questioning in relation to terrorism matters were conferred upon the Australian Security Intelligence Organisation: see the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act [No 2] 2003 (Cth), the Anti-Terrorism Act (No 3) 2004 (Cth) and the ASIO Legislation Amendment Act 2006 (Cth).

4 See Telecommunications (Interception) Amendment Act 2006 (Cth) and Telecommunications (Interception and Access) Amendment Act 2007 (Cth).

detention, control orders and sedition reforms,[5] and procedures governing the handling, availability and application of information in national security curial matters.[6] It also emerged in its counter-terrorism interactions with the United States, Asia-Pacific nations and United Nations bodies. In both contexts, actions of the Howard government were often characterised by a distinctive, exceptionalist interpretation of international law.

In this article, the areas selected for review of the Howard government's responses to the intersection of international law and international terrorism are representative and comprehensive, but cannot be exhaustive. The article commences with an analysis of the assertion of the Howard government at Parliamentary and other review committee processes of the compliance of the latest of many counter-terrorism legislative proposals with international law. It then looks at the appropriation and re-invention by Attorney-General Ruddock of the international law concept of 'human security' to justify, on international human rights grounds, the Howard government's extensive and ongoing counter-terrorism legislative agenda. The article continues with a discussion of Howard government support of United States detention and military commissions processes applying to Australian nationals David Hicks and Mamdouh Habib, including its failure to assess and engage a range of international law issues. There follows a survey of the Howard government's adoption of UN terrorism conventions and entry into regional memoranda of understanding on terrorism, with a number of states in the Asia-Pacific. Two other sets of international law obligations in the context of terrorism are also canvassed as arising in the Howard era. These are Australia's reporting obligations to the UN Counter-Terrorism Committee under Security Council Resolution 1373 and the intersection with international human rights, and Australia's reports to three UN human rights treaty bodies, necessarily engaging with international law terrorism issues.

In considering these areas in the Howard government's treatment of international law issues in response to international terrorism, some distinctive, but overlapping characteristics emerge. These include a strongly asserted executive precedence and discretion in the formulation of counter-terrorism law and policy, particularly expressed through serial domestic legislative reform, in a manner frequently antipathetical to international law; scepticism towards the integration of counter-terrorism responses with international human rights law, reflecting a broader Howard government criticism of its reform agenda for the treaty-based aspects of the UN human rights framework, as well as a preference for a Parliamentary sovereignty model over human rights; and an often distinctive, exceptionalist interpretation of international law, replicated in the deference to the larger international law exceptionalist policies and practices of its major ally in the war on terror, the United States.

The article concludes with an analysis of the legacy and prospects of the Howard government's international law approaches to terrorism, prompting the

---

5 See Anti-Terrorism Act (No 2) 2005 (Cth).

6 See National Security Information (Criminal Proceedings) Act 2004 (Cth) and National Security Information Legislation Amendment Act 2005 (Cth).

larger question of whether these approaches in the areas canvassed were principled or pragmatic.

II. Assertions of Compliance with International Law in Developing Domestic Counter-terrorism Legislation

Many of the counter-terrorism legislative reforms of the Howard government were reviewed by Parliamentary Committees and occasionally other bodies, which invited public submissions, called expert witnesses and produced detailed reports. The legislative proposals invariably raised questions of conformity with international human rights standards, although that type of analysis did not necessarily dominate public debate. Two features concerning international law emerged from the series of these counter-terrorism law reviews. First, there was a wide disparity of opinion between the assertions by the Attorney-General's Department of government compliance with international human rights law in drafting counter-terrorism provisions[7] and the detailed submissions by expert organisations and individuals disputing such compliance.[8] Second, in the later stages of the Howard government, some greater efforts were made by the Attorney-General's Department to substantiate claims of compliance of proposed laws with international human rights law,[9] perhaps indicative of a growing standing of contrary international human rights-based submissions upon the review process.

---

7 One illustration of this asserted compliance with international human rights obligations with minimal information to support that claim arises in relation to the ASIO questioning and detention regime; the Attorney-General's Department taking 'the approach of a brief, asserted but unsubstantiated compliance of detention and questioning provisions with international human rights obligations': G Carne, 'Gathered Intelligence or Antipodean Exceptionalism?: Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27 *Adelaide Law Review* 17, 55.

8 See examples from the various Parliamentary Committees of Inquiry: Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*: Amnesty International, Submission 140; Castan Centre for Human Rights Law, Submission 111; Australian Section of International Commission of Jurists – see *Advisory Report* 23; Law Council of Australia, Submission 147; Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and ors*: Law Council of Australia, Submission 251; Human Rights Council of Australia Submission 174; Amnesty International, Submission 169; Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*: Amnesty International, Submission 136; Law Council of Australia Submission 299, Dr G Carne Submission 24; Senate Legal and Constitutional Legislation Committee *Provisions of the Anti-Terrorism Bill (No 2) 2005*: ACT Government, Submission 156; Gilbert and Tobin Centre of Public Law, Submission 80; Professor D Rothwell, Submission 188; ACT Discrimination and Human Rights Commissioner, Submission 154; Human Rights and Equal Opportunity Commission, Submission 158; Professor H Charlesworth, Professor A Byrnes, Ms G Mackinnon, Submission 206; Dr P Matthew, Submission 187; Dr G Carne, Submission 8; Amnesty International, Submission 141; Australian Lawyers for Human Rights, Submission 139.

9 Particularly in the instance of the Anti-Terrorism Act (No 2) 2005 (Cth).

An early example of government response to international law questions arose in the 2002 Senate inquiry into the ASIO (Terrorism) Bill 2002.[10] Apart from issues relating to Australia's obligation to implement Security Council Resolution 1373, the main international law focus was upon international law requirements relating to detention.[11] One particular, if indirect, outcome of the discussion about international law was the eventual inclusion within the legislative framework of a mechanism to ensure protocols for the treatment of detainees,[12] giving some substance to the legislative requirement of humane treatment.[13] This Australian Security Intelligence Organisation (ASIO) detention and questioning legislation was subsequently reviewed in 2005 by the Parliamentary Joint Committee on Intelligence and Security.[14] The Howard government responded to international human rights issues by asserting full compliance,[15] in response to several submissions stressing the importance of the International Covenant on Civil and Political Rights[16] (ICCPR) as the standard against which the legislation should be assessed.[17]

Likewise in 2005, the Security Legislation Review Committee (Sheller Committee) was established pursuant to section 4(1) of the Security Legislation Amendment (Terrorism) Act 2002 (Cth), to review major pieces of terrorism legislation.[18] It conducted its inquiry over six months, receiving written

---

10 Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002).

11 See Senate Legal and Constitutional References Committee report p 79, particularly the prohibition against arbitrary detention under Art 9 (1) of the ICCPR. The matter of compliance of the then Bill with international obligations under the ICCPR had been raised in the earlier Parliamentary Joint Committee inquiry in a witness submission by the Attorney-General's Department, which asserted no breaches of the convention: see Parliamentary Joint Committee on ASIO, ASIS and DSD, *Hansard* 30 April 2002, 49.

12 See s 34C ASIO Act 1979 (Cth). However, this provision includes no specific reference to ICCPR articles nor the General Comments on those articles.

13 See ASIO Act 1979 (Cth) s 34T(2).

14 Parliament of Australia, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers* (2005).

15 See Parliamentary Joint Committee on ASIO, ASIS and DSD, *Hansard* 19 May 2005, 5 and Submission 102 (Attorney-General's Department supplementary submission) to Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO's questioning and detention powers, 23: 'Many submissions and witnesses have referred to international human rights obligations and suggested that our legislation is deficient in this regard. There does not appear to have been anything new on this raised in the hearings, and our view remains as set out in our opening statement to the Committee on 19 May 2005'.

16 (16 December 1966) 999 UNTS 171.

17 See Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 14, 28-9.

18 S 4(1) of the Act required the Attorney-General to cause a review to be carried out as soon as practicable after the third anniversary of the amendments made by six Acts: The Security Legislation Amendment (Terrorism) Act 2002 (Cth); the Suppression of the Financing of Terrorism Act 2002 (Cth); the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth); the Border Security Legislation Amendment Act 2002 (Cth); the Telecommunications Interception Legislation

submissions and background briefings and conducting public hearings. Competing claims about conformity of the legislation with international law principles emerged during the review between government, the review panel and submissions to the review.

A singular example is the general opening statement in the Attorney-General's Department submission to the Sheller Committee,[19] noting that 'a number of submissions[20] challenge the laws on the basis of proportionality and in so doing raise the operation of the International Convention [sic] on Civil and Political Rights'.[21] The Department rejected the arguments put forward in these submissions, by referring to the Human Rights and Equal Opportunity Commission (HREOC) submission stating neither expression nor association are absolute rights, but 'may be limited to the extent that the limitations are provided or prescribed by law and proportionate and necessary to achieve a legitimate end'.[22] The departmental submission then asserted 'that the limitations as prescribed by the offences in the Criminal Code and the prescription of an organization as a terrorist organization are directly proportionate to the terrorist threat'.[23] The Attorney-General's Department also made other assertions of conformity of the terrorism provisions under review with international human rights law.[24]

The Sheller Committee Report indicates that the Attorney General's Department assertions were not accepted: the Report provides an extensive range of reform proposals intended to ensure close conformity of provisions of the legislation with relevant articles of the ICCPR.[25] These reform proposals extended

---

Amendment Act 2002 (Cth); and the Criminal Code Amendment (Terrorism) Act 2003 (Cth).

19 See Security Legislation Review Attorney-General's Department Submission, February2006,7 <http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Reviews_SecurityLegislationReviewCommittee_Submissions>.

20 Submissions cited were those of HREOC, the Law Council, the Australian Privacy Foundation and the Federation of Community Legal Services (Vic).

21 See Attorney-General's Department Submission 7, above n 19.

22 Ibid.

23 Ibid.

24 See Attorney-General's Department Submission 2 (Response to Questions Taken on Notice during Hearing on 3 February 2006), response to questions concerning compliance of the proscription of terrorist organisations with arts 19 and 22 of the ICCPR, including the practice of other nations.

25 See Sheller Committee Report, 36, first taking up the issue of the intersection of considerations of national security with the right of liberty of movement (art 12 of the ICCPR) and freedom from arbitrary detention (art 9 of the ICCPR). The report engages with several sections of legislation, recommending reform to ensure conformity with the ICCPR: see Sheller Committee Report ch 6 responding to the intersection of terrorism offences in the Criminal Code (Cth) with ICCPR art 19 freedom of expression and ICCPR art 22 freedom of association, and in doing so, responding to the UN Human Rights Committee observations regarding arbitrariness and proportionality, this response given particular weight as in Australia 'for the most part, the protection of human rights depends on the Constitution, the common law or specific legislation, federal or state'. See, for further examples, the application of ICCPR based proportionality principles in relation to the retention of an intention to advance a political, religious or ideological cause in the definition of a terrorist act:

to terrorism offences from terrorist acts,[26] as well as terrorism organisation offences[27] and proscription powers applying to terrorist organisations.[28]

Subsequently, the Parliamentary Joint Committee on Intelligence and Security[29] also made reference to various international law matters, raising the same broad concerns as the Sheller Committee,[30] principally the need to integrate human rights principles with counter-terrorism responses and recommended a range of reforms to this end.[31] The endorsement and adoption of the Sheller Committee report by the Parliamentary Joint Committee report on these issues lends substance to the view that the various pieces of terrorism legislation were not in conformity with international law obligations.

A further significant example of claims and contrary claims of conformity with international human rights obligations in the area of counter-terrorism law arose in the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Act (No 2) 2005 (Cth).[32] The principal features of that legislation were the introduction of control orders, preventative detention and the reform of sedition laws, introduced in the wake of the July 2005 London bombings.

Sheller Committee Report, 57; and in relation to the recommended repeal of the s 102.8 Criminal Code association offence: Sheller Committee Report, 128, 133.

26 Ch 6 of the Sheller Committee Report examines offences in the Criminal Code (Cth) which are founded upon the s 100.1 Criminal Code (Cth) definition of terrorist act. The offences, as found in ss 101.2, 101.4, 101.5 and 101.6 of the Criminal Code (Cth), involve 'providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts or other acts done in preparation for, or planning for, terrorist acts': Sheller Committee Report, 58.

27 Ch 7 of the Sheller Committee Report examines the definition of 'terrorist organisation' in the Criminal Code (Cth) whilst ch 10 of the Sheller Committee Report examines the various terrorist organisation offences in the Criminal Code (Cth): Directing the activities of a terrorist organisation (s 102.2); Membership of a terrorist organisation (s 102.3); Recruiting for a terrorist organisation (s 102.4); Training a terrorist organisation or receiving training from a terrorist organisation (s 102.5); Getting funds to, from or for a terrorist organisation (s 102.6); Providing support to a terrorist organisation (s 102.7); and Associating with terrorist organisations (s 102.8).

28 Chs 8 and 9 of the Sheller Committee Report deal with existing and alternative proscription processes for terrorist organisations.

29 The Parliamentary Joint Committee on Intelligence and Security in conducting its own review under s 29(1)(ba) of the Intelligence Services Act 2001 (Cth) of the same pieces of terrorism legislation was required to take account of the Sheller Committee Report in conducting its own review: see s 4 Security Legislation Amendment (Terrorism) Act 2002 (Cth).

30 See esp Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) 12-16 'Global terrorism policy' and 'Democratic freedoms, counter-terrorism measures and public safety', observing that the "Committee believes that the recommendations of the Sheller Report and the additional recommendations resulting from parliamentary review are moderate and sensible refinements. The aim is to improve specificity and proportionality …

31 See Parliamentary Joint Committee on Intelligence and Security, above n 30, xv-xx 'List of recommendations'.

32 See Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005).

The government again asserted conformity of the bill with international human rights law principles. It was significant that on this occasion some efforts to substantiate this claim rather than merely asserting it were made in content around several major parts of the bill. The extent of human rights restrictions in significant aspects of the bill raised the possibility that a proper derogation process under Article 4 of the ICCPR should be invoked.[33] The generalised government response was that measures in the bill 'are consistent with Australia's obligations under international law, including international human rights law. The Government is satisfied that not only are the measures consistent with those obligations, the legislation contains sufficient safeguards to ensure that its implementation in individual cases will also be consistent.'[34] That response stressed limitations and qualifications upon rights as consistent with international law obligations[35]seeking to make normal the legislative measures taken.

Two immediate observations may be made. The first is that claimed consistency of the bill with international law obligations emerges from the context of an executive-concentrated approach of the Howard government, particularly emphatic in terrorism-related matters. Within this framework, insistence of the government's view of consistency with international human rights obligations is considered definitive and conclusive. The second is that the government refused to release the legal advice advising compliance with international law obligations,[36]precluding a direct opportunity to test in detail the content of that advice.

The government response also specifically asserted compliance with international law in relation to the most controversial features of the bill. It asserted that the preventative detention provisions were not arbitrary, claiming that the procedures for obtaining a preventative detention order would ensure such detention was 'reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances'.[37] Other aspects of the preventative detention regime were also claimed to be consistent with international obligations.[38]

---

33 Ibid 9-11: see the commentary on this point. The Howard government did not invoke art 4 ICCPR circumstances claiming an emergency threatening the life of the nation which is officially proclaimed.

34 Attorney-General's Department Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 Submission 290A.

35 'The International Covenant on Civil and Political Rights (ICCPR) expressly allows governments to limit the exercise of rights such as freedom of movement and freedom of expression where it is necessary to do so to protect national security and public order. The Government is satisfied, based on the advice of law enforcement and security agencies, that the strengthening of our counter-terrorism laws is necessary to protect national security': Submission 290A. This argument was also made by the Attorney-General elsewhere: see Sheller Committee Report, 36.

36 See Senate Legal and Constitutional Legislation Committee, *Hansard* 18 November 2005, 3, 7.

37 Submission 290A, 2. It was stated that 'The Government is satisfied that the preventative detention regime meets this test and so is not arbitrary or otherwise contrary to international law.'

38 Such as the somewhat contentious claim that art 14 of the ICCPR only applied to detention associated with criminal charges and that as preventative detention did not

The government further asserted compliance of the control orders provisions in the bill with its international law obligations, emphasising the permissibility of the restriction of rights for the protection of national security.[39] This once again reflected a strong executive orientation in assessing those obligations. The government likewise argued that a third controversial counter-terrorism reform topic, sedition, conformed to international law obligations.[40] In each of these instances, there was extensive contrary opinion about the bill's lack of compliance with international human rights obligations,[41] prompting the defensive government responses canvassed above.

This more-detailed government response arguing compliance with international law obligations, in comparison with earlier terrorism legislation, most likely came about through the debate generated by unexpected publication of the draft bill on the Australian Capital Territory Chief Minister's website[42] and extensive legal opinion assessing the bill's compliance with international human rights requirements.[43] This happened because legislation to be passed in the ACT under

---

involve criminal charges or punishment, the legislation did not impinge on those protections: Submission 290A, 3; and the assertion that the access to lawyer and court provisions in the bill satisfied the art 9 ICCPR requirements of being able to test the lawfulness of detention: Submission 290A, 4.

39 See Submission 290A, 5: 'The Government has assessed that the threat posed to Australia's security is such that the measures in the Bill are necessary and justifiable, and not inconsistent with Australia's international human rights obligations, which provide for restrictions on certain rights (such as freedom of expression and freedom of movement) to protect national security. Also, the Government is satisfied that the safeguards in the legislation will ensure the implementation of the control order regime in specific cases will be consistent with Australia's international human rights obligations.'

40 See Submission 290A, 6: 'The right to freedom of expression under Article 19(2) of ICCPR may be subject to restrictions provided by law, and that are necessary for the protection of national security and public order. The Government is satisfied that restrictions on communication imposed by the measures are necessary for the protection of national security.'

41 See, eg, references made to various submissions in the Senate Legal and Constitutional Legislation Committee Report, above n 32, 10 (in relation to formal derogation of Australia's obligations under the ICCPR); 24-5 (in relation to preventative detention); 63-4 (in relation to control orders) and 89, 91-2 (in relation to sedition).

42 This occurred on 14 October 2005, with draft version 28 of the bill appearing on the Chief Minister's website: John Stanhope 'Chief Minister Makes Public Draft Terror Legislation' Chief Minister's Press Release 14 October 2005.

43 A range of legal advice was sought by the ACT Chief Minister on compliance of the bill with human rights matters: H Watchirs (ACT Human Rights Commissioner), 'Re: Council of Australian Government's meeting – potential human rights implications of proposed measures to strengthen counter-terrorism laws' 19 September 2005; A Byrnes, H Charlesworth and G McKinnon, 'Human Rights Implications of the Anti-Terrorism Bill 2005' 18 October 2005; Advice of the Australian Capital Territory Director of Public Prosecutions, R Refshauge SC, 'Anti-Terrorism Bill 2005' 20 October 2005; and L Lasry QC and K Eastman 'Anti-Terrorism Bill 2005 (Cth) and Human Rights Act (2004) ACT Memorandum of Advice' 27 October 2005. See also, A Byrnes, 'More Law or Less Law? The Resilience of Human Rights Law and Institutions in the "War on Terror"' in M Gani and P Mathew (eds), *Fresh*

the co-operative agreement between the Commonwealth, states and territories subsequent to the 27 September 2005 Council of Australian Governments (COAG) meeting needed to conform as far as possible to the international human rights law standards incorporated in the Human Rights Act 2004 (ACT). Indeed, the differences between the ACT legislation[44] implementing the COAG arrangements with its more rigorous international human rights standards,[45] in contrast to the Commonwealth legislation[46] and legislation in the states[47] itself is an indication that the Commonwealth had not fully complied with its international law obligations, or that those obligations were being re-interpreted through the executive-orientated prism discussed above.

III. Appropriating and Re-inventing the International Law Concept of 'Human Security' in Relation to Terrorism

The Howard government's asserted compliance of its terrorism legislation with international law requirements was given a further twist from October 2003 with the appointment of Philip Ruddock as Attorney-General. Mr Ruddock's appointment signalled a move by the Howard government to exploit decisively its perceived political strengths in national security and counter-terrorism over the Opposition and minor parties.

A significant element of this shift was in the rhetorical adoption and adaptation by the Attorney-General of the international law concept of 'human security'[48] as a means of supporting and justifying domestic counter-terrorism legislation. Attorney-General Ruddock's adaptation was an overt political device appropriating the language of an international human rights law-related concept. The Attorney General deployed the device to argue that the government's counter-terrorism legislative agenda was synonymous with the protection of human rights,[49] so

---

Perspectives on the War on Terror (2008) 127.

44 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT).

45 These standards included the fact that no person under 18 years of age may be subject to a Preventative Detention Order and the requirement that a court be satisfied on reasonable grounds that detaining the person would prevent a terrorist act, in place of the requirement elsewhere that detaining the person would substantially assist in preventing a terrorist act.

46 Anti-Terrorism Act (No 2) 2005 (Cth).

47 Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005 (NSW); Terrorism (Preventative Detention) Act 2005 (Qld); Terrorism (Preventative Detention) Act 2005 (SA); Terrorism (Preventative Detention) Act 2005 (Tas); Terrorism (Community Protection)(Amendment) Act 2006 (Vic); Terrorism (Preventative Detention) Act 2005 (WA) and Terrorism (Emergency Powers) Act 2003 (NT).

48 On the issue of human security as a concept developed and applied by the Commonwealth Attorney-General, see C Michaelsen, 'Security against Terrorism: Individual Rights or State Purpose?' (2005) 16 *Public Law Review* 178; and C Michaelsen, 'Intrusive Anti-Terror Laws: Useful or Symbolic' *Canberra Times* (13 May 2005); S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005) 875; G Carne, 'Beware a Populist Approach to Counter-Terrorism Laws' *Canberra Times* (11 August 2005).

49 The principal medium for utilisation of the human security label was in a series of

distracting attention from actual infractions of human rights that such legislation was likely to produce. In other words, human security was applied as a label making compatible the Howard government's counter-terrorism legislative measures with human rights.

Human security was invoked in a variety of contexts[50] by the Attorney-General to claim that protective counter-terrorism legislation was derivative of a right to life obligation under Article 3 of the Universal Declaration of Human Rights (UDHR).[51] The essence of this reconceptualisation of human security was that legislative and other measures protective of that right, though increasing state power and discretion over the individual, supported, rather than offended, human rights. This invocation of a peculiarly Australianised conception of human security by the Attorney-General as a justification for counter-terrorism laws is inconsistent with the broadly accepted international understanding of the term and its relation to human rights.[52]

In the first place, the history and circumstances of Article 3 of the UDHR make the claim for a state-orientated right to security, which reinforces executive authority, problematic. Article 3 of the UDHR has traditionally been considered to state the primacy of individual rights to protect the individual against state power, to guard against an improper assertion of state or community interests over the individual.[53] This reflects its development in the immediate post-war era as a

---

Attorney-General's speeches, articles and media releases mentioning the phrase: see, eg, Speeches: 'Statement by the Attorney General Philip Ruddock On National Security – Overseas Developments' (19 February 2004); 'A New Framework: Counter-Terrorism and the Rule of Law' (20 April 2004) reprinted as *The Sydney Papers* (2004 Autumn) 113; 'International and Public Law Challenges for the Attorney-General' (8 June 2004); 'Security in Government Conference 2005 Opening and Welcome Address' (10 May 2005); Media Releases: 'Attorney-General Rejects Amnesty Criticism' (27 May 2004); Letter: Attorney General dated 2 August 2004 to Muslim Communities representative, making reference to a 'right to human security'; Newspaper Report 'Hardline Security a UN Right' *The Australian* (26 July 2005) 1, citing Attorney-General's comments about the 'legal concept' of human security; Article: 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, fn 3.

50 Such as articles, media releases, speeches and interviews mentioned above. As an indication of 'human security' so defined being embedded in Howard government policy and culture, it was further adopted by the Secretary of the Attorney-General's department, to foreshadow a major shift in rights towards state interests as against individual interests as part of the post-11 September legislative and political environment: see, eg, R Cornall, 'A Strategic Approach to National Security' Paper presented at Security in Government Conference Canberra 10 May 2005; 'Keeping Our Balance in Troubled Times: Legal Measures, Freedoms and Terrorist Challenges' (2005) *Defender* 28, 30-1; and 'Global Security in the New Millennium: The View from the Attorney-General's Department' (2003) *Canberra Bulletin of Public Administration* 66, 68-9.

51 GA Res 217A (1948).

52 See G Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Aust YBIL* 1.

53 See J Morsink *The Universal Declaration of Human Rights Origins Drafting and*

reaction against then recent totalitarian practices. Consequently, the use of the term as a justification for the state to expand power through counter-terrorism reforms at the expense of traditional individual rights inverts the meaning of the term. This emphasis is corroborated by the disappearance of the liberty criterion[54] from Article 3 in this new configuration,[55] and the profound emphasis upon security.

A distinguishing feature of the Attorney-General's use of human security was its radical departure from conventional UN-derived usages and meanings of the term.[56] The precision with which the Attorney-General re-configured the term is at odds with the fact that no universally accepted definition of human security exists.[57] Conventional appraisals of human security identify a shift in focus from state-centric to human-centric values[58] (and in doing so expand the concept of 'security' beyond physical security) as well as accepting that a range of pre-conditions are necessary for the fulfillment of human potential.[59] Furthermore, human security is significantly connected with the broadest compass of human rights,[60] neither ranking the importance of individual rights,[61] nor seeking to include or exclude any individually identified human right on a basis of an assumed compatibility or incompatibility with human security. Accordingly, it would be illogical to focus upon a single human right, such as the Article 3 UDHR right to

---

Intent (1999) 39, 78; N O'Neill, S Rice and R Douglas, *Retreat from Injustice* (2nd ed, 2004) 15; L Rehof 'Article 3' in A Eide et al (eds), *The Universal Declaration of Human Rights – A Commentary* (1992) 75; and C Michaelsen, 'Security Against Terrorism: Individual Right or State Purpose' (2005) 16 *Public Law Review* 178, 180.

54 The absence of the liberty aspect of art 3 of the UDHR is one of the most striking features of the Attorney-General's adaptation of the human security principle.

55 In the sense that the removal of the liberty criterion from Attorney-General Ruddock's configuration of human security changes the rights equation, so that (i) the security obtained forms the focus of the right and (ii) the issue of security-enhancing measures impacting adversely upon the enjoyment of liberty as traditionally understood from art 3 of the UDHR is excised from direct consideration.

56 Some examples are found in the comments of the then Secretary-General of the UN: see UN Press Release SG/SM/7382 (8 May 2000) and UN Press Release SG/SM/9061 (8 December 2003); the President of the UN General Assembly: see UN Press Release GA/SM/290; and the Commission on Human Security, *Human Security Now* (2003) 4.

57 See Workshop: Measurement of Human Security: Summary of Deliberations, Harvard John F Kennedy School of Government, 30 November 2001, 2. On 24 October 2005, the UN General Assembly adopted GA Res 60/1 (2005) which, amongst other things, committed the General Assembly to discussing and defining the notion of human security: see 2005 World Summit Outcome, UN Doc A/Res/60/1 [143].

58 See D Newman, 'A Human Security Council? Applying a "Human Security" Agenda to Security Council Reform' (1999) 31 *Ottawa Law Review* 215, 219.

59 See *Human Security Now* above n 56, 3.

60 See *Human Security Now* above n 56, 9; B Ramcharan, *Human Rights and Human Security* (2002) 9-10; and Workshop on the Relationship Between Human Rights and Human Security, San Jose Costa Rica, 2 December 2001.

61 Indeed, art 2 of the UDHR creates no formal differentiation or hierarchy in the value of rights to be enjoyed, nor in who is entitled to access those rights: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

life, liberty and security of the person, as comprehensively describing human security.[62]

Another critical factor exposing problems of the Attorney-General's human security claim was the selective use of two leading Canadian authorities, Irwin Cotler[63] and Louise Arbour,[64] to provide respectability to it. It was both inaccurate and unjustifiable to claim that the writings of these persons supported the particular conception of human security being advanced. The Attorney-General's appraisal reflected only the most basic starting point of Cotler's consideration of security. Cotler provided a much fuller consideration of the relationship between security and human rights, including a range of foundational principles,[65] in turn tested against civil liberties principles specific to the counter-terrorism legislation in question.[66] This operating model, which is intended to

---

62 Reflecting this point, see counter-terrorism SC Res 1456 [6] and [1566] preamble, which state that 'States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.' The formally binding right to life emerging from the UDHR in the form of art 6 of the ICCPR states that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life', exists beside a range of *other equally non derogable rights* in the ICCPR, such as art 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment), art 8(1) and (2) (freedom from slavery and servitude), art 11 (freedom from imprisonment merely on the ground of inability to fulfill a contractual obligation), art 15 (prohibition against retrospective criminal law and retrospective criminal offences), art 16 (recognition everywhere as a person before the law) and art 18 (freedom of thought, conscience and religion).

63 Irwin Cotler was the then current, and now former, Canadian Attorney-General and a former Dean of McGill University Law Faculty. The major article written by Cotler which was referred to by the Commonwealth Attorney-General was: I Cotler, 'Thinking Outside the Box: Foundation Principles for a Counter-Terrorism Law and Policy' in R Daniels, P Macklem and K Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001) 111. Attorney-General Ruddock cites the Cotler article in his own articles 'Australia's Legislative Response to the Ongoing Threat of Terrorism' above n 49, and 'A New Framework: Counter-Terrorism and the Rule of Law' above n 49.

64 Louise Arbour, then UN High Commissioner for Human Rights, a former Canadian Supreme Court justice and a former Chief Prosecutor at the International Tribunal for the Former Yugoslavia. Arbour's writings and comments were referred to by the Commonwealth Attorney-General in P Ruddock, 'National Security and Human Rights' (2004) 9 *Deakin Law Review* 295, 300; and Speech: 2004 Homeland Security Conference 'Opening Address', 24 August 2004.

65 The foundational principles are those principles underlying the relevant counter-terrorism law and include 1. Human Security Legislation; 2. Jettisoning 'false moral equivalences': Towards a 'Zero Tolerance' Principle re Transnational Terrorism; 3. Terrorism and Human Rights: The Contextual Principle; 4. The Proportionality Principle; 5. The International Criminal Justice Model; 6. The Domestication of International Law; 7. The Comparativist Principle; 8. The Prevention Principle; 9. Criminal Due Process Safeguards; 10. The Minority Rights Principle; 11. The Anti-Hate Principle; 12. The Chartering of Rights; and 13. The Oversight Principle. These principles are set out in Cotler, above n 63.

66 These are Cotler's 'Rights-Based Concerns' and include: 1. Definition of 'Terrorist

install accountability mechanisms and reinforce democratic institutions, is entirely absent from the Attorney-General's conception of human security.

Similarly, references to Louise Arbour in support of the human security claim are also misguided. When the extracts from Arbour's statements are read in context with her relevant judgments while a member of the Canadian Supreme Court and subsequently as UN High Commissioner for Human Rights, it becomes apparent that the idea of human security contemplated is much broader than that presented by the Attorney-General. Given these factors, there was little, if any, similarity between Arbour's opinions on human security with those advanced by Attorney-General Ruddock.

A further difficulty emerging from the Howard government's application of the concept of human security was the elision by Attorney-General Ruddock from Article 3 of the UDHR (in its 'security of the person' aspect, then building from that commentary regarding the right to life in Article 3) to a claimed human right to safety and security,[67] taking precedence over other rights and creating a governmental obligation for the realisation of that right. This meant that the referent focus of threat to be protected against by the right had shifted from the state to non-state actors. In fulfilling this obligation to create a physically secure environment, the possibility that state-enacted counter-terrorism measures themselves may constitute a threat to the safety and security of the individual is oddly removed from the debate.

The application by the Howard government of this concept of human security to justify legislative developments persisted, even after extensive, reasoned criticism had been made of its application.[68] The Attorney-General's unique development of the particular human security principle is a metaphor for how far, in its counter-terrorism legislative agenda, the Howard government was prepared to pursue both political advantage and concentrated executive power, at the expense

---

Activity'; 2. Listing of Terrorist Organisations; 3. Requirement of a *Mens Rea* Threshold; 4. Access to Information and the Right to Privacy; 5. Preventive Arrest and Investigative Hearing: Provision for a Sunset Clause; 6. Interception of Foreign Communications; 7. The Right of Visible Minorities to Protection Against Differential Discriminatory Treatment; 8. Scrutiny of Registered Charities; 9. Civil Forfeiture Process; 10. Legal Representation Solicitor Client Privilege and Solicitor Client Confidentiality; and 11. Oversight Mechanisms.

67 That right, perhaps indicating its amorphous and unpredictable content, was variously described as a 'fundamental right to live in safety and security', 'British Counter-Terrorism Options Examined' Attorney-General's Media Release 26 February 2004 and Press Conference, 'Recent Developments In National Security' Attorney-General's Media Release 26 February 2004; 'the right to be safe and the right to live without fear', 2004 National Security Australia Forum 'Opening Address' 23 March 2004; 'the right to live freely and safely in our community', P Ruddock, 'Securing Civil Liberty' *Lawyer's Weekly* (19 August 2004); 'people's right to life and personal safety and security', 'Counter-terrorism laws a balancing exercise: Ruddock' ABC *Insiders* Program Transcript 11 September 2005; and the 'most fundamental right of all – the right of citizens to live safely and securely in their communities', 'Attorney responds: what about the right to security?' *Bar News* (Winter 2005) 8, 9.

68 See the critics of the concept at above n 43, and Carne, above n 52.

of distorting international law principles. In this example of an international law term or concept, the Howard government fostered a contraction and distortion of public debate about counter-terrorism policy, potentially also compromising much broader principles of democratic governance and integrity of institutions, the very targets of terrorism.

IV. United States Military Commissions and Guantánamo Bay: the Howard government, Hicks and Habib

A further prominent feature of the Howard government's engagement with international law and terrorism arose in relation to the incarceration of Australian citizens David Hicks and Mamdouh Habib in United States military custody in the Guantánamo Bay detention facility.

The approach of the Howard government to the extended detention and alleged maltreatment of the two Australian nationals is necessarily understood within a broader context of strong Australian support for the United States-led war on terror[69] and its sceptical approach to UN-mandated international human rights standards and institutions.[70] Such broad principles or attitudes necessarily produced individual features in the Howard government response whereby international law and human rights issues were sought to be marginalised or neutralised, with maximum political advantage to be extracted through an emphasis upon presentational handling of the issues. The egregious nature of the procedural issues surrounding the Military Commission's process and human rights infractions in both instances ultimately diminished the political advantage, more so in the case of Hicks, with the issue attracting such controversy in the year preceding the 2007 federal election, as to become a political liability.

The issue of treatment of the detainees and subsequent allegations of physical and psychological abuse in detention, and interrogation were sought to be neutralised by the use of the words 'humane treatment'[71] and by subsequent

---

69 Indicated early on from a formal invocation of the ANZUS Treaty: see 'Australian Practice in International Law 2001: Defence Cooperation – Terrorism – ANZUS Treaty' (2001) 22 *Aust YBIL* 354-55.

70 See, in particular, Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, 'Improving the Effectiveness of the United Nations Committees' (Joint Media Release, 29 August 2000) <http://www.foreign minister.gov.au/releases/2000/fa097_2000.html> and Minister for Foreign Affairs and Attorney-General, 'Progress Made to Reform UN Treaty Bodies' (Joint Media Release, 9 March 2006) with attached report *Reform of the United Nations Treaty Body System: Australian Initiatives* <http://www.foreignminister.gov.au/releases/2006/joint_ruddock_un_treaty_bodies_090306.html>; E Evatt, 'How Australia "Supports" the United Nations Human Rights Treaty System' (2001) 12 *Public Law Review* 3; D Otto, 'From "Reluctance" to "Exceptionalism": the Australian Approach to the Domestic Implementation of Human Rights' (2001) 26 *Alternative Law Journal* 219; D Kinley and P Martin, 'International Human Rights at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466; D Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297.

71 See assurances and usages of humane treatment in Joint News Release, Attorney-General and Minister for Foreign Affairs, 'David Hicks and Mamdouh Habib

reporting of two investigations into the abuse allegations by the United States military.[72] The use of 'humane treatment'[73] or similar words is one of the few international law references employed by the relevant ministers relating to the Guantánamo Bay detentions.

The impression that the Howard government communicated about the ongoing management of the Guantánamo Bay detentions was that of regularity, fairness and a positive Australian government influence on United States decision-making processes, as the benefits of the special relationship with the United States. This was manifested in the ongoing communications of relevant ministers with United States authorities[74] and in the concessions in the Military Commission's process obtained from the United States,[75] presented as assurances to the Australian public that a fair process was arranged for the trials of the Australians.

The strong support of the Howard government for the United States war on terror necessarily precluded independent analysis and public critique of the Military Commission legal procedures, let alone an engagement with international law issues. Proper engagement would invariably have highlighted the deficiencies and shortfalls in the US Administration's Military Commissions scheme in relation to international human rights law and international humanitarian law. Indeed, much

---

Treated Well' 23 May 2002 <http://www.foreignminister.gov.au/releases/2002/fa078j_02.html>; 'Claims of Abuse to be Examined' 13 May 2004.

72 Minister for Foreign Affairs, 'Investigation into Allegations of Mistreatment of Guantánamo Bay Detainees' (Media Release, 26 August 2004) <http://www.foreignminister.gov.au/releases/2004/fa126_04.html> see letter attached to Media Release from Principal Under Secretary of Defense to Australian Ambassador to United States dated 23 August 2004, about the inquiry by the US Office of Secretary of Defense held in response to a request by the Australian government following allegations about the treatment of David Hicks and Mamdouh Habib while in US custody. The inquiry found no evidence of mistreatment or abuse.

73 Deriving from such sources as the ICCPR (see art 10) and the Geneva Conventions (see Common art 3).

74 See Attorney-General, 'Another Step Towards David Hick's Trial' (Media Release, 19 January 2007); Attorney-General, 'Attorney-General Visits North America For Security Talks' (Media Release, 25 September 2006); Attorney-General, 'Briefing on David Hicks' (Media Release, 28 July 2006); Minister for Foreign Affairs and Attorney-General, 'Delegation Concludes Successful Talks on David Hicks' (Joint News Release, 24 July 2003).

75 See Attorney-General and Minister for Foreign Affairs, 'David Hicks Eligible for US Military Commission Trial' (Joint Media Release, 3 July 2003) <http://www.foreignminister.gov.au/releases/2003/joint_ag.html>; Attorney-General, 'Another Step Towards David Hicks' Trial' (Media Release, 19 January 2007); Minister for Foreign Affairs and Attorney-General, 'Government to Discuss Improvements to Guantánamo Bay Military Commission Process' (Joint Media Release, 5 September 2004); Attorney-General, 'Labor Dismisses Charges' (Media Release, 10 June 2004); Minister for Foreign Affairs and Attorney-General 'Delegation Concludes Successful Talks On David Hicks' (Joint News Release, 24 July 2003); Attorney-General and Minister for Foreign Affairs, 'David Hicks Eligible For US Military Commission Trial' (Joint News Release, 4 July 2003) <http://www.foreignminister.gov.au/releases/2003/joint_ag.html>.

independent legal commentary and analysis emerged making these very points.[76] To ignore these criticisms suggests a Howard government determination to minimise international legal considerations from its terrorism law policy.

This approach of the Howard government[77] is also more readily appreciated from the perspective that its close political ally, the Bush administration, was engaged in the construction of an extra-legal, executive-orientated framework for the detention and intelligence-gathering interrogation of persons it believed were engaging in terrorism, invoking Presidential war powers as the source of authority.[78] The new intelligence gathering, preventative and executive inspired punitive model of Guantánamo Bay, the indeterminacy of the war on terror and the attempt to source authority in Presidential power[79] were inimical to an international law rule of law framework. Indeed, these considerations provided a barrier against explaining these systems in conformity with conventional understandings of international law. The Howard government methodology accordingly avoided responding to international law issues on this topic, or indeed, to successful legal challenges that found key elements of the scheme lacking legal authority.[80]

---

76 Some examples are L Sales, *Detainee 002 The Case of David Hicks* (2007); P Sands, *Lawless World America and the Making and Breaking of Global Rules* (2005); M Ratner and E Ray, *Guantánamo What the World Should Know* (2004); T McCormack, 'David Hicks and the Charade of Guantánamo Bay' (2007) 8 *Melbourne Journal of International Law* 273; P Vickery, 'David Hicks and the Military Commission – Is Australia Turning its Back on International Law?' (2006) 137 *Victorian Bar News* 55; J Lewis, 'Inside the Trial of David Hicks' (2007) *Law Society Journal* 22; T Bugg, 'Release Him Now' (2007) *Law Society Journal* 50. In addition, the Law Council of Australia appointed an Independent Legal Observer, Lex Lasry QC, who produced three reports: see *United States v David Matthew Hicks First Report of the Independent Legal Observer for the Law Council of Australia – September 2004* (2004); *United States v David Matthew Hicks Report of the Independent Legal Observer for the Law Council of Australia – July 2005* (Second Report) (2005); *United States v David Matthew Hicks Final Report of the Independent Observer for the Law Council of Australia* (2007). The three reports can be accessed at <http://www.lawcouncil.asn.au/hicksjustice.html>. See also legal advice from several eminent jurists on the legality of the charges against David Hicks: *Advice In the Matter of the Legality of the Charge against David Hicks* 8 March 2007, which can be accessed at <http://www.lawcouncil.asn.au/hicksjustice.html>.

77 In contrast, the United Kingdom government sought and obtained release of several of its nationals from Guantánamo Bay and the Military Commissions process, on the basis that it was dissatisfied with various human rights-related aspects of the detention and proposed Military Commissions process: see Sands, above n 76, 166-72.

78 On this point see Sands, above n 76, ch 7: 'Guantánamo: the Legal Black Hole'; and K Greenberg and J Dratel (eds), *The Torture Papers the Road to Abu Ghraib* (2005).

79 Eg, see Memorandum 19 January 2002 from Jay S Bybee Assistant Attorney-General US Department of Justice to Alberto Gonzales, Counsel to the President and William J Haynes, General Counsel, Department of Defense *Re Application of Treaties and Laws to al Qaeda and Taliban Detainees* and Memorandum 25 January 2002 for the President from Alberto Gonzales *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* in Greenberg and Dratel (eds), above n 78, 81-121.

80 See *Hamdan v Rumsfeld* (2006) 548 US 557 and *Rasul v Bush* 124 S.Ct 2686 (2004).

In particular, the continuing assumptions by the Howard government about the legality of the United States arrangements as they affected Hicks proved to be ill-founded.[81] There was a prolonged, misguided legal and political faith[82] invested by the Howard government in the promptness and regularity of the Military Commission's process. The extent of that investment is indicated, for example, in the suggestion[83] that Howard government ministers may have *prima facie* been liable under the war crimes denial of a fair trial provision of the Criminal Code (Cth).[84] It is also indicated by the fact that rather than use the *Hamdan* decision as a critical turning-point to withdraw support for the Military Commission process for Hicks, the Howard government persisted with support for the revised version of the process.[85]

---

81 The US Supreme Court in *Rasul v Bush* 124 S.Ct 2686 (2004) found by a majority (Stevens, O'Connor, Souter Ginsburg and Breyer JJ, with Kennedy J in a judgment concurring with the majority) that United States courts have jurisdiction to examine the legality of detention in Guantánamo Bay of foreign nationals captured and detained overseas. The petitioners in this case were the two Australian citizens, Hicks and Habib, 12 Kuwaiti citizens and two British citizens captured abroad. Hicks and Habib filed individual petitions for a writ of *habeus corpus* seeking release from custody, access to counsel, freedom from interrogations and other relief: see 124 S.Ct 2686, 2691, Rehnquist CJ, Scalia and Thomas JJ dissented. For the affidavit of David Hicks in *Rasul*, see Greenberg and Dratel (eds), above n 78, 1234-38. The US Supreme Court in *Hamdan v Rumsfeld* (2006) 548 US 557 found by a majority (Stevens J, joined by Souter, Ginsberg and Breyer JJ, with a separate judgment from Kennedy J) that the measures adopted under the Military Commission trial failed to conform, at a minimum, with the standards required by Common art 3 of the Geneva Conventions. For commentary on *Rasul v Bush* see Lasry (second report), above n 76, 9-11. For commentary on *Hamdan v Rumsfeld* see Lasry (final report), above n 76, 7-8; S Finnin 'Case note: Salim Ahmed Hamdan, Petitioner v Donald H Rumsfeld Secretary of Defense: Has The Bush Administration's Experiment With Military Commissions Come To An End?' (2006) 7 *Melbourne Journal of International Law* 372; and T Holden, 'The Implications of Hamdan's Case' *Quadrant* (March 2007) 42.

82 On this point see Sales, above n 76, 240-41.

83 See G Robertson, 'In thrall to the Bush lawyers' *The Age* (17 August 2006) 17.

84 S 268.31 of the Criminal Code (Cth) incorporating the Rome Statute for the International Criminal Court states: (1) A person (the perpetrator) commits an offence if: (a) the perpetrator deprives one or more persons of a fair and regular trial by denying to the person any of the judicial guarantees referred to in paragraph (b); and (b) the judicial guarantees are those defined in articles 84, 99 and 105 of the Third Geneva Convention and articles 66 and 71 of the Fourth Geneva Convention; and (c) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and (d) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and (e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

85 Namely, the Military Commissions Act of 2006 . See T Holden, 'The Guantánamo Detainees and The Military Commissions Act' *Quadrant* (June 2007) 60; D Rothwell, 'David Hicks and the US Military Commission Process: Next Steps' Jurist Legal News and Research, School of Law, University of Pittsburgh, 11 November 2006; Attorney-General, '"I stress the urgent need for continuing progress and passage of legislation through Congress to re-establish the military commission process" Mr Ruddock said' (Media Release, 25 September 2006) and 'Government's Blind

Aside from the difficulties created by the Howard government for itself on international law doctrines through its unquestioning support of the Bush administration policies, this inability of the Howard government to ensure a timely trial process for Hicks produced other public responses. In seeking to convey a regularity and attentiveness about its dealings with the detention of the two Australian nationals, the Howard government repeatedly, but futilely, proclaimed its efforts of the need for the United States to expedite matters.[86] This pressing, repeated claim for expeditious treatment in these cases appears as a variation of the urgency paradigm in terrorism matters cultivated elsewhere by the Attorney-General.[87]

Furthermore, the extended delays in the military commission process caused the Howard government to attempt to blame the lawyers acting for the Australians and others in legal challenges to the detentions as the cause of those delays.[88] Implicit in this was the assumption that legal challenges to the application of executive discretion and authority in terrorism matters are improper. This last point is both confirmatory of the Howard government's disposition to concentrate executive power in terrorism matters and a technique designed to anticipate and deflect criticism, or the suggestion of criticism, of the Bush administration's military commissions process. A credible Howard government response had to be

---

Defence of Military Commissions – a Case of Déjà Vu' Law Council of Australia (Press Release, 10 January) 2007.<http://www.lawcouncil.asn.au/read/2007/2433067279.html>.

86 See Attorney-General, 'Labour Wrong Again On David Hicks' (Media Release, 8 February 2007); Minister for Foreign Affairs and Attorney-General, 'David Hicks: Charges Outlined' (Joint Media Release, 3 February 2007) <http://www.foreignminister.gov.au/releases/2007/joint_ruddock_hicks.html>; Attorney-General, 'Another Step Towards David Hicks' Trial' (Media Release, 19 January 2007); 'Attorney General Visits North America For Security Talks' (Media Release, 25 September 2006); 'Briefing On David Hicks' (Media Release, 28 July 2006); Attorney-General and Minister for Foreign Affairs, 'Statement on Mamdouh Habib' (Joint Media Release, 11 January 2005) <http://www.foreignminister.gov.au/releases/2005/joint_ruddock_habid_110105.htm>; 'Government to Discuss Improvements To Guantánamo Bay Military Commission Process' (Joint Media Release, 5 September 2004).

87 The use of urgency as a legislative technique in a particular terrorism matter is canvassed by A Lynch, 'Legislating With Urgency – The Enactment of The *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747; and 'Hasty law making diminishes public respect for the law itself" *Canberra Times* (3 April 2006); G Carne, 'Hasten Slowly: Urgency, Discretion and Review – a Counter-Terrorism Legislative Agenda and Legacy' (2008) 13 (2) *Deakin Law Review* (forthcoming); G Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth' (2007) 10 *Flinders Journal of Law Reform* 17, 49-50; G Carne, 'Brigitte and the French Connection: Security *Carte Blanche* or *A La Carte* (2004) 9 *Deakin Law Review* 573, 599; A Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81, 91-5.

88 See Law Council of Australia, 'Howard Deceptive About Hicks Delay' (Media Release, 18 May 2006) <http://www.lawcouncil.asn.au/read/2006/2424016075.html> and 'Blame Politics, Not Lawyers, for Hicks Delay' (Media Release, 16 August 2006) <http://www.lawcouncil.asn.au/read/2006/2426773314.html>.

articulated against the earlier circumstances of the United Kingdom having its nationals released from Guantánamo Bay,[89] on the grounds that the detention and trial processes involved significant breaches of international human rights law.

In relation to the revised Military Commission (2006)[90] and the new charges against Hicks,[91] the Howard government emphasised the regularity of the process, the seriousness of the charges, the fact of a guilty plea to one[92] of two charges, the serving of the non-suspended part of the sentence imposed in an Australian gaol[93] and the adoption of further security measures relating to Hicks in Australia.[94] By 2006, in the lead-up to five years of detention without trial for Hicks, and in the year before a federal election,[95] the Hicks matter had taken on greater political

---

89 UK Foreign and Commonwealth Secretary of State Jack Straw, 'Foreign Secretary Statement on Return of British Detainees' (Press Release 19 February 2004) <http://www.globalsecurity.org/security/library/news/2004/02/sec-040219-uk-fco01.htm>. Five UK detainees were released. See McCormack, above n 76, 273, 277 and Sands, above n 76, 169-71.

90 See Military Commissions Act of 2006 s 3930 (US) passed by the US Congress on 29 September 2006, subsequent to the decision of the United States Supreme Court in *Hamdan v Rumsfeld*, which was decided on 29 June 2006. For a chronology of developments in relation to the David Hicks matter, see Parliament of Australia Parliamentary Library *Australians in Guantanamo Bay A Chronology of the detention of Mamdouh Habib and David Hicks* <http://www.aph.gov.au/library/pubs/online/Australians_GuantanamoBay.htm>.

91 The draft charges laid on 2 February 2007 were Attempted Murder in Violation of the Law of War and Providing Material Support for Terrorism. Details of the two draft charges are set out in Lasry (final report), above n 76, 14-15. The final charge was approved and issued by the Convening Authority for Military Commissions on 1 March 2007, with the charge of attempted murder in violation of the law of war dropped.

92 Namely, providing material support to terrorism. Hicks pleaded guilty to this charge on 26 March 2007, as part of a pre-trial agreement, and also agreed not to appeal his conviction and not to comment to the media.

93 Minister for Foreign Affairs and Attorney-General, 'Government finalises transfer of prisoner arrangement with United States', (Joint Media Release, 9 May 2006) <http://www.foreignminister.gov.au/releases/2006/joint_ruddock_prisoner_tranf_100506.html>. See also International Transfer of Prisoners (Military Commission of the United States of America) Regulations 2007 (Select Legislative Instrument 2007, No 79) (Cth) and International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Amendment Regulations 2007(No 1) (Select Legislative Instrument 2007, No 80) (Cth).

94 See Minister for Foreign Affairs and Attorney-General, 'David Hicks; charges outlined' (Joint Media Release, 3 February 2007) <http://www.foreignminister.gov.au/releases/2007/joint_ruddock_hicks.html> and 'David Hicks is transferred to Australia under the International Transfer of Prisoners Scheme' (Joint Media Release, 20 May 2007) <http://www.foreignminister.gov.au/releases/2007/fa055a_07.html>. See also Attorney-General, 'Preparation for the Return of David Hicks' (Media Release, 31 March 2007). Hicks was subjected to a control order obtained under the Commonwealth Criminal Code on his release from prison in December 2007: see *Jabbour v Hicks* [2007] FMCA 2139 (21 December 2007). The constitutionality of the control orders provisions of the Criminal Code (Cth) had earlier been upheld by five votes to two in the High Court in *Thomas v Mowbray* (2007) 237 ALR 194.

95 The adverse political aspects for the Howard government of the publicity surrounding

significance. The approaches of the Howard government had thus far averted attention from international law issues relating to continued ill-treatment in custody prior[96] to the guilty plea. However, egregious flaws in the application of the military commission process, the persistent efforts of Hicks' counsel, Major Michael Mori,[97] and his father Terry Hicks, and subsequent significant legal opinion on international law aspects casting doubt upon the legality of the charges,[98] provided considerable prominence for the Hicks matter.

Many of the Howard government's attitudes to the international law aspects of the Hicks and Habib matters were replicated in the Australian litigation individually brought by these parties against the Commonwealth.[99] In addition, the Senate Standing Committee of Privileges was given a reference on 18 September 2007 to inquire 'whether false or misleading evidence was given to the Legal and Constitutional Affairs Committee or any other Senate committee concerning the Government's knowledge of the rendition of Mr Mamdouh Habib to Egypt, and whether any contempt was committed in that regard'.[100] In its May 2008 report,[101] the Senate Standing Committee on Privileges stated that no finding of contempt could be made against Commissioner Keelty of the Australian Federal Police or

---

Hicks are briefly canvassed in McCormack, above n 76, 288 and T McCormack, 'The David Hicks trial was a political fix by two governments' *The Age* (21 May 2007).

96 See 'Hicks suffering in isolation, says lawyer' ABC Radio *PM* transcript 30 January 2007 <http://www.abc.net.au/pm/content/2007/s1836606.htm>.

97 See Sales above n 76, 221-27.

98 See P Vickery, T McCormack, A Nicholson, H Charlesworth, G Griffith, A Byrnes, G Boas, S Kaye, and D Rothwell, *Advice in the Matter of the Legality of the Charge against David Hicks* 8 March 2007 <http://www.lawcouncil.asn.au/read/2007/2435666831.html> and 'Summary of Observations and Findings' in L Lasry, *David Hicks v the United States Summary of the Report of the Independent Observer for the Law Council of Australia* (July 2007) <http://www.lawcouncil.asn.au/hicksjustice.html>.

99 See the civil actions *Hicks v Ruddock* [2007] FCA 299 8 March 2007 and *Habib v Commonwealth* [2008] FCA 489 16 April 2008. In the *Hicks* matter, Ministers Ruddock and Downer and the Commonwealth unsuccessfully sought to have the matter summarily dismissed on the basis that Hicks' claims disclosed no reasonable prospect of success as a matter of law. In the *Habib* matter, the Commonwealth attempted to have determined separately and early the factual question of whether there was a justiciable duty of care to its citizens abroad and in possession of an Australian passport to take all reasonable steps to ensure that they are in the custody of foreign governments and that they are treated lawfully, fairly and humanely: the Commonwealth only succeeding in establishing that the meetings between Habib and Australian government officers in Islamabad in October 2001 did not occur at the Australian High Commission or any other place under the control of the Commonwealth.

100 See Senate Standing Committee of Privileges website 'Current Inquiries' <http://www.aph.gov.au/Senate/committee/priv_ctte/inquiries.htm>; and Senate *Hansard (*18 September 2007) 47 (Statement by Senator Nettle); Senate *Hansard* (18 September 2007) 4415 (Reference to Privileges Standing Committee).

101 Parliament of Australia Senate Committee of Privileges, *Possible False or Misleading Evidence before the Legal and Constitutional Affairs Committee or any other committee* 133rd report May 2008 <http://www.aph.gov.au/Senate/committee/priv_ctte/report_133/index.htm>.

Mr Robert Cornall, Secretary of the Attorney General's Department.[102] Other comments by the Committee however do offer a further insight into the Howard government's approach to international law in the Habib matter, in the sense of a claimed lack of candour, timeliness and inter-agency co-ordination in responding to important questions about government knowledge about the whereabouts of Habib in October and November of 2001 and the United States practice of extraordinary rendition.[103] The delays and difficulty in obtaining information only after the persistent effort of some members of the Senate Committee[104] does provide some indication of how the Howard government's passive approach to this aspect of the United States war on terror policy, including extraordinary rendition, significantly compromised Australia's international human rights obligations.

V. Entering into United Nations Terrorism Conventions and Regional Memoranda of Understanding

The Howard government's engagement with international law issues in the area of counter-terrorism was also noteworthy for adoption of three major UN-sponsored

---

102 'The committee concludes that neither Commissioner Keelty nor Mr Cornall knowingly gave false or misleading evidence to the Legal and Constitutional Affairs Committee in respect of their knowledge of whether Mr Mamdouh Habib had been taken to Egypt. It therefore finds that no contempt was committed in this regard': above n 101, 9 [1.31].

103 This matter refers to a question by Senator Ludwig to Commissioner Keelty at the Senate Standing Committee on Constitutional and Legal Affairs Budget Estimates hearing on 23 May 2007 (Question No 79) namely '(a) was the AFP provided with information from any intelligence authority (either inside or outside of Australia) about the alleged rendition of Mr Habib.' The question was taken on notice with a deadline of 6 July 2007. The Senate Committee of Privileges Report acknowledges that Commissioner Keelty provided an answer to this question in correspondence to the Privileges Committee on 26 October 2007, but that the Senate Legal and Constitutional Affairs Committee did not receive the answer, despite the 6 July 2007 deadline, until 'Commissioner Keelty read it into the record at the committee's additional estimates hearing on 18 February 2008, seven months after the deadline had passed': Senate Privileges Committee Report, 7 and see Senate Standing Committee on Legal and Constitutional Affairs Estimates *Hansard* (18 February 2008) 47-8.

104 Indeed, the Senate Committee of Privileges Report at 7 observes that Commissioner Keelty's answer 'referred to a meeting on 22 October 2001 in Pakistan attended by the AFP and US authorities at which the possibility of transporting Mr Habib to Egypt, the country of his birth, was canvassed. This information had not previously been provided by the AFP over several rounds of estimates, including questioning by several different senators concerned to uncover the truth about Mr Habib's fate following his detention in Pakistan. Despite the evident concern of senators, it apparently took a very specific question to elicit the particular information.' Commissioner Keelty states in the Senate Estimates *Hansard* (18 February 2008) at 48 that 'The question was – obviously a very well framed question, might I add!' In correspondence dated 16 June 2008 to the Chair of the Senate Committee of Privileges, Commissioner Keelty responded to criticisms of delay in the Committee's report, by stating that 'these were delayed due to the coordination of responses by multiple agencies regarding questions relating to Mr Habib. Multi-agency coordination was critical to ensure that responses provided by all Agencies were as accurate as they could be based on information held across a number of Commonwealth Agencies'.

counter-terrorism treaties, as well as a commitment to move towards ratification of a further two UN counter-terrorism treaties.[105]

The first of the treaties ratified was the accession to the International Convention for the Suppression of Terrorist Bombings[106] on 9 August 2002, taking effect on 8 September 2002. The Howard government observed that:

> Terrorist attacks by means of explosives or other lethal devices have become increasingly widespread, and a review of the scope of existing international legal provisions on the prevention, repression and elimination of terrorism found that existing multilateral legal provisions did not adequately address these attacks. The purpose of the Convention is therefore to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators.[107]

This convention was domestically implemented by the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002.[108]

The second of the UN counter-terrorism treaties was the ratification of the International Convention for the Suppression of the Financing of Terrorism on 26 September 2002.[109] The Howard government observed that:

> [t]he purpose of the Convention is to suppress acts of terrorism by depriving terrorists and terrorist organisations of the financial means to commit such acts. It does so by obliging State Parties to criminalize and take other measures to prevent the provision or collection of funds for the purpose of committing terrorist acts and to cooperate with other State Parties in the prevention, detection, investigation and prosecution of terrorist financing.[110]

There were further areas of prospective counter-terrorism treaty developments for the Howard government. It announced that Australia was considering becoming a party to the Convention on the Marking of Plastic Explosives for the Purpose of Detection[111]and acceded to that treaty on 26 June 2007.[112] It additionally became a

---

105 Namely, the Convention on the Marking of Plastic Explosives for the Purpose of Detection [2007] ATS 25; and the International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res A/RES/59/290 (2005).

106 [2002] ATS 17.

107 National Interest Analysis on International Convention for the Suppression of Terrorist Bombings cited in 'Australian Practice in International Law: Terrorism' (2002) 23 *Aust YBIL* 389.

108 See also Minister for Foreign Affairs and Attorney-General, 'One More Step Towards a Safer Australia' (Joint Media Release, 12 August 2002) <http://www.foreignminister.gov.au/releases/2002/joint_safer_oz.html>.

109 [2002] ATS 23. See Minister for Foreign Affairs, 'Australia Ratifies Terrorist Financing Convention' (Media Release, 27 September 2002) <http://www.foreignminister.gov.au/releases/2002/fa137_02.html>.

110 National Interest Analysis on International Convention for the Suppression of the Financing of Terrorism cited in 'Australian Practice in International Law: Terrorism' (2002) 23 *Aust YBIL* 388.

111 Convention on the Marking of Plastic Explosives for the Purpose of Detection, above n 105. See Minister for Foreign Affairs, 'Australia Ratifies Terrorist Financing Convention' (Media Release, 27 September 2002) <http://www.foreignminister.gov.au/releases/2002/fa137_02.html>.

signatory to the International Convention for the Suppression of Acts of Nuclear Terrorism[113] and indicated that it was working towards ratification of that treaty.[114] First, it is remarkable for a government that boasted of its pragmatism and practicality in policy areas, including counter-terrorism matters that the quintessentially practical Convention on the Marking of Plastic Explosives took so long to be acceded to by the Howard government on behalf of Australia.[115] Second, given the nature of expressed concern over weapons of mass destruction - indeed as forming the basis for the Howard government's commitment of forces to the invasion of Iraq, it would have been interesting to speculate upon the timeframe a re-elected Howard government would have required to accede to the International Convention for the Suppression of Acts of Nuclear Terrorism.

VI. Regional Arrangements

With the focus of the major international terrorist incidents of the tragic deaths of Australians and others and damage to Australian interests in the October 2002 Bali bombing, the September 2004 Australian Embassy in Jakarta bombings, the second Bali bombing in October 2005, and the fear of militant Islam contributing to terrorist activity, it is unsurprising that a growing part of the Howard government's focus was upon entry into a series of bilateral memoranda of understanding on terrorism issues with a number of states in the Asia-Pacific. These states were Indonesia,[116] Malaysia,[117] Thailand,[118] The Philippines,[119] Fiji,[120] Cambodia,[121]

---

112 Convention on the Marking of Plastic Explosives for the Purpose of Detection, above n 105.

113 International Convention for the Suppression of Acts of Nuclear Terrorism, above n 105.

114 See Department of Foreign Affairs and Trade document, 'Non Proliferation, Arms Control and Disarmament International Safety Standards and the Regulatory Regime Physical Protection of Nuclear Material' <http://www.dfat.gov.au/security/int_safety_stnd.html>.

115 This treaty was open for signature on 1 March 1991 and entered into force generally on 21 June 1998.

116 See references to the MOU in February 2002 with Indonesia in Minister for Foreign Affairs Media Release, 'Australia and Thailand Sign MOU on Counter-Terrorism' 3 October 2002 <http://www.foreignminister.gov.au/releases/2002/fa143_02.html> and Minister for Foreign Affairs speech at Chatham House, London on 31 October 2002, referred to in 'Australian Practice in International Law: Terrorism' (2002) 23 *Aust YBIL* 387.

117 See references to the MOU in Minister for Foreign Affairs, 'Australia and Thailand Sign MOU on Counter-Terrorism' (Media Release, 3 October 2002) <http://www.foreignminister.gov.au/releases/2002/fa143_02.html>.

118 See Media Release, ibid.

119 See Minister for Foreign Affairs, 'Australia and Philippines Sign Counter-Terrorism Agreement' (Media Release, 4 March 2003) <http://www.foreignminister.gov.au/releases/2003/fa017_03.html>.

120 See Minister for Foreign Affairs, 'Counter-Terrorism Package' (Media Release, 7 March 2003) <http://www.foreignminister.gov.au/releases/2003/fa020_03.html>.

121 See Minister for Foreign Affairs, 'Australia and Cambodia Sign Counter-Terrorism Agreement' (Media Release, 18 June 2003) <http://www.foreignminister.gov.au/releases/2003/fa069_03.html>.

India,[122] East Timor,[123] Papua New Guinea,[124] Pakistan,[125] Brunei[126] and Afghanistan,[127] as well as a counter-terrorism declaration with the Association of Southeast Asian Nations (ASEAN).[128]

The memoranda typically highlighted a range of co-operative matters, including intelligence and information-sharing, capacity-building by training, education and technical-assistance programs, and increased co-operation between security, intelligence, law enforcement and defence officials. The Howard government considered the Memorandum of Understanding as the underpinning of practical counter-terrorism co-operation with these nations.[129] In particular, it considered the MOU with Indonesia as 'the basis for the excellent cooperation between the Australian and Indonesian police forces in the aftermath of the Bali and Jakarta bombings which has helped hunt down the perpetrators and bring them to justice',[130] in particular leading to the establishment of a Joint Investigation and Intelligence Team in the instance of the 2002 Bali bombing.[131] The multiplicity of such bilateral negotiated arrangements was aided by an initial general foreign affairs preference by the Howard government for bi-lateral over multi-lateral arrangements. However, the circumstances of significant international terrorist incidents affecting the United States and Indonesia and Australia's very significant

---

122 See Minister for Foreign Affairs, 'Australia and India Sign Counter-Terrorism MOU' (Media Release, 28 August 2003) <http://www.foreignminister.gov.au/releases/2003/fa107_03.html>.

123 See Minister for Foreign Affairs, 'Australia and East Timor Sign Counter-Terrorism Arrangement' (Media Release, 25 August 2003) <http://www.foreignminister.gov.au/releases/2003/fa104_03.html>.

124 See Minister for Foreign Affairs, 'Australia and Papua New Guinea to Work Together Against Terrorism' (Media Release, 11 December 2003) <http://www.foreignminister.gov.au/releases/2003/fa157_03.html>.

125 See Minister for Foreign Affairs, 'Australia and Pakistan Sign Counter-Terrorism MOU' (Media Release, 15 June 2005) <http://www.foreignminister.gov.au/releases/2005/fa078_05.html>.

126 Referred to in Minister for Foreign Affairs, 'Australia and Afghanistan Sign Counter-Terrorism Memorandum of Understanding' (Media Release, 20 December 2005) <http://www.foreignminister.gov.au/releases/2005/fa161_05.html>.

127 See Minister for Foreign Affairs, 'Australia and Afghanistan Sign Counter-Terrorism Memorandum of Understanding' (Media Release, 20 December 2005) <http://www.foreignminister.gov.au/releases/2005/fa161_05.html>.

128 The ASEAN-Australian Joint Declaration for Cooperation to Combat International Terrorism: see Minister for Foreign Affairs, 'Australia and ASEAN Sign Counter-Terrorism Declaration' (Media Release, 1 July 2004) <http://www.foreignminister.gov.au/releases/2004/fa098_04.html>.

129 See reference to Minister for Foreign Affairs address to National Press Club 13 April 2004 referred to in 'Australian Practice in International Law: Terrorism' (2004) 25 *Aust YBIL* 687.

130 Ibid.

131 See Minister for Foreign Affairs and Minister for Justice and Customs, 'Joint Investigation and Intelligence Team to Investigate Bali Bombing' (Joint Media Release, 16 October 2002) <http://www.foreignminister.gov.au/releases/2002/fa148a_02.html>. See also Minister for Foreign Affairs, 'First Anniversary of the Bombing at the Australian Embassy in Jakarta' (Media Release, 9 September 2005) <http://www.foreignminister.gov.au/releases/2005/fa111_05.html>.

relationships with both states provided momentum for the speedy ratification of the two earlier UN conventions,[132] as also reflected in the exhortations to states under Security Council Resolution 1373.[133]

VII. Reporting to the United Nations Counter-terrorism Committee under Security Council Resolution 1373 and the Intersection with International Human Rights

The Howard government also sought to respond in a positive, methodical manner in its annual reporting obligations to the UN Counter-Terrorism Committee established under Security Council Resolution 1373.[134] This resolution created a number of binding obligations upon states to take a range of counter-terrorism measures.[135] The Howard government sought to project to the international community and the Security Council that it was serious in its range of domestic implementation measures, both legislatively and through executive action, and dedicated to internationally co-operative efforts, in responding to the most pressing counter-terrorism concerns after the terrorist attacks of 11 September 2001.

These considerations are readily reflected in the detailed content of the first of Australia's reports submitted to the Counter-Terrorism Committee.[136] That report methodically addresses the several efforts Australia had made or intended to make in responding to the obligations or exhortations in the paragraphs of Security Council Resolution 1373.[137] In contrast, subsequent Australian reports to the Counter-Terrorism Committee[138] are more succinct and are necessarily framed to respond to specific questions, lines of enquiry or appraisals sought from Australia by the Counter-Terrorism Committee,[139] and often seek elucidation of issues and

---

132 Namely the International Convention for the Suppression of Terrorist Bombings, [2002] ATS 17, and the International Convention for the Suppression of the Financing of Terrorism, GA Res 109, UN GAOR 54th Sess, Supp No 49, UN Doc A/54/49.

133 See in particular, SC Res 1373 [3(d)] and [3(e)].

134 Ibid [6].

135 See principally ibid [1] and [2]. The binding obligation of course arises under art 25 of the Charter of the United Nations

136 Report of Australia to the Counter-Terrorism Committee of the UN Security Council pursuant to SC Res 1373 [6] (2001) 28 September 2001 (S/2001/1247).

137 Namely ibid [1(a) to (d)], [2(a) to (g)] and [3(a) to (g)]. This report comprises 25 pages.

138 There have been six reports in total: 2001 report (first report) S/2001/1247; 2002 report (second report) Supplement to first report of Australia to the Counter-Terrorism Committee pursuant to SC Res 1373 [6] (2001) 28 September 2001(S/2002/776); 2003 report (third report) Supplement to second report of Australia to the Counter-Terrorism Committee pursuant to SC Res 1373 [6] (2001) 28 September 2001 (S/2003/513); 2003 report (fourth report) Fourth Report to UN Counter-Terrorism Committee (S/2003/1204); 2005 report (fifth report) Fifth Report to the Counter-Terrorism Committee (S/2005/90); and 2005 report (sixth report) Sixth Report to the Counter-Terrorism Committee (S/2005/671).

139 This reality is most clearly demonstrated in the words of the covering letter attached to the report, submitted by the Permanent Representative of Australia to the UN addressed to the Chair of the Counter-Terrorism Committee, for example: 'I refer to your letter of 1 April 2002 in which you sought information on a number of points arising from the first report of Australia to the Counter-Terrorism Committee pursuant

updating of developments.[140] Within the various Australian reports to the Counter-Terrorism Committee, references to other, broader, international law matters as part of the response in demonstrating compliance with Security Council Resolution 1373 are few,[141] with little or no reference to human rights issues.

This is in spite of the fact that the role of human rights in implementing Security Council Resolution 1373 has occasioned considerable attention, through the interaction of the Office of the High Commissioner for Human Rights (OHCHR) with the Counter-Terrorism Committee. This relationship has, since 2001 manifested itself in different ways, which are ultimately relevant to the reporting process. A concern of the Office of High Commissioner for Human Rights contemporaneous with the period of Australian reports has been that the Security Council Resolution 1373 be implemented in a manner consistent with the UN-mandated human rights system.

Accordingly, the High Commissioner has emphasised in an annual report,[142] and the Security Council in its subsequent Resolution 1566,[143] that counter-terrorism measures must comply with international human rights, refugee and humanitarian law. Earlier, the then High Commissioner for Human Rights addressed the Counter-Terrorism Committee, emphasising the willingness of that office to continue to provide information on standards, principles, conclusions and recommendations to ensure the proper implementation of Security Council Resolution 1373.[144] The Vice-Chairperson of the Human Rights Committee

---

to paragraph 6 of Security Council resolution 1371 (2001)': (S/2002/776); 'In a letter of 15 November 2002, the Committee sought a progress report on the passage and bringing into operation of the counter-terrorism legislation that was before the Australian Parliament at the time of submission of the supplementary report on 18 July 2002': (S/2003/513); 'I am writing in response to your letter of 15 November 2004 following up Australia's fourth report to the Committee and requesting updates on implementation of a range of counter-terrorism measures': (S/2005/90).

140 Under the explicit authority 'to monitor implementation of this resolution': SC Res 1373 [6].

141 Examples are found, however, in the first report (S/2001/1247) which includes details of the (then) list of conventions and protocols relating to terrorism of which Australia was a party (at [75] of S/2001/1247), the (then) nine instruments relating to terrorism of which Australia was a party and which had been domestically implemented (at [78]-[84] of S/2001/1247) and the citation of 'International obligations arising under the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment and the International Covenant on Civil and Political Rights' in response to SC Res 1373 [3(f)], namely to 'Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.'

142 Report of the High Commissioner for Human Rights Promotion and Protection of Human Rights: Protection of human rights and fundamental freedoms while countering terrorism UN Doc E/CN.4/2005/100, 4.

143 See SC Res 1566 [6].

144 Address by Sergio Vieira de Mello High Commissioner for Human Rights to the Counter-Terrorism Committee of the Security Council 21 October 2002, 4. de Mello's predecessor, Mary Robinson had also briefed the Counter-Terrorism Committee on 19 February 2002.

subsequently briefed the Counter-Terrorism Committee on human rights and counter-terrorism measures in the implementation of Security Council Resolution 1373, submitting it would 'be desirable for the Counter-Terrorism Committee to pose questions to Member States on the human rights dimensions of their reports to the Counter-Terrorism Committee'.[145]

Other initiatives from the OHCHR included the provision of human rights principles and guidance about identifying issues and raising questions by the Counter-Terrorism Committee when replying to the reports of states.[146] The High Commissioner for Human Rights has also acknowledged[147] that the revitalisation plan for the Counter-Terrorism Committee reflected in Security Council Resolution 1535 would involve continuing liaison with the Counter-Terrorism Committee and the new Counter-Terrorism Committee Executive Directorate (CTED), as well as several other initiatives highlighting human rights concerns.[148] Following a comprehensive review report,[149] the Counter-Terrorism Committee adopted a policy guidance document on human rights for the CTED[150] to be applied in reporting and communication matters[151] and obligations under Security Council Resolution 1373.[152]

---

145 Human Rights and Counter-Terrorism Measures Security Council Counter-Terrorism Committee UN Headquarters Briefing by Sir Nigel Rodley, Vice Chairperson, Human Rights Committee (19 June 2003).

146 See Proposals for 'Further Guidance' for the submission of reports pursuant to SC Res 1373 [6] (2001) (intended to supplement the Guidance of 26 October 2001) Compliance with International Human Rights Standards and 'Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorism Measures'.

147 See Report of the High Commissioner for Human Rights Protection of human rights and fundamental freedoms while countering terrorism, 16 February 2006 (E/CN.4/2006/94), 4.

148 Ibid.

149 Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate (S/2005/800). In the report, the Committee reiterated 'that States must ensure that any measures taken to combat terrorism should comply with all their obligations under international law and that they should adopt such measures in accordance with international law, in particular human rights law, refugee law and humanitarian law' (S/2005/800 [13]).

150 Policy Guidance PG.2 of Counter Terrorism Committee of 26 May 2006 (S/AC.40/2006/PG.2).

151 Ibid: 'The CTC and CTED, under direction of the Committee, should incorporate human rights into their communications strategy as appropriate.'

152 Three requirements in analysing the implementation by states of SC Res 1373 were identified for the CTED: (a) provide advice to CTC, including the ongoing dialogue with States on their implementation on resolution 1373 (2001) on international human rights, refugee and humanitarian law, in connection with identification and implementation of effective measures to implement resolution 1373(2001) (b) advise the CTC on how to ensure that any measures States take to implement the provisions of resolution 1624 (2005) comply with their obligations under international law, in particular international human rights law, refugee law and humanitarian law and (c) liaise with the Office of the High Commissioner for Human Rights and as appropriate, with other human rights organisations in matters related to counter terrorism.

In practical terms, little if anything of this framework was translated into questions, lines of inquiry or appraisals sought by the Counter-Terrorism Committee of Australia, nor was it evident in the Howard government's presentation of its initial and subsequent reports under Security Council Resolution 1373 or in its responses to issues raised by the Committee. The omission of international human rights considerations from the Australian reports to the Counter-Terrorism Committee is explicable through the coincidence of two factors. The first is the approach by the Counter-Terrorism Committee of not directly raising international human rights compliance issues in the implementation of Security Council Resolution 1373 in its questions to and clarifications sought from Australia and its annual reports.

The second is that the omission of an international human rights law element in Australian reports to the Counter-Terrorism Committee indicating compliance with and implementation of Security Council Resolution 1373 neatly coincides with the Howard government's declared, preferred approach to human rights. [153] Furthermore, it was contemporaneously consistent with its critical appraisal of the performance and activities of UN human rights treaty bodies, as well as its reform leadership of the UN human rights system.[154]

Importantly, amongst the earliest counter-terrorism responses of the Howard government was the implementation of Security Council Resolution 1373 suppression of financing of terrorism obligations, in the form of the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001 (Cth).[155] Following Australia's ratification of the Convention for the Suppression of Financing of

---

153 The preferred human rights approach of the Howard government was set out in the document *Australia's National Framework For Human Rights National Action Plan* (2005). A strong emphasis is given in this document to representative and responsible government and Parliamentary institutions as the most effective mechanism for human rights protection, even to the extent of stating that 'Australia's democratic traditions and processes are its greatest ally and greatest strength in the war on terror. These traditions and processes are the tools that will help combat terrorism and protect and preserve our human rights' (at 21-22).

154 See particularly Minister for Foreign Affairs, 'Government to Review UN Treaty Committees' (Media Release, 24 March 2000) <http://www.foreignminister.gov.au/releases/2000/fa024_2000.html>; 'Improving the Effectiveness of United Nations Committees' (Media Release, 29 August 2000) <http://www.foreignminister.gov.au/releases/2000/fa097_2000.html>; 'Australian Initiative to Improve the Effectiveness of UN Treaty Committees' (Media Release, 5 April 2001) <http://www.foreignminister.gov.au/releases/2001/fa043a_01.html>; 'Australia's Criticisms of the UN Human Rights Committee System Validated by New Report' (Media Release, 21 May 2001) <http://www.foreignminister.gov.au/releases/2001/fa059_01.html>; 'UN Report Has No Credibility' (Media Release, 22 March 2002) <http://www.foreignminister.gov.au/releases/2002/fa033l_02.html>; 'Progress Made to Reform UN Treaty Bodies' (Media Release, 9 March 2006), with attached report *Reform of the United Nations Human Rights Treaty Body System: Australian Initiatives* <http://www.foreignminister.gov.au/releases/2006/joint_ruddock_un_treaty_bodies_090306.html>.

155 See Minister for Foreign Affairs, 'Government Implements New Anti-Terrorism Regulations' (Media Release, 15 October 2001) <http://www.foreignminister.gov.au/releases/2001/fa156_01.html>.

Terrorism in 2002,[156] the 2001 regulations were replaced by a new Part 4 of the Charter of the United Nations Act 1945 and the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002. Much of the content of Australia's first report to the Counter-Terrorism Committee[157] concerned the structure and implementation of counter-terrorism financing matters.[158]

VIII. Engaging with United Nations Human Rights Treaty Bodies Regarding International Law Terrorism Issues

The international human rights issues canvassed so far leads us necessarily to Australia's engagement with the states parties reporting process under the UN treaty committee system and inclusion of international law terrorism issues. Australia is a party to the major UN human rights treaties with individual communications processes to treaty committees, such as the Human Rights Committee,[159] the Committee on the Elimination of Racial Discrimination[160] and the Committee Against Torture.[161] Since the terrorist attacks in the United States on 11 September 2001, Australia, through the Howard government, was obliged to engage with the UN human rights treaty bodies states parties reporting process on various terrorism-related matters arising under the respective treaties.

Australia was two years late in submitting its fifth periodic report[162] to the UN Human Rights Committee under the requirements of the ICCPR.[163] The report will be considered in the 95th session in 2009 by the Committee,[164] for which a list of issues has been prepared. Obviously, the lateness of the report has meant scrutiny of Australian counter-terrorism measures from an international human rights law perspective has been delayed. There has been some suggestion that lateness of submission was a deliberate political manoeuvre by the Howard government, in the immediate lead up to the 2007 Federal election,[165] to avoid international scrutiny of its human rights record, which might significantly compromise its perceived achievements on counter-terrorism issues.

---

156 See discussion above under the heading 'Entering into UN Terrorism Conventions and Regional Memoranda of Understanding' and Minister for Foreign Affairs, 'Australia Ratifies Terrorist Financing Convention' (Media Release, 27 September 2002) <http://www.foreignminister.gov.au/releases/2002/fa137_02.html>.

157 Report of Australia to the Counter-Terrorism Committee of the UN Security Council pursuant to SC Res 1373 [6] (2001) 28 September 2001 (S/2001/1247).

158 See, eg, (S/2001/1247) [1]-[11].

159 Under the First Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 302.

160 Under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966) 660 UNTS 195.

161 Under art 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

162 The fifth periodic report was due on 3 July 2005 and submitted on 7 August 2007.

163 The reporting obligation arises under art 40 of the ICCPR.

164 At the time of writing, the fifth periodic report was not available on the UN treaty body database.

165 See 'The Coalition's shame file' *The Age* (4 December 2007).

In relation to the Convention Against Torture, Australia submitted its third periodic report[166] on 7 April 2005. That report included discussion of the detention and questioning powers under the amendments made to the ASIO Act 1979 (Cth), with particular emphasis on substantiating the treaty's humane treatment obligations in Articles 2[167] and 16.[168] Emphasis was placed upon various legislative safeguards, the existence of a Protocol for questioning and detention and a requirement that 'the subject of a warrant must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment'.[169] Further procedural safeguards, complaints mechanisms and access to the courts for the seeking of remedies are also presented as meeting the various procedural guarantee requirements of Articles 12 to 16 of the Convention Against Torture.[170] The Committee examined the third periodic report of Australia in its November 2007 session,[171] and included two terrorism-related matters amongst its list of issues to be considered during examination of Australia's report.[172] It provided its Concluding Observations[173] on the Australian report on 15 May 2008, registering significant concerns about two examples of the Howard government enacted counter-terrorism powers,[174] and made recommendations in relation to them.[175]

---

166 Under art 19 of the CAT above n 161.

167 Art 2 of the CAT above n 161, states 1. 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.'

168 Art 16 of the CAT above n 161, states 1. 'Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment.

169 Committee Against Torture Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Third Periodic Report Australia (CAT/C/67/Add.7) [26]-[29].

170 Third Periodic Report Australia (CAT/C/67/Add.7) [76]-[78].

171 Committee Against Torture 39th Sess 5-23 November 2007.

172 See Committee Against Torture List of issues to be considered during the examination of the third periodic report of Australia (CAT/C/67/Add.7), points 2 and 5: 'Has the new legislation against terrorism affected these rights (of persons detained in police custody)?' and 'Please elaborate on safeguards contained in the new counter-terrorism laws, notably the *Anti-Terrorism Act (No 2) 2005*, aimed at ensuring that the obligations under the Convention are met also in the context of any counter-terrorism legislation and operation.'

173 Committee Against Torture Consideration of Reports Submitted By States Parties Under Article 19 of The Convention (CAT/C/AUS/CO/1) 15 May 2008.

174 The examples were the ASIO detention powers including rights to a lawyer of choice

Australia submitted its 13th and 14th periodic states parties report[176] under the Convention on the Elimination of All Forms of Racial Discrimination in 2003, in which brief mention is made of racial harmony issues arising in the Australian community following 'the 11 September terrorist attacks in the USA and the escalation of the Israeli-Palestinian conflict'.[177] In its Concluding Observations,[178] the Committee expressed concern about reports of increased prejudicial effects and a potential indirect discriminatory impact upon Arab and Muslim Australians with the enforcement of counter-terrorism legislation, but welcomed the national consultations on eliminating prejudice against Arab and Muslim Australians.[179]

IX. Some Conclusions: The Legacy and Prospects of the Howard Government's International Law Approaches to Terrorism

This article has surveyed the major policy approaches and initiatives relating to international law issues of the Howard government's response to international terrorism since 2001. An assessment of that domestic and international record presents a complex task, but one that reveals consistent themes.

Given the serious terrorist incidents involving the tragic loss of Australian and other lives and harm to Australians in our region and a genuine desire to commit itself to major co-operative international efforts to suppress terrorism, the most positive aspects of the Howard government's record relate to pragmatic co-operative measures. These have taken the form of bilateral memoranda of understanding with a number of states, in responding comprehensively to obligations under Security Council Resolution 1373 and subsequent resolutions and in actions to become party to three further UN terrorism conventions and a commitment to a further counter-terrorism treaty. Such developments can be seen as a necessary and legitimate governmental response to an actual threat.

Yet the stature of these pragmatic, co-operative policies was diminished by the readiness of the Howard government to exploit its perceived electoral strength on the issue of terrorism, including in its international law dimension, to advance party

---

and the right to seek judicial review of the validity of the detention; and the lack of judicial review and character of secrecy about the preventative detention and control orders under the Anti-Terrorism Act (No 2) 2005 (Cth): (CAT/C/AUS/CO/1), 3.

175 The Committee advised Australia that it should '(a) ensure that the increased powers of detention of ASIO are in compliance with the right to a fair trial and the right to take proceedings before a court to determine the lawfulness of detention' and (b) 'Guarantee that both preventative detention and control orders are imposed in a manner that is consistent with a State party's human rights obligations, including the right to a fair trial including procedural guarantees': (CAT/C/AUS/CO/1), 3.

176 Submitted under art 9 of the CERD. See Reports Submitted By States Parties Under Article 9 of The Convention Fourteenth periodic reports of States parties due in 2002 Australia (CERD/C/428/Add.2).

177 CERD/C/428/Add.2.

178 Consideration of reports Submitted by States Parties Under Article 9 of the Convention Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/AUS/CO/14).

179 (CERD/C/AUS/CO/14), 3.

political and ideological causes for temporary electoral advantage, at the expense of a long-term broader conception of national security. This aspect was exaggerated by Opposition difficulties in achieving political credibility through more cautious responses to terrorism issues, which were more likely to conform to relevant international law. This overt political aspect explains the consistency with which many international legal principles affecting the development of responses to international terrorism were contested and distorted in the Howard years.

These developments relating to international law issues affecting terrorism in the post-September 11 environment actually emerged from a pre-existing context of renewed policy approaches favoured by the Howard government from around 2000. The key elements involved were the cultivation of stronger ties with the United States following the election of the ideologically compatible Bush administration in 2000, sovereignty-based objections to the operation of the UN human rights charter and treaty-based system,[180] and the pursuit from 2000 of a range of reform initiatives for that system.[181] These existing realities before 11 September 2001 and the concurrent investment of political capital meant that legal responses to the intersection of international terrorism and international law issues after 11 September 2001 were inevitably to be shaped, and indeed, ordained by them.

Indeed, the Howard government's domestic and internationally focused Australian legal responses to terrorism and its approach to international law reinforced existing paths selected well before the elevation of international terrorism to major policy status after 11 September 2001. The Howard government's drive for concentrating executive authority and discretion leant strongly towards marginalising international law, which might otherwise have proved a restraining influence upon the exercise of such discretion, particularly in its human rights dimensions.

From one perspective therefore, initially international law was not considered to be an important influence, or at the very least, was ideally not to be perceived as an important influence, over the domestic and international responses of the Howard government to terrorism. The earliest examples of a deliberate minimisation and

---

180 Commencing with the activities of the Committee on the Elimination of Racial Discrimination in 1998 and 1999: see Decision 1(53) on Australia 11 August 1998 (A/53/18 [11B1]), Decision 2(54) on Australia 18 March 1999 (A/54/18 [21(2)]) and Decision 2(55) on Australia 16 August 1999 (A/54/18 [23(2)]) and its subsequent Concluding Observations on the tenth, eleventh and twelfth reports of Australia in 2000: See Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia 19/04/2000 (CERD/C/56?misc.42/rev.3) and Attorney-General (News Release, 26 March 2000) 'CERD report unbalanced'.

181 See Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, 'Improving the Effectiveness of United Nations Committees' (Joint Media Release, 29 August 2000) <http://www.foreignminister.gov.au/releases/2000/fa097_2000.html>; and Minister for Foreign Affairs and Attorney-General, 'Progress Made to Reform UN Treaty Bodies' (Joint Media Release, 9 March 2006) with attached report *Reform of the United Nations Treaty Body System: Australian Initiatives* <http://www.foreignminister.gov.au/releases/2006/joint_ruddock_un_treaty_bodies_090306.html>.

marginalisation of international law matters in counter-terrorism issues demonstrate this point,[182] mirroring developments already in train in relation to UN human rights procedural and treaty-based matters.

From another perspective, the Howard government treated international law matters in an anticipatory manner of something to be reacted against, resisted or neutralised in carrying out its counter-terrorism legislative policy preferences. International human rights law was not considered as a positive influence from which principles such as proportionality, reasonableness and necessity could be incorporated into legislative responses, to both strengthen rule of law values being defended against terrorism and promote inclusivity of potentially alienable community groups. Instead, the Howard government was later forced to more elaborate defensive responses with the persistence and multiplicity of international law claims on counter-terrorism law.

The failure to give adequate consideration and weighting to international law issues in counter-terrorism responses did produce adverse political consequences from the Hicks matter, with the prolonged incarceration, allegations of ill-treatment and flawed military commissions process attracting significant media attention. In that sense, the Howard government's failure to accommodate the inevitable influence of international law issues in international responses to terrorism exposed the substantive, as distinct from rhetorical, flaws of Howard government counter-terrorism policy. These flaws were increased through an unquestioning alignment of Australian interests with United States detention and military commissions' processes, already at odds with international law.

This brings us full circle to the pragmatic, result-focused emphasis in areas of Howard government counter-terrorism policy, a distinctively Australian approach, coincidentally favoured by the Howard government in human rights matters.[183] Applying its declared standards of pragmatism and practicality to its own engagement with international law in relation to terrorism, the results are not inspiring. Whilst the preventative approach of tough counter-terrorism laws where the niceties of international human rights law were marginalised, coincided with a period where no terrorism attack succeeded on Australian soil, questions should, and do, remain.

---

182 See in particular, the references to the 2002 Parliamentary inquiries into the ASIO detention and questioning legislation, discussed under the heading, 'Assertions of compliance with international law in developing domestic counter-terrorism legislation'.

183 See, eg, Attorney-General, 'Debate about human rights issues in Australia is in danger of becoming too theoretical and academic than focusing on practical ways to ensure that everyone gets a fair go … It is important that we don't treat human rights in an abstract or esoteric way. We must never forget … how we deal with human rights has a real and direct impact on people's lives and the world in which we live … When Australia's human rights record is examined in an objective and rational manner two things are abundantly clear. First, we have a magnificent human rights record that is amongst the best in the world. Second, if we do not always meet our human rights goals it is more due to the complexity of some problems we face.' (News Release, 8 December 2000).

Would this situation have existed in any case if there had been a closer, more conscious adherence to and application of these international legal principles in the development of domestic legislation? Furthermore, would Australia's international standing have been more exemplary and its diplomatic and political capital more substantial, through a greater acceptance and accommodation of international legal principles? Similarly, would a less ideological appraisal of international law have expended fewer institutional resources and energy in denying or distorting international law claims when addressing substantive terrorism questions? In addition, would a broadly based national security interest, as distinct from the party-political interest, been more keenly advanced by accepting the legitimacy of international human rights principles in counter-terrorism policy and laws at both a domestic and international level? And would a deliberate, systematic adherence to international law principles in the drafting and implementation of legislation provide both legitimacy and inclusion towards ethnic and religious groups in the Australian community alienable and vulnerable to terrorist sympathies? These are the unanswered questions from the Howard era. They remain unanswered because the Howard government failed to perceive many aspects of international law as a positive, enabling medium for addressing the threat of terrorism. In doing so, it ignored its own rhetorical strictures of pragmatism and practicality.

Towards the end of its tenure, the Howard government seemed to realise, without explicitly admitting, that it could not continue to marginalise international law issues in its law and policy responses to terrorism, at least in quite the same way it had done in the past. Yet it found itself unable to address coherently that reality or respond to that changing dynamic.

That challenge has been left to its successor. It will be some time before the Howard government's legacy can be assessed for its enduring influences over the usages of international law in a terrorism context in the bureaucracy and public discourse, or alternatively whether a change of government will occasion a closer alignment of international legal principles with counter-terrorism developments. A preliminary finding though is that the Howard government was rarely principled or pragmatic in optimising international law approaches to engage with the pressing questions of counter-terrorism law and policy.