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The Rudd Government's Human Rights Record: One Year On NSW Young Lawyers, Sydney, 29 October 2008

Good evening Attorney-General, Chairs of the Criminal Law and Human Rights Committees, and Young Lawyers. I would first like to acknowledge the traditional owners of this land. Tonight I have been instructed to go head to head with the Attorney over his government's human rights record. Tearing strips off the government for its human rights failures was much easier when Phillip Ruddock was Attorney-General, although I note that Phillip did always wear an Amnesty International badge as proof of his human rights credentials, whereas Mr McClelland's lapel and commitment to human rights appears to be flagging on that front.

The problem with this government is that it has been doing far too much good on human rights, and as a human rights lawyer, that is not good for business. But in the spirit of generating debate in this US election season, I'd like to step into the shoes of Barack Obama and put to you the progressive case for change, while Sarah Palin over there tries to convince you of the status quo by wearing an Armani suit, paid out campaign funds, and engaging in a whole lot of ambiguous winking around the room.

A. Positive Developments in Australia's Human Rights Performance

I would like to start by commending the government on what it has been doing well. So far, this government has demonstrated a qualitatively different approach to human rights issues than the previous government. It is clear that the government does not view human rights as a suspicious foreign influence which threatens Australian sovereignty or the freedom of Australians to make their own policy choices.

First, the government is engaging more fully with international human rights standards by moving to accept new normative architecture like the 2007 Disabilities Convention, the Optional Protocols to the Women's Convention and the Convention against Torture, and the UN General Assembly's Declaration on the Rights of Indigenous Peoples. It has issued a standing invitation to the Special Procedures of the UN Human Rights Council to visit, and is participating more constructively in treaty body reforms than the previous government.

It is, however, regrettable that the Department of Foreign Affairs and Trade is refraining from campaigning for Australia's candidate for the new Disabilities Convention Committee, Professor Ron McCallum of Sydney Law School, on the basis that DFAT is focusing its energies on Australia's bid for a Security Council seat. This is particularly disappointing given that Australia did not nominate a candidate to replace Professor Ivan Shearer on the UN Human Rights Committee when his eight years on the Committee expired this month.

As Australia's Human Rights Commission reviews the Racial Discrimination and Sex Discrimination Acts, it is hoped that the government will be receptive to constructive recommendations which come out of those processes, including, for instance, to establish a much needed federal offence of religious vilification, given the documented upsurge in Islamophobia in recent years.

Secondly, considerable improvements have been made in a number of key areas of domestic policy: blunting some of the worst excesses of immigration law by improving detention practices, eliminating temporary protection, and abolishing the Pacific Solution; safeguarding equality rights and non-discrimination through the same-sex entitlements legislation; apologising to the Stolen Generations; beginning to act seriously on homelessness; inching towards paid maternity leave (although equal pay and domestic violence remain serious women's rights issues).

Thirdly, internationally the government has been working harder to protect human rights in some areas. To give just a few examples, it has increased funding to the Khmer Rouge criminal tribunal in Cambodia; increased Australia's foreign aid, a vital part of advancing economic and social rights overseas (although we are still barely half way towards meeting the UN target of 0.7% of GDP); and the government's interest in new regional institutions in the Asia-Pacific may provide impetus for strengthening regional human rights mechanisms down the track.

In some ways, the government's international agenda has proven a little too eager; the suggestion of legal proceedings against Iran for incitement to genocide was always an ill-advised long-shot, and fortunately has been knocked on the head in recent weeks. Here I am in rare agreement with a member of the National Party, Mr Truss, who recently said in Parliament: "I caution against bravado where there is no capacity to actually deliver what might be threatened".¹

Finally, the government has signalled its commitment to a public consultation on the better legal protection of human rights in Australia, such as through a bill or charter of rights. After almost a year in government, the form and timing of that consultation has still not been announced. I understand that the global financial crisis has bumped the issue off the Cabinet agenda in recent weeks, and I hope that the ongoing delay is not symptomatic of cold feet in government on this issue.

B Room for Improvement in Australia's Human Rights Performance

While I would like to give the government credit for its potential shift in attitude towards a bill of rights, it is less creditworthy than you might think – it merely brings us in to line with every other liberal democracy which has accepted the idea and value of human rights, with little question, for decades.

On one hand, the blizzard of inquiries and consultations launched by this government on a range of issues might be seen as a strengthening of participatory democracy and consensus-building in the community on critical social issues. On the other hand, there comes a point where inquiries begin to look like a strategy for deflecting difficult choices, and endless consultation about the need for consultation wears thin.

One year on, there is a need for the government to move beyond symbolic gestures and easy wins like signing treaties, to make hard decisions about the full legislative implementation of human rights in domestic law. That includes not confining the debate to the watery or gruel-

like version of a bill of rights – that is, the non-enforceable dialogue model, without judicial remedies, and limited to civil or political rights – and which has been exclusively championed by many NGOs. Genuine consideration ought to be given to models which encompass all rights, including economic, social and cultural, and which provide for binding remedies.

The litmus test of any government’s commitment to human rights is its preparedness to expend political capital to secure fundamentally important changes, which may not necessarily appeal to majoritarian sentiment, or to the usual cacophony of shock jocks and polemicists. Political capital is greatest in the government’s first term, while it is still highly popular and has not yet started the slide into decline, as all governments eventually do as they accumulate mistakes over time.

Attorney, your government has an unprecedented chance not only to put right what was so out of balance under the previous government, but to show real leadership in developing a progressive human rights agenda in Australia and the region. I would urge you not to waste that opportunity by delaying on the question of a bill of rights. You might also be pleasantly surprised by how warmly a bill of rights might be received in the community; the state and territory consultative processes have shown overwhelming support for bills of rights, while the previous government’s intransigence on human rights issues accounts for part of the public’s turn against it.

I would now like to suggest some key specific areas where the government could improve its human rights performance.

1. Death Penalty

Next month three Indonesians convicted of the Bali bombings will be shot in the heart at dawn by a firing squad. While execution is not contrary to human rights law for States such as Indonesia which are not parties to the Second Optional Protocol to the ICCPR, the UN Human Rights Committee has stated that to be lawful an execution “must be carried out in such a way as to cause the least possible... suffering”.²

Execution by shooting is an inhumane and barbaric method, designed as it is to kill through explosive haemorrhaging of the heart. In 1953 the British Royal Commission on Capital Punishment rejected shooting on the grounds that “it does not possess even the first requisite of an efficient method, the certainty of causing immediate death.” In a number of cases, shooting has not resulted in instant death, but has inflicted severe suffering on a wounded victim – in one case, for up to seven minutes before death.

Not only has the Australian Government failed to raise any protest against the impending executions, our Prime Minister actively approved of the killings when he stated earlier this month that they “deserve the justice that will be delivered to them”. Under this government, Australia’s staunch opposition to the death penalty in our region and internationally has been wavering, and that is a cause for some shame.

The new approach directly contradicts the Prime Minister’s previous position on the death penalty. In 2005, he said that “Australia must work through the United Nations to abolish the death penalty universally” and that “whether we are talking about individuals in Iraq or Indonesia or elsewhere, our policy has to be consistent”. Early last year year, Mr Rudd properly opposed the execution of Saddam Hussein.

The about-face in policy suggests that Mr Rudd is a fair-weather friend of human rights — which is no friend at all. Human dignity is not something that can be surrendered for bad behaviour, traded away in a vengeful political climate obsessed by polling numbers, or eclipsed by a public sentiment of toxic retribution.

Human rights law is based on the fundamental idea that every life is equally precious and entitled at all times to dignified treatment. Politicians are not entitled to pick and choose whom they will bestow with rights and dignity, and from whom rights and dignity will be withdrawn. The bedrock of equal dignity explains why we do not shoot the disabled, or murder Jews, or beat up monks or imprison those with different views. It also provides a sufficient moral reason not to execute terrorists, even though they appear to have taken themselves outside the bounds of civilised behaviour.

In our region, the death penalty is actively retained by 14 Asian countries, including Australia's good friends Indonesia, Japan, India, Thailand, Vietnam, Singapore, Malaysia and China. There is much scope for Australian governments to play a quiet and constructive diplomatic role in encouraging more countries in our region to abolish the death penalty, without preaching. Using our diplomats in this way may not increase our exports and create investment or gain access to new markets. But being Australian is about more than a commitment to economic growth and must surely include a non-negotiable belief in protecting the value of human life, and preventing governments from capriciously taking it.

2. Torture

There remains unfinished business in the implementation of Australia's obligations to prevent and punish torture, which is of some concern in an era of aggressive counter-terrorism responses which have encouraged the use of torture worldwide. First, there is still no federal offence of torture as such, undermining the universal condemnation and stigmatization of torture as a specific form of criminal harm. Secondly, there is no legislative prohibition on admissibility of torture evidence in court proceedings, providing an incentive for law enforcement officials to rely on torture evidence obtained in other jurisdictions, including aggressive partners in the war on terror.

Thirdly, and extraordinarily, there is no enforceable legal protection in Australia against being returned to torture or cruel, inhuman or degrading treatment or punishment in another country. Currently, a person can only apply for protection against torture by requesting the Minister of Immigration exercise his or her discretion to grant protection on a non-compellable, non-reviewable basis, and only after all other avenues have failed. The lack of a complementary protection visa category unnecessarily prolongs the time spent by non-citizens in detention, encourages protracted litigation in the courts, causes unnecessary harm to applicants, and seriously wastes public revenue.

3. Refugee and Asylum Policy

First, Australia's system of **mandatory immigration detention** for unauthorised arrivals to Australia remains in place, notwithstanding the procedural improvements made by this government. The policy has been the single greatest cause of successful complaints about Australia to the UN Human Rights Committee, which has repeatedly identified that policy as amounting to unlawful arbitrary detention.

Australia should limit detention to cases where it is genuinely necessary to establish identity or for security reasons, rather than applying its existing indiscriminate policy of mandatorily detaining all asylum seekers. Very few asylum seekers pose any risk to the Australian

community and there is usually little reason to detain asylum seekers after their identity is established and their asylum claim is commenced. Alternatives to mandatory detention in the form of community release schemes may circumvent the traumas experienced by those placed in detention for long periods of time.

Substantive judicial review of the grounds for detaining an asylum seeker is not available under Australian law, in breach of the obligation to provide full judicial review of the reasons for detention and the right to an effective remedy (including compensation for unlawful detention) under the ICCPR.

Secondly, the persistent use of **Bridging Visa E** in Australian immigration law ensures Australia continues to risk inflicting inhuman or degrading treatment on some asylum seekers. Bridging Visa E may be granted to asylum seekers who are in Australia unlawfully, including in detention. If a person applies for refugee status more than 45 days after arriving in Australia, their bridging visas deny the right to work and access to Medicare, income and housing support and transport assistance.

The lack of federal support shifts the burden for the care of asylum seekers onto state and territory governments and particularly onto charitable, community and religious groups. These groups have been overwhelmed by the financial pressures of caring for large numbers of bridging visa holders, as the government has vacated its responsibility for their welfare.

While it is preferable for asylum seekers to live in the community rather than in detention, without federal government support there is a risk that people on these visas may be left homeless, destitute, starving, or seriously ill. A study by Hotham Mission in Victoria found that almost 70% of people on these visas were homeless or at risk of homelessness, with many living in 'abject poverty' and subject to high levels of physical and mental illness and family breakdown.

Where people on these visas are left destitute, such treatment by Australian law may amount to 'inhuman' or 'degrading' treatment in violation of international law, as was found by the House of Lords in a case dealing with a similar policy in Britain (*Adam* [2005]), since it leads to an imminent prospect of homelessness and destitution. Lord Bingham, wrote that 'Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being'.

Australia's justification for its policy is that it is desirable to discourage late asylum applications. That may be so, but there are often good reasons why asylum seekers are reluctant to apply on time, including trauma, fear of the authorities due to experience of official persecution at home, lack of information and uncertainty about the process, lack of documentation, and fear of retribution from people smugglers or traffickers.

Thirdly, in order to comply with Australia's obligations **under the Disabilities Convention, the health test for new migrants**, which indirectly discriminates against the disabled by imposing health related barriers to entry, needs to be reformed.³ Health requirements under migration law are permissible in principle under human rights law to legitimately safeguard scarce medical resources in the community. The current Australian health test, however, is not sufficiently restrictive so as to comply with the equal protection obligation under article 5 of the Disabilities Convention. The health test may give rise to unjustifiable indirect discrimination against some disabled migrants, because: (a) the threshold of the test is set too low, (b) the evidentiary requirements are not sufficiently strong, and (c) an applicant's capacity to pay for the costs of their own disability care is not taken into account.

In addition, the ten-year waiting period for the *Disability Support Pension* under the *Social Security Act 1991* (Cth) impermissibly interferes with human rights to an adequate standard of living and to social protection under article 28 of the *Disabilities Convention*, the right to health of disabled persons under article 25 of the *Convention*, and may even amount to inhuman or degrading treatment contrary to article 16 of the *Disabilities Convention*.

Finally, with the real risk of **climate change-induced displacement** in the Asia-Pacific region, from Bangladesh to Kiribati and Tuvalu, Australia needs to take the lead in developing a comprehensive migration strategy to deal with vulnerable so-called “climate refugees” in the region.⁴ A related but distinct challenge for Australia is to become a party to the 2003 Convention on Migrant Workers.

4. Indigenous Affairs

The practice of **indigenous child removals** involved breaches of a bundle of related internationally protected human rights. Australia is required to provide effective remedies for rights violations, which in the case of the stolen generations may include infringements of rights to family life (ICCPR, art 23), culture/minority rights (ICCPR, art 27), liberty and security of person (ICCPR, art 9), equal protection before the law (ICCPR, art 26), a fair hearing (ICCPR, art 14), and education (ICCPR, art 18); as well as infringements of the prohibition on racial discrimination (ICCPR, art 26; Convention on the Elimination of All Forms of Racial Discrimination), children’s rights (Convention on the Rights of the Child), freedom from arbitrary interference with their privacy, family and the home (ICCPR, art 17), and freedom from cruel, inhuman or degrading treatment (ICCPR, art 7; Torture Convention). Some removal practices may have amounted to genocide as defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for manifesting the specific intent to destroy indigenous people as a separate group.

As a State responsible for breaches of the rights identified above, Australia is required to make reparation for injury, pursuant to the obligation to provide effective remedies for violations (ICCPR, art 2). Reparation should include measures of restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition.⁵ Such principles were adopted by the Human Rights and Equal Opportunity Commission in *Bringing Them Home* in supporting measures of restitution, compensation and rehabilitation. The right to reparations of indigenous peoples has, for instance, been recognised in Canada and through the Waitangi Tribunal in New Zealand.

Satisfaction, as an element of reparation, can include a State’s expression of regret or a formal apology. The Prime Minister’s apology to the stolen generations in Parliament in 2008 constitutes a measure of satisfaction for rights violations caused by child removals. An apology alone cannot, however, discharge the obligation to make full reparation, and therefore it does not take the place of the pressing need also to render monetary compensation. Nor can a policy for the general welfare of indigenous people, such as the government’s “Closing the Gap” approach, substitute for the legal requirement to compensate the specific victims of the child removals.

The second indigenous issue I would like to highlight is the racially discriminatory impact of the **Northern Territory intervention**. The government has made some improvements to the intervention scheme, including by reinstating the permit system as a means of re-asserting some indigenous control over their lands. But other features such as the preservation of compulsory income quarantining are operating in a racially discriminatory fashion.

If there are legitimate welfare reasons for directing the household expenditure of some families, that rationale should be applied equally to all families in which children are at risk – not just black families in the Northern Territory. There are plenty of white families which also face acute social and behavioural problems. That the government is reluctant to apply the policy in a racially neutral fashion indicates something about its palatability: mainstream society might well find it objectionable for being paternalistic, humiliating, and overly restrictive of personal and family autonomy – and yet we expect indigenous people to cop it.

5. Labour Rights

In the area of labour rights, this government appears set to continue the trend over time of significantly restricting the manner in which the right to strike and freedom of association in the workplace can be exercised and enjoyed. The Committee of Experts of the International Labour Organisation has repeatedly indicated that numerous provisions of Australian industrial law are not in conformity with the ILO treaties such as the 1948 Freedom of Association and Protection of the Right to Organise Convention and the 1949 Right to Organise and Collective Bargaining Convention.⁶

These concerns relate particularly to the right of workers organisations to engage in free and voluntary collective bargaining and to take industrial action in support of the level at which they wish to bargain (the pursuit of industry level or multiple employer agreements) and the issues they wish to include in bargaining (for example strike pay). The proposed changes to federal industrial law, particularly in the regulation of industrial action, will do little to alleviate the ILO's concerns.

6. Access to Justice

The government has substantially increased funding for legal aid, stimulating greater access to justice for the most vulnerable clients in our legal system. The amount of funding is, however, still not enough; approximately 70 out of 200 community legal centres nation-wide do not receive recurrent federal funding.

To give one example of an organisation which I am involved with, the Refugee Advice and Casework Service in Sydney has a waiting list of at least 30 compelling cases of asylum seekers who need legal assistance to assist in preventing their return to persecution, yet whom RACS lacks the capacity to help. It is one thing to provide a legal right to claim asylum; but it requires more to adequately fund the realization of that right through legal aid. Similar stories can be told of other community legal centres, where there is an urgent need for further funding for civil and administrative law matters which vitally affect the fundamental interests of Australians.

7. Anti-Terrorism Laws

Serious reform of Australia's anti-terrorism laws remains something of an untouched frontier for this government. Under the previous government, for the most part supported by the current government in opposition, alarmism, anxiety, panic and the politics of fear have driven us into reconfiguring our legal responses, without fully considering the costs of such measures or the need for them.

We have sleep-walked into a state of exceptionalism and chronic, perpetual emergency, in which the prevention of speculative future terrorist attacks justifies the suppression of centuries-old freedoms. As Conor Gearty of the London School of Economics puts it, "our preoccupation with the unknown unknowns of a terrifying future leads us into bad policy

decisions”.⁷ Crises are bad paradigms, and there is a grave risk in being mesmerized by the scale, symbolism, and emotional resonance of the September 11 attacks, and thereby acceding to unnecessary or imprudent modifications of the law.

Just last month the Attorney-General stated that terrorist groups have “radically changed the way Australia perceives and responds to threats. Our mindset has changed from ‘defending’ against attacks to taking steps to prevent such attacks”.⁸ He went on to assert that “[a]dhering to old methods of response is not going to be enough”.⁹ Yet political claims about the novelty of contemporary terrorism tend to underestimate the durability and flexibility of the existing law – and underplay the risks of new laws.

In our obsession to legislate terrorism out of existence, and then to use those laws to get results, we have not stopped to think whether the existing law was enough.¹⁰ For Gearty, the “orthodox criminal law [is] far better able to deal with violent subversion than its ill-informed critics so often assume”.¹¹ New law proceeds on the assumption that the current law is deficient; but the assumption is rarely tested in any empirical sense.

Even if it were true that terrorism is such an existential threat to humanity (which is doubtful), then it must still be shown that each particular measure adopted in response is necessary, proportionate and effective in meeting that threat, and this certainly has not been individually demonstrated in relation to each of the anti-terrorism laws adopted by Australia since 2002.

In fact, most terrorist attacks which have succeeded would not have been stopped by the kinds of new laws which we have adopted, since for the most part such attacks succeeded because of failures in regular intelligence gathering and policing. For that reason, one of the best ways of countering terrorism remains improving our intelligence and policing capabilities – not legislating our way to safety.

I accept that limited modification of traditional legal responses is appropriate in countering terrorism. Terrorism is a significant risk to society which requires careful management, but it is not so catastrophically threatening as to justify the kind of whole-scale revision of our legal system which has been supported by most of our reactive Parliament in recent years.

I am deeply suspicious of what governments have sought to hang off even the most narrowly formulated definitions of terrorism, some of which measures are pertinent to the treatment of Dr Haneef: wide preparatory or inchoate offences, and organisation-based offences, which extend criminal liability too far without justification; protracted, arbitrary detention in police custody; preventive detention and control orders; ASIO detention of non-suspects; reversing the presumption for bail; modifications to sedition and censorship law; and measures preventing a person from seeing and testing evidence in proceedings which detrimentally affect them.

It is one thing to prosecute a new offence of committing a terrorist act; it is something quite different to prosecute (or indeed deport) someone for, for example, threatening to possess a thing to be used in the commission of a (but not one specific) terrorist act, and based on secret, undisclosed evidence. This is particularly so given the breadth of the Australian definition of terrorism, which oddly criminalises everything from legitimate militant resistance against the Sudanese or Burmese governments, to the conduct of Australian armed forces abroad, to throwing a brick through the window of the local MP’s office.

There is something perverse and disproportionate about the extraordinary investment of regulatory energy in the domain of terrorism in light of other pressing legal needs. For instance, Australia has had federal war crimes legislation in place since 1957 and yet we have

never brought a single prosecution in 50 years. We signed the Genocide Convention in 1948 but could not be bothered to criminalise it in domestic law until 2002. Genocide, war crimes, crimes against humanity and torture have long been regarded as universal international crimes. The commission of such crimes has caused untold human suffering since the end of the Second World War.

There are tens of thousands of people suspected of committing such crimes around the world, some of them who have lived in or visited Australia. The number and magnitude of such crimes vastly outstrips the problem of terrorism. Yet Australia has never invested comparable resources in bringing to justice perpetrators of those most serious of crimes, even where they involved exterminating our Timorese neighbours. Nor have we ever sought to hang a myriad of special powers or modified procedures off these crimes in the way we have done for terrorism offences.

We are still dragging our heels on seeking the extradition and prosecution of Indonesian military personnel suspected of killing five journalists at Balibo in East Timor in 1975. Elsewhere, much greater effort is being put into bringing international criminals to account. For instance, under a European Union measure in 2003, European States have been urged to establish specialist international crimes units within their law enforcement bodies.¹² The Senior Public Defender in NSW, Mark Ierace SC, has recently urged Australia to do the same, in contrast to the current ad hoc approach where a number of isolated Australian Federal Police carry the can.

All of this points to a deeper problem affecting the Australian government's response to terrorism. Countries like Britain and France have long experience in combating terrorism, whether the Irish Republican Army in Northern Ireland or in the Algerian war of independence. Both countries soon realized that overreacting to terrorism was counter-productive. Internment in Northern Ireland was an abject failure, and succeeded only in radicalising resistance to British rule. In Algeria, the ruthless torture of suspects by French paratroopers helped to win battles but lost the war.

Australia has had no comparable experience of sustained terrorist violence on its home soil, with only one minor hotel bombing in the late 1970s. Confronted with real terrorist threats for the first time, Australian governments are susceptible to the kinds of overreactions which plagued other democracies in the past.

Conclusion

There are, of course, many other areas for improvement in human rights in Australia which could be canvassed tonight. May I recommend to you one starting point, which NSW Young Lawyers was involved in – the recent NGO Shadow Report on Australia's obligations under the International Covenant on Civil and Political Rights, which provides a detailed treatment of many other specific issues.

To conclude, if, as an academic, I were asked to mark this government on its human rights performance to date, I would give it a solid Distinction grade (75% or over): some original thinking, good use of international and comparative sources, but not yet quite up there in the exceptional category of the very best governments around the world. But it is early days yet; this is still only your first assignment; and I've provided you with some excellent tips on how to bump up your mark to a High Distinction over the next two years. Thank you.

Notes

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¹ Australian Parliament, House of Representatives, Hansard, 15 October 2008 (Mr Truss).

² UN Human Rights Committee, General Comment 20 on article 7 of the ICCPR, para 6.

³ See Ben Saul, Opinion for the National Ethnic Disability Alliance (PILCH referral) on Australian migration legislation and disability discrimination under the 2007 Disabilities Convention, appendix to NEDA, Report on Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities, July 2008.

⁴ See Jane McAdam and Ben Saul, 'Weathering Insecurity: Climate-Induced Displacement and International Law' in A Edwards and C Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, forthcoming 2009), chapter 13.

⁵ See, eg, the United Nations (Van Boven-Bassiouni) Principles on The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, United Nations Human Rights Commission, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report of the Special Rapporteur, M Cherif Bassiouni, submitted in accordance with the Commission resolution 1999/33, E/CN.4/2000/62 (Jan. 19, 2000).

⁶ International Labour Conference (95th Session, 2006), Report of the Committee of Experts on the Application of the Conventions and Recommendations, Report III (Part 1A), Geneva, 42-45.

⁷ Conor Gearty, 'The Superpatriotic Fervour of the Moment' (2008) 28 *Oxford Journal of Legal Studies* 183, 199.

⁸ Attorney-General Robert McClelland MP, Security in Government Conference 2008, Canberra, 16 Sept 2008, para 23.

⁹ Gearty, *op cit*, para 37.

¹⁰ See, eg, Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives of Terrorism law Reform' in M Gani and P Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E-Press, Canberra, 2008), 65, 73-74.

¹¹ Gearty, *op cit*, 200.

¹² EU Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes.