Chapter Two:
The *UN Convention on Refugees* and its Implications for Australia's Sovereignty

Hon Peter Walsh, AO

All UN Conventions and Treaties signed by Australian governments have the potential to erode both Australian sovereignty and democracy. Conventions are drafted by committees and replete with the usual defects of committee produced "consensus" documents: in particular, strong on motherhood statements and laudable objectives, imprecise in detail and meaning.

Statements and policy platforms from political parties have similar attributes for similar reasons. But in this case there are other, more sinister implications. I do not doubt many naïve people believe the UN and its committees are altruistic institutions like a Christian charity of old, not at all corrupted by power lust, greed, self-interest or self-aggrandisement. UN committees resemble, in structure, non-accountability and self-service, the International Olympic Committee.

Paddy McGuinness made these points in the October, 2000 issue of *Quadrant*:

> "Many participants in the work of the UN system have their own agendas, whether in matters of general human rights, or special rights like women's or indigenous people's rights, who also have little or any in the way of democratic credentials. There is a large number of international lawyers who work in these areas, both in the UN and in Australia and other countries, who see the agencies of the UN as a means of imposing their own standards on everybody else without any participation in decision-making by the people. Many countries, including Australia over the last half century, have signed new treaties and conventions of the UN in the expectation that they are simply making general promises of good behaviour. But these treaties have been used by zealous and inadequately supervised diplomats and lawyers as instruments for extending their own political power".

To these people, McGuinness says, "the faults of the UN system do not matter". What matters is that:

> "..they can be used for domestic political purposes against our own governments and laws when they disagree with them but know they cannot get popular support to change them. The international lawyers of Australia are determined that human rights become a cloak for building up their own undemocratic political power, through treaties and courts, to implement whatever good or bad agendas they might have. They have only contempt for democratic rights and ordinary people".

Assorted activists who have lost political debates/disputes within Australia see any UN Committee – no matter how fly blown it may be – as a court of appeal against policy decisions made by democratically elected Australian governments. Such appeals have not (yet?) been successful, but are always approvingly trumpeted by a media "commentariat" which hopes the government will be suitably chastened and intimidated. (So far that hasn't worked either.)

Recent examples include *Wik* amendments, mining uranium at Jabiluka and mandatory sentencing. On the last issue, Australia is to be "prosecuted" by "human rights" lawyer Cherie Booth (aka Blair), who is no more perturbed about the existence of mandatory sentences for housebreaking in Wales and England than is her husband Tony, PM. As usual, all the UN Committees which have criticised Australia include members from several countries which are authoritarian single party states, or military or clerical dictatorships.

The Australian government, justifiably angered by this hypocrisy, made known it would pay little attention, and specifically refused to sign the *Optional Protocol to the Convention for the*

Elimination of all forms of Discrimination Against Women. Our resident "human rights" activists were further outraged. *The Weekend Australian* reported, uncritically, that Meg Lees, Carmen Lawrence, Sex Discrimination Commissioner Susan Halliday and "Liberal Party matriarch" Dame Beryl Beaurepaire had condemned the government. Some went further, saying that by refusing to sign the *Protocol*, Australia will be responsible for women's rights abuses by *other* countries which have not signed.[1]

Countries which have signed include Thailand (in which desperately poor families are believed to sell their daughters to Bangkok brothels). In the Republic of Ireland, abortion is banned. What Meg Lees *et al* believe about women's rights in those two countries remains a matter for wide-eyed conjecture.

On August 7 last *The Australian* published, side-by-side, two letters. One was from Professor David Kinley and other signatories from the "Castan Centre for Human Rights Law", which slagged the government for pointing the finger at despotic regimes, because "Western liberal democracies such as Australia are well capable of breaching human rights." The other letter, from one Henry Wardlaw, defended double standards more honestly, saying, "UN Committees are surely acting sensibly if they direct their efforts to areas where they may have some influence (i.e., liberal democracies) rather than to those where nothing short of international sanctions or military force can be expected to bring about change".

For three decades or more, social engineers disguised as "human rights" advocates have campaigned for a *Bill of Rights*, the (intentional) effect of which would be to transfer power from Parliaments to unelected officials and judges. When Malcolm Fraser hopped on that bandwagon last August he was applauded by Federal Shadow Attorney-General Robert McClelland, who also lauded Canada's *Charter of Rights and Freedoms,* which, he told us, ensures that "before any legislation or administrative act is introduced it's vetted (by non-elected people) against their *Charter of Rights and Freedoms*". He continued: "If a government steps outside their bounds and infringes the rights of citizens ... citizens should have redress".[2] McClelland apparently has not noticed that we Australians already have methods of redress called elections.

To put in place the *Bill of Rights* wanted by McClelland and others requires a constitutional amendment and, therefore, a referendum. Such referenda have never secured majority support from the Australian people, who have more innate commonsense than their self-proclaimed guardians realise. United Nations Conventions and Treaties are seen as an alternative means of implementing the guardians' agenda without approval by either Parliament or people. To succeed fully, this subterfuge requires compliance by courts, ultimately in Australia the High Court. In one case (*Teoh*) to which I will refer later, the High Court has so complied.

The degree to which the High Court will endorse law based on UN Conventions not even *ratified* by Parliament, has yet to be tested. The *Mabo II* and *Wik* decisions, however, suggest that narcissistic High Court Justices will not necessarily be constrained by mere parliamentary injunction. A forthright declaration by key Ministers (PM, Attorney-General and Foreign Affairs) and endorsed by the House of Representatives, that any Convention signed by an Australian government, or law passed by the Parliament, can be amended or repealed at any time by Parliament, would surely have to be taken into account – even by a hypothetical future *Mabo* Six.

Several attempts by me in the early 90s to get such a statement were fudged. On 17 October, 1991 this question was put on notice:

> "What legislation or regulation is required by Commonwealth law to delist from World Heritage status areas which had been previously listed?"
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> Attorney-General Duffy replied:
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> "A Commonwealth Act or regulation could not operate to remove an area from the World Heritage List ... a removal can only take place if approved by a majority of two-thirds of the World Heritage Committee".

Later attempts to clarify this matter produced soft responses from Attorney-General

Lavarch and a claim from Foreign Minister Evans on 6 December, 1994 that "we retain the sovereign capacity to make and apply our own laws as we see fit".

Somewhat indirectly, an article[4] and letter[5] from Department of Foreign Affairs and Trade Secretary Michael Costello published in *The Australian Financial Review* made similar but stronger claims. Subsequent attempts to get the organ grinders (Lavarch and Evans) to back up the monkey's (Costello) claim were not successful. Neither Lavarch nor Evans, nor their successors, have ever stated unambiguously that any law passed by the Australian Parliament or treaty ratified by the Executive may be amended, repealed or repudiated by a future Parliament at any time.

This is not a mere semantic quibble. Greenpeace has already attempted to litigate planning decisions on the basis that they conflict with our "Kyoto obligations". There is reason to question whether Australian government officials dealing with treaties in general, and the *Kyoto Protocol* in particular, are at least as concerned about capturing their Minister, and receiving plaudits from their peers in a non-accountable international bureaucracy, as they are with Australia's national interest. The danger is compounded when non-elected Non-Government Organisations with their own, often subversive, political axes to grind, claim to have legitimate "standing" in Treaty and Convention deliberations. Such brazen attempts to usurp political power rarely fail to secure media endorsement.

When this was written, legislation was before the Senate to unilaterally impose a *de facto* carbon tax in Australia by requiring an extra two per cent of electricity to be produced from "renewable" sources, as part of our Kyoto commitment to cap our CO_2 emissions at 108 per cent of 1990 levels. That Australia, the most vulnerable country in the world, should be first to adopt economic lunacy based on dodgy science is almost beyond belief. But much worse is to come.

The *Kyoto Protocol* obliges Annex 1 (first world) countries to reduce CO_2 emissions by about five per cent from 1990 levels. The third world can do whatever it choses. To *stabilise* atmospheric CO_2 at present levels (360 parts per million), worldwide emissions would have to be reduced, according to the International Panel on Climate Change (IPCC) reports,[6] by 60 to 80 per cent of 1990 levels. According to the greenhouse "industry", we had already wrecked the global climate by 1990.[7] If zealot claims are taken seriously, *Kyoto* compliance would merely postpone the Apocalypse by a short period. It could, however, soften us up for the much stronger doses of authoritarian government the zealots crave.

The *UN Convention on Refugees* is qualitatively different from *Kyoto* and most other UN Conventions. Drawn up 50 years ago to deal with a refugee problem of a type which no longer exists, it is largely obsolete. But our present refugee problems are not derived from the Convention *per se*. They are a function of size – up to 20 million people seeking "asylum" worldwide – the criminal involvement of people smugglers, a noisy minority of Australians who relentlessly subvert public policy, avaricious lawyers and creative interpretation and expansion of Convention and statute by the judiciary – especially the Federal Court.

The Convention was drawn up principally to deal with the problems of post-war Europe – millions of people displaced from their homelands, unwilling to return because their countries of origin no longer existed or were controlled by authoritarian political regimes. Through most of the '50s and '60s the West perceived refugees to be people fleeing from Communist regimes. So much so that in the 1960s US authorities towed back to Haiti a boat loaded with people fleeing the barbarous but non-Communist ruling junta.

In the last 50 years Australia has resettled about 600,000 refugees. In the last decade the annual intake has been about 12,000, amongst the highest per capita "offshore" intakes in the world. In recent times the vast majority of the world's refugees have been "onshore"; i.e., they have crossed the border to neighbouring countries when fleeing from ethnic cleansing, climatic catastrophe, or civil and other wars. The Balkans excepted, most of these movements are from and to third world countries in Africa and Asia. Despite assistance from the United Nations High Commission for Refugees (UNHCR) and individual donor countries, neighbouring states bear a

disproportionate share of a burden they can ill afford.

The UNHCR has dealt with these people in three ways: repatriation where feasible, settlement in the (usually) neighbouring country of first asylum and, where neither appears possible, resettlement in a third country.

From the third group, Australia has drawn its "legal" offshore humanitarian migrant intake. Not surprisingly, first world countries are preferred by most of these people. Processes are orderly but acceptance rates vary. Acceptance rates in European Union countries in the 1990s have been 10–15 per cent of Afghani asylum seekers compared with 30 per cent in Australia. Australia has accepted this year about 90 per cent of Afghani asylum seekers compared with 30 per cent in the UK.

In the mid '70s "boat people" from Vietnam began to arrive in Australia. They have been coming ever since from several sources in highly variable and recently high numbers – more than 4,000 in the last financial year. "People smuggling" has become a global industry organised by criminals and said to yield up to US$1 billion a year. Orderly processing of asylum applications from these people, many of whom have thrown away all evidence of identity, is obviously difficult.

Most Australians resent this incursion. Illegal arrivals are placed in detention pending determination of their status. Some are granted visas for up to three years, which do not have any entitlement to family reunion or automatic access to social security payments. Unless the Minister uses his personal power – which he and his Labor predecessors have rarely done – those who fail the tests are deported. But due principally to a vain and meddlesome judiciary, the process can be extended for many years, during which a self-aggrandising minority, almost always supported by the media, tries to build up enough political pressure to overturn policy. These activists describe Australian detention centres as "concentration camps" of the Auschwitz and Dachau variety. For them, no lie is too monstrous, no misrepresentation too great.

Much of this should be dismissed as typical rent-a-crowd moral vanity. Those who take it seriously should be obliged to spell out their preferred policy. For them, the only policy logically consistent is an open door policy. In a liberal democracy people are entitled to such a belief. Pity though, they do not have the intellectual honesty to advocate it.

Refugee politics as practised in Australia has produced a pernicious *homo sapiens* mutant known as an "immigration lawyer", dedicated simultaneously to displaying their moral superiority while padding their wallets with public money by abusing legal processes. In the 1990s they have applied a new device for generating income while subverting the public interest – class actions. Recruit a thousand or so asylum seekers at $200 each for a class action. Some of them succeed in getting "bridging visas". This fact is then used to encourage and recruit other people to join class actions.

As far back as 1992 the Keating Government amended the *Migration Act*, inserting Part 8 in the hope and belief that it would prevent Federal Court judges from handing down inconsistent or capricious decisions, in effect *making* law whenever a judge felt inclined to do so. The Federal Court, or more accurately some of its rogue judges, continued to make decisions as if Section 8 had never been incorporated by Parliament.

Last month *The Australian* reported that the High Court sitting in Perth on October 25 would hear appeals by the Minister against decisions by the Federal Administrative Appeals Tribunal (AAT) and lower Courts which set aside his deportation order against an unsuccessful refugee claimant convicted of rape in Australia and sentenced to 6_ years gaol.[8] Earlier *The Australian* reported that the full Federal Court had quashed an AAT decision to overturn the Minister's deportation of a Fijian citizen with a long criminal record. AAT Deputy President Alan Blow, QC had set Mr Ruddock's order aside because "he (Shane Ali) may have been wrongly convicted", adding that he (Blow) did not know enough about the case to "make a finding" that "(Ali) was rightly convicted".[9]

In a recent speech Minister Ruddock dealt with these matters at some length, citing rebukes in 1996 from High Court Justices Brennan, Toohey, McHugh, Gummow and Kirby to the Federal Court for intruding, contrary to law, its version of merit when hearing appeals from Refugee Review Tribunal decisions.[10] In the 1999 *Eshutu Case*, Justices Gleeson and McHugh told the Federal Court:

> "It is not an acceptable approach to statutory interpretation to negate the clear intention of the legislation by reliance on Section 42 of the *Migration Act*".[11]
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> In the penultimate paragraph of his aforementioned speech, Mr Ruddock observed:
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> "There will always be some tension between the branches of government. Indeed some would argue that a degree of tension is an indicator of a healthy government. However I think the tension that presently exists is excessive. Some judges have strayed into the political arena, with reflections on the Parliament's wisdom in enacting particular provisions. I do not want to say any more than that".

Whether some Federal Court Judges will be chastened by either High Court rebuke or statute law remains to be seen. Perhaps we should expect no better from a court which has never had a functional reason for existence, and has been restructured for reasons of political expediency.

The Government has introduced a Bill amending the *Migration Act* to curtail the lawyer, judge and do-gooder driven abuses, which have bedevilled the system for a decade or more. One of its more important clauses tightens the legal rule of "standing". The present permissive system allows open-ended access to appeals, even to people who have no connection to the case. Most importantly, it seeks to prohibit the use and abuse of opportunistic lawyers' cash cow: class actions.

The Bill was passed by the House of Representatives. When this was written it was before the Senate with recommendations for amendment from a Senate Committee. Labor in power also legislated to clean up the system, but was thwarted by lawyers and the judiciary. In Opposition, Labor has opted for opportunism and joined the Democrats – who will never actually be accountable – in sabotaging policy directions Labor followed in office.

I fear Labor will do so again – that it will support typically stupid and sanctimonious Democrat amendments in the Senate. In this as in most areas Democrat policy is incoherently irresponsible. For example, Democrat policy a few years ago was zero net immigration, which would have limited the gross intake to 30,000. But Democrat Senators pursued amendments for an intake well above 30,000 in the humanitarian category alone.

As someone who has been a Labor Party member for 40 years, and a parliamentary representative for almost half that time, it disappoints me that today's Labor Caucus so often behaves like a lap dog of the Australian Democrats – a party which polled substantially fewer votes than One Nation.

Endnotes:

1. *The Weekend Australian*, September 30-October 1, 2000.

2. *The World Today* program (ABC), 25 August, 2000.

3. Letter to *The Australian Financial Review*, 11 August, 1994.

4. *The Australian Financial Review*, 29 November, 1994.

5. *Ibid*., 18 January, 1995.

6. IPCC WGI (1990 and 1992).

7. See S Fred Singer, *Hot Talk, Cold Science*, revised Second Edition, p.62.

8. *The Australian*, 23 October, 2000.

9. *The Australian*, 2 October, 2000.

10. Speech by the Minister for Immigration and Multicultural Affairs, 24 August, 2000.

11. It is a pity the High Court does not itself practise the restraint and respect for Parliament it recommends to "inferior" courts. In the *Teoh Case* the High Court overruled a Ministerial decision to deport Teoh because the Minister had not, when making his decision, adequately taken into account Australia's obligations pursuant to the *UN Convention on The Rights of the Child* – which Parliament had not even ratified. To my knowledge this is the only example of the High Court egregiously giving a UN Convention the value of statutory law. I fear it will not be the last.