'Killing off' international human rights law: An exploration of the Australian Government's relationship with United Nations human rights committees

Joanne Kinslor*

Introduction

Tension between the Howard Government (the Government) and the United Nations (UN) human rights treaty bodies climaxed on 29 August 2000 when the Government declared its dissatisfaction with how the UN human rights treaty committee system was operating and demanded that it be completely overhauled. The Government's demand was accompanied by an announcement that it would modify its relationship with UN human rights committees while its requirements were being met. This article concentrates on the two modifications designed to limit the opportunities individuals have to make complaints against Australia. The first is the Government's decision to 'reject unwarranted requests from treaty committees to delay removal of unsuccessful asylum seekers' and the second is its refusal to sign or ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[1] This discussion will explore the reasons behind the Government's reluctance to engage in and to support UN human rights committees, with particular reference to UN individual complaints mechanisms.

The Government defended its move on the grounds that UN committees needed procedural reform[2] and a change of focus[3], but did not adequately explain why its

* BA, LLB (Hons) (The University of Sydney) Joanne is currently employed as a solicitor at Christopher Levingston & Associates. Her areas of practice are migration law and criminal law.

1 The Australian Government outlined its decision in a joint media release by the Minister for Foreign Affairs, Alexander Downer; Attorney-General, The Hon Daryl Williams AM QC MP; Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP: 'Improving the Effectiveness of United Nations Committees' Tuesday 29 August 2000 FA97 <www.dfat.gov.au/media/releases/foreign/2000/fa097.html2000>.

2 Specific areas of criticism included the inefficiency of committee processes, the lack of co-ordination between committees and the fact that committees were too demanding upon state resources.

3 This criticism has two broad strands. First, that committees failed to recognise the primary role of democratically elected governments in favour of non-governmental organisations (NGOs). Second, that committees focused upon minor human rights issues in Australia, which generally has a good

actions were the most appropriate means of addressing such issues. Of particular concern to Opposition parties, human rights advocates and media commentators was why the Government decided to attempt to generate reform within UN treaty committees by lessening its engagement with these committees, instead of committing more resources to them. This inconsistency within the Government's position indicates that there are other reasons underpinning the Government's move, which hinge upon the Government's concern with maintaining clear jurisdictional boundaries of control. Professor Charlesworth has stated that '(t)he thrust of the press release... was that the treaty bodies not only need reform but that they need reform because they are criticising Australia a bit much' (Charlesworth 2001: 429). What this article seeks to explore is the reason the Government is so sensitive to criticism.

It is the contention of this article that the Government's reluctance to engage in and to support UN individual complaints mechanisms cannot simply be explained as the Government's concern that Australia's internal authority is under threat. The UN's involvement in Australia is dependent upon Australia's willingness to co-operate with the UN. Any authority that the UN does have in Australia has been voluntarily agreed to by Australia. Australia has voluntarily ratified UN human rights treaties, including some optional protocols connected with these treaties. Thus, Australia has willingly acquiesced to the supervisory mechanisms of the UN that are the subject of this paper. Moreover, with respect to UN individual complaints mechanisms, the communications of UN committees become effective only in so far as Australia chooses to implement them.[4]

This article seeks further to explore the Government's stance as it expresses concern that political power within the Australian 'nation'[5] is being re-organised. The potential that the operation of the UN committee system, specifically the individual complaints mechanism, has to challenge state structures and re-organise control of the Australian nation becomes evident when this mechanism is analysed using the

---

human rights record, while neglecting major human rights breaches in other countries and that the number of issues for which Australia has been criticised is higher than for countries, such as the People's Republic of China, that do not have democratically elected governments.

4 Thus Australia was able to disagree with the ICCPR's determination in *A v Australia* (1997) and did not act in accordance with its recommendations. See Charlesworth (1999) pp 68-9.

5 I use the term 'nation' to refer to Australia as a community of people with a sense of solidarity and a common culture and history, whereas I use the word 'state' to refer to Australia as a political entity with a defined territory over which it has internationally recognised authority.

work of Robert Cover.[6] Drawing upon the insights of Cover and focusing upon the operation of the UN individual complaints mechanism under the Convention Against Torture (CAT) and CEDAW, this article argues that the Government's concerns regarding the UN human rights treaty system have resulted from a fear that it has the potential to magnify the tensions within our democratic sovereign state and to provide a platform from which new forms of authority may develop.

Cover's exposé of the reality of multiple legal worlds challenges the positivist notion that the state is the only true repository of law. This challenge threatens traditional understandings of the role of the state as the only legitimate origin of law and enables us to identify other legal authorities, such as UN committees and non-governmental organisations (NGOs) as sources of law that stand in competition with state law. Cover's analysis of the relationship between violence and state law casts doubt over the legitimacy of democratic states, which silence and destroy alternative voices. Finally, Cover's argument that the creation of normative worlds is not confined to the state, alerts us to other possible sources of political authority. This helps to explain why a government concerned with maintaining power wishes to stop the development of alternative narratives, even if these narratives do not presently wield sufficient force to override its rule.

This discussion begins by looking at the operation of the UN individual complaints mechanism under CAT and CEDAW. It explains how the Australian Government has sought to restrict and prevent individuals from using this system. Following this is an analysis of the operation of the UN individual complaints mechanism using Cover's insights on the nature of law. First, an outline of Cover's observations on the nature of law is provided, then Cover's insights are used to reflect upon the nature of UN committee communications and of Australian law and the extent to which these two forms of law are in opposition to each other.

Individual complaints mechanisms under CAT and CEDAW

State signatories to CAT are automatically bound by the individual complaints mechanism prescribed within the convention. State signatories to CEDAW may choose to support the enforcement of this convention by agreeing to be bound by an Optional Protocol, which contains an individual complaints mechanism for this convention. The individual complaints mechanisms of these conventions set down a procedure that enables individuals (and, in the case of CEDAW, groups) to bring claims against a state party to the convention's committee if they believe that they are

6 I will be using 'Nomos and Narrative' and 'Violence and the Word' in Minow et al (1992).

victims of the state breaching the relevant convention.[7] A communication may be submitted by the individual or her/his representative. Communications may not be anonymous and may only be submitted if domestic remedies have been exhausted[8] and another international human rights committee has not examined the matter. That a communication may only be made if all avenues of appeal within the state have been exhausted places the process in a difficult position. From one angle, it is, therefore, peripheral and incidental to the main source of law, which is found in the state. From another angle, it is the highest court of appeal dealing with select matters.

Once a communication's standing has been established the relevant committee considers written submissions from the complainant and the state party before handing down a determination, known as a view (rather than a decision), because it cannot be enforced by the committee system. UN Committees are not courts, so strictly speaking their decisions are not legally binding. This substantially limits the extent to which the committees act as a final court of appeal. The complaints procedure is similar to the adversarial system that we are familiar with in that it involves two parties presenting their dispute over the legality of an action to an authoritative body, which decides between them and sets down the law on a particular issue.[9] The crucial difference between the two arrangements is that the UN complaints procedure, unlike domestic court structures, is not connected with a system of enforcement. While a judge's ruling is supported and implemented by a complex system of enforcement that is underpinned by violence, the state's monopoly on violence within its borders means that it has control over the extent to

---

7 With respect to the CAT, refer to Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment. CEDAW's complaints procedure is explained by Della Torre (2000) p 181.

8 Exceptions to this rule are provided when domestic remedies are 'unreasonably prolonged' or 'unlikely to bring effective relief'. See art 22 5(b) CAT and CEDAW Optional Protocol art 4(1). However, in the case of CAT these exceptions have been interpreted quite strictly. In *M.A. v Canada* CAT Communication No. 22/1995 the applicant argued that his chance of success was almost non-existent because of binding jurisprudence and the review process in Canada. The UN Committee Against Torture (UNCAT) stated that it could not accept this argument, because it could not assess whether domestic remedies would be successful, but only if they were 'proper remedies'. UNCAT explained that 'special circumstances' were needed before the domestic remedies requirement could be waived.

9 In claiming that Australia's sovereignty is threatened the Government emphasised UN committees as courts of appeal. For example, the Minister for Foreign Affairs, Mr Downer, likened the UN committee system to Privy Council appeals. He stated: 'The Labor Party...were opposed to Privy Council appeals. But the Labor Party in government were in favour of United Nations appeals from the Australian parliament, from Australian courts and from Australian institutions' (Downer Q 2000).

which its complies with the views of the UN Committee Against Torture and the CEDAW Committee.

Nevertheless, the Australian Government views this procedure as an intrusion upon Australia's sovereignty and has taken steps to prevent individuals from engaging with it.[10] As mentioned above, the Government has decided that it will not comply with 'unwarranted requests' from UN committees to delay the deportation of asylum seekers. Under this policy the Government will effectively frustrate any attempts by asylum seekers who fear torture outside Australia from using the individual complaints procedure under CAT. Complaints have been made to the UN Committee Against Torture by such asylum seekers on the grounds that Australia will be in breach of its *non-refoulement* obligations under article 3 of CAT if it deports them.[11] The question of why the Government is so concerned about a procedure that, as of July 2002 has only resulted in seven communications being handed down by the UN Committee Against Torture will be explored below.[12]

Secondly, the Government has refused to sign or ratify the Optional Protocol to CEDAW that would enable women to bring complaints against Australia for violating one or more of their rights embodied in CEDAW. In summary, the Convention contains women's rights to: bodily integrity (art 6); political rights (arts 7 and 8); nationality (art 9); education (art 10); employment rights (art 11); health care and leisure (arts 12 and 13); economic rights (art 13 and 14); civil rights (art 15) and family and marriage rights (art 16).[13] Such rights are supported by the Government and Australia generally upholds women's rights. Yet, the Government has chosen not to engage in the complaints process while it seeks reform within the UN. This much the Government has stated. What this article explores is the degree to which the Government hopes also to engender substantive change in the

---

10 Avenues are still available to individuals who wish to make complaints against Australia under the International Convention on Civil and Political Rights (ICCPR) or the Convention on the Elimination of Racial Discrimination (CERD).

11 Article 3 states that 'No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he (sic) would be in danger of being subjected to torture'.

Australia also has *non-refoulement* obligations to torture victims under the International Convenant on Civil and Political Rights (ICCPR), arts 6 and 7, which Australia ratified on 13 August 1980. These provisions are discussed in Hearn and Eastman (2000) p 216.

12 Refer to UN Treaty Bodies Database at <www.unhcr.ch/tbs/doc.nsf>. This issue was raised in Parliament by Michael Danby (Danby 2000).

13 This summary comes from Emilia Della Torre (2000) at 182-3.

complaints process, in terms of the interpretations committees arrive at and the issues with which they deal. In particular, this article will focus on the extent to which the Government's concept of Australian democracy is bound within a staid societal structure that is threatened by progressive interpretations of women's rights. Of note is that women's rights apply to a majority[14] although they are known as minority rights. Thus, although the Government's decision not to sign or ratify the Optional Protocol was opposed by 200 women's groups from 'right across the political spectrum' (Mackay 2000: 17973) and by a senior Liberal Party member, Dame Beryl Beaurepaire, (Stott Despoja 2000: 17202) the Government did not change its decision. What this implies about how the Government conceptualises the strength and place of women within the Australian polity will be discussed below, using the insights of Cover. First, however, it is necessary to outline Cover's theoretical approach to law.

Cover's reflections upon the nature of law

Normative universes

In his article, 'Nomos and Narrative', Cover challenges us to see law beyond the courtroom and statute books. Moreover, he suggests that while the state, as represented by Government and judges, is able to create law, it is not the primary source of legal meaning (Synder 1999: 2, 12). Focusing upon examples of religious communities, Cover reveals the many nomoi, or legal worlds, that exist within the state and regulate the behaviour of individuals and groups that inhabit them. Instead of starting with law contained within statute books and court judgments, Cover begins with the many acts that make up our lives, both the mundane and the spectacular. He explains that we understand our actions in relation to norms that have diverse sources — that we regulate and comprehend our behaviour by reference to many normative worlds.

Norms, legal norms, legal meaning and law

Cover's focus is to help us to see 'law' in many situations and then to discuss the mechanisms by which laws are enforced. As such, he is not concerned about using 'law' as a synonym for 'norm' (Synder 1999: 4). However, since such usage can be confusing, this article adopts the definitions generated by Synder for the terms 'norm', 'legal norm', 'legal meaning' and 'law' (Synder 1999: 9-10).

---

14 Generally, women make up 52% of the population. Refer to Australian Bureau Statistics website at <www.abs.gov.au>.

A 'norm' refers to rules of conduct used by a group and expected by a group; a standard of behaviour recognised by a group as proper in a particular situation. 'Legal norms' are those norms a group develops that it believes should be backed by the organised violence of the state. The process of generating legal norms is the process of creating 'legal meaning'. 'Law' will be used in this article to refer to those legal norms or legal meanings that are enforced by the deliberate action of the state and backed by the violence of the state.

Those groups that will be jurisgenerative, or able to create legal norms, must:

- share a normative universe;
- be bound together by a narrative;
- exist as a social organisation whose members are linked together in a formal and structured manner; and
- be made up of members that are committed to each other and to the group as a whole (Synder 1999: 11).

However, *nomic* groups do not consider all the norms they create significant enough that they want to entrench them and ensure that they are legally enforceable. Synder explains that Cover distinguishes norms in general from legal norms, the latter being those norms that a group is strongly committed to and wants supported by the organised violence of the state (Synder 1999: 10). For a norm to have legal meaning it must engender the commitment of a group of people that are prepared to live by it and it must be understood to be objective in that those who follow it understand it to be outside of themselves (Synder 1999: 15).

Paideic and imperial law models

Cover distinguishes different types of normative worlds according to the context in which they are created and maintained, with *paideic* and imperial normative worlds constituting ideal types at either end of his spectrum. Cover emphasises the importance of context in defining the particular character of a normative world through his discussion of *paideic* and imperial types. Although he admits that 'no normative world has ever been created or maintained wholly in either the *paideic* or the imperial mode' (Minow et al. 1992: 107) Cover describes these two different modes in order that we might be able to identify the predominant character and function of a particular normative world and its law using his theoretical framework.

The paideic nomos

A *paideic* or 'world creating' nomos is found where a group of people, such as a faith

community, share a common set of precepts and a strong, binding narrative. Interpersonal relationships are important within such a group as they allow individuals to be directly educated into the group's knowledge and to participate directly in the group's development and the changing understanding that the group has of its law (Minow et al. 1992: 105).

Individuals of a pure *paideic* normative order would share a common sense of normative order without needing speech to refine or re-establish their common understanding. However, this is an illusive reality, because individuals and segments of such a normative order will always and continually differ in their understanding of the meaning of their common code (Minow et al. 1992: 108). One example of this process that Cover cites is the multiplicity of understandings that grow up around a religious creed (Minow et al. 1992: 107). Nevertheless, a bonding mechanism, such as a creed, is able to create an imagined moment of unified meaning for its normative world into which different legal meanings may be integrated (Minow et al. 1992: 108).

The imperial nomos

After focusing upon law as norms that require no state for their creation or maintenance, Cover explains the importance of the state in maintaining order in society through his discussion of the imperial mode.

The predominant feature of imperial normative worlds is that they are world maintaining (Minow et al. 1992: 109). Imperial normative worlds work to effect order out of the chaos that they perceive to have been created from the multiplicity of norms produced by *paideic* normative worlds. In order to achieve this function they employ universal norms that are enforced by institutions underpinned by violence. They do not need to rely upon interpersonal relationships or shared rituals and creeds as *paideic* worlds do. As such, the modern state is a primary example of an imperial *nomos*, which functions to maintain order over a pluralistic society. Cover pictures judges as the administrators of the state's imperial normative world as they destroy legal norms in order to assert which particular legal tradition should be law. Thus, the state maintains 'peace' through domination (Minow et al. 1992: 155).

However, Cover's focus upon the individual actions of jurispathic judges should not distract us from focusing upon the imperial *nomos* of the state as a whole, which cannot be limited or summed up by its individual constituents. In his article entitled 'Violence and the Word' Cover describes legal interpretation 'as the violent activity of an organisation of people, not the mental activity of a person' (Minow et al. 1992: 107, 236). This emphasises that the creation and maintenance of imperial law requires the agreement and co-operation of all members of the polity, in varying degrees-

depending upon their relationship to the state's legal institution. One aspect of this phenomenon is that the *nomic* groups who come before a judge must have included in their normative world the notion that certain legal meanings should be enforced through violence (Synder 1999: 10, 20-1). Another aspect is that a legal interpretation, as an 'implemen[t] of violence' must be able to 'transform itself into action' (Minow et al. 1992: 223) as it is enforced. This requires that a legal interpretation is sufficiently acceptable to the members of the state, especially those directly involved with the state's legal institutions, that it overcomes their natural inhibitions towards violence (Minow et al. 1992: 223). Furthermore, legal interpretations must also be 'able to deter reprisal and revenge' (Minow et al. 1992: 223). This is also achieved by interpretations that are acceptable to the parties. However, the state's moral claim for obedience is also significant. That is, the validity of the state's legal system as an imperial normative world is strengthened by the belief that it is 'an authority structure that is good to observe' (Fiss in Minow et al. 1992: 143).

Cover's insights provide us with a useful analytical tool for re-examining and re-evaluating the nature and significance of UN communications beyond whether they constitute an immediate threat to Australia's internal sovereignty.

The competing legal norms of the United Nation's individual complaints mechanism

As discussed above, the communications of UN committees on matters arising through individual complaints mechanisms are not equivalent to the legal decisions of domestic courts, primarily because they are not enforced by the committee system. Nevertheless, Cover's exposition of the nature of law invites us to revisit the committee system as a normative, legal norm producing (and, perhaps, legal norm destroying) world. Cover also invites us to examine the normative worlds of the parties, being states and individuals/NGOs, who make submissions to UN committees.

UN committee communications

Although Cover is concerned with law as it functions within the state, his description of a *nomos* can be applied to international institutions. Returning to Synder's summary of the characteristics of jurisgenerative groups enables us to identify the UN Committee Against Torture and the CEDAW Committee as capable of producing legal norms. These committees share a normative universe committed to the advancement of universal human rights. They are bound together by the narrative of the universal human rights system, which was created by the human rights movement (including states, intergovernmental institutions and NGOs) that developed after WWII for the purpose of preventing a re-occurrence of the atrocities

of the war and promoting universal human rights norms that protected individuals of all states. This narrative incorporates the foundational creed of the modern universal human rights movement: The Universal Declaration of Human Rights. The narrative that tells the story of the formation and development of their particular treaty and committee also binds them. The committees are regulated in terms of: the number of members they have; their members' qualifications; the method by which members are elected; the tasks members are to perform and the manner in which those tasks are to be performed and the subject matter that they are to be concerned with. This makes them easily identifiable as social organisations whose members are linked by a formal structure. Finally, committee members are committed to each other and to their group (which is at one level a committee and at another the UN institution as a whole), because it is through their group that they are able to advance their goal of promoting and enforcing universal human rights norms. Commitment is increased by the fact that, at least with respect to the UN Committee Against Torture, members have consistently produced unanimous communications.[15]

Establishing that these committees are jurisgenerative allows us to predict that they will produce legal norms that are in conflict or disagreement with other legal norms produced by other normative worlds: the conflict of particular interest here being that between state legal norms and UN legal norms. However, the extent and the nature of this conflict will be dependent upon the particular character of the legal norms involved.

The first thing to note in this regard is that the state's imperial law, discussed above, is only effective so far as it is final. It is imperial because it conclusively decides which legal tradition will dominate. Moreover, once a judge's decision is successfully appealed, it no longer constitutes effective law. The communications of UN committees disturb the imperial law of the state because they can stop it from being final and from being enforced; from being imperial. This is illustrated by the story of a Somalian asylum seeker, Sadiq Elmi, who feared torture and death in his country. Mr Elmi made an application for a protection visa after arriving in Australia during October 1997. His application was refused at first instance and on appeal his request to the Minister for Immigration and Multicultural Affairs for a humanitarian visa was also denied. Finally, a High Court injunction delaying his deportation was removed on the grounds that his case presented no 'serious question to be tried' by the High Court.[16] However, Mr Elmi was saved from the violence of the state, which

15 It is not mandatory for communications to be unanimous. Refer to UN High Commissioner for Human Rights Fact Sheet 17 <www.unhcr.ch/html/menu6/2/fs17.htm>.

16 Facts set out in Rintoul and Haslem (1998) p 4. Refer also to facts as set out in *Sadiq Shek Elmi v Australia* Communication No 120/1998, 17 November 1998.

was determined to deport him back to Somalia, when the UN Committee Against Torture requested that Australia delay his deportation while it investigated his case and Australia agreed. Under the jurisdiction of the UN Committee Against Torture Mr Elmi's story became one of redemption as it accepted that his fear of torture in Somalia and determined that Australia's *non-refoulement* obligations under CAT required that Australia not deport him (*Sadiq Shek Elmi v Australia* Communication No 120/1998, 17 November 1998).

While the communication did not directly override the sovereignty of Australia (the UN Committee Against Torture could only advise Australia on its obligations and recommend a course of action) it threatened to destabilise any decision by Australia to continue with its prior course of deportation, because that course would now be contrary to an authoritative *nomic* voice and it would be a display of state violence no longer directly linked with, or justified by, definitive legal reasoning. As discussed above, Cover ('Violence and the Word') explains the crucial connection within imperial law of violence being enforced through an institution that provides a narrative and myth justifying state violence to those who benefit from it.

From this perspective we can see the Government's criticism of UN committees as being 'undemocratic' as an effort to establish a narrative that undermines the UN normative world that has produced competing legal norms. The attack is targeted against the moral and democratic integrity of the committees because the foundational narrative of the UN human rights system is based upon claims of moral superiority and the advancement of freedom.[17]

Perhaps the more effective attack by the Government was that which implied that UN committees and their norms are utopian.[18] Cover describes *nomos* as the 'process

---

17 With respect to this issue, the comments of the Government about the UN's criticisms of Australia's mandatory detention of asylum seekers without valid Australian visas are noteworthy. In response to the UN's statements that criminals were treated better than asylum seekers in Australia, the Government is reported to have accused the relevant UN delegation of being 'outsiders' who 'exacerbate health problems inside camps by demanding access to detention facilities' (Millett and Bradley 2002: 2).

18 For example, the Government has stated that it will 'reject unwarranted requests from treaty committees to delay removal of unsuccessful asylum seekers from Australia'. It is my view that part of the Government's justification for such actions is that it cannot allow individual humanitarian considerations to override the implementation of, what it views as, the orderly management of a worldwide crisis in people movements. On this point, it is instructive to note Prime Minister John Howard's response to questions about Australia's policies for dealing with asylum seekers when he was

of human action stretched between vision and reality' (Minow et al. 1992: 144) and explains that utopians are those who fail to present alternatives created from 'stretching our reality toward their vision", with the result being that we will not commit ourselves to their alternatives' (Minow et al. 1992: 144). This insight can be applied to the UN committees on the basis that the reality that they begin with is distorted because it is so limited. That is, it is arguable that while states must take into account a wide range of social, economic and political considerations in their law making UN committees are utopian because they focus upon small, discrete situations in isolation.

Notwithstanding the Government's attacks, the thing that most threatens UN jurisprudence is its inability to substantiate itself as imperial law. Cover's insights enable us to identify UN communications as legal norms. However, his insights also help us to understand its ineffectiveness as law, because it is imperial in form, but not in substance. UN communications are rhetorically imperial in their claims to superiority over state law. Being an adversarial system the complaints mechanism is more concerned with creating static norms that override other norms than with engaging other *nomoi* and adapting to different contexts as a *paideic* system. However, imperial law only becomes effective to the extent that it can transform itself into action, which the complaints mechanism can only achieve in so far as it succeeds in securing the co-operation of the state. Consequently, UN communications defy (without being a true combination) categorisation into Cover's *paideic* or imperial models. This suggests that Cover's insights do not fully translate to the international realm of international law. It also alerts us to a fundamental problem of the UN communication mechanism: that it is lacking as a *paideic* and as an imperial system.

To the extent that UN communications may be characterised as legal norms created by a *paideic* system, we can also see how vulnerable UN committees are to denigration by state parties. As UN committees rely upon co-operation between member states and a common commitment to a binding human rights narrative they constitute a *paideic* nomos that is significantly undermined by criticism from state parties.

Imperial state law

As explained above, state law is characteristically imperial in form. However, what will

---

in Germany during July 2002. Mr Howard's response was that Australia's actions are reasonable, proper and justifiable in the circumstances and in accordance with Australian public opinion and Australia's needs. 'Howard Questioned Over Asylum Seekers' AM 2 July 2002 *Australian Broadcasting Corporation News Online* <www.abc.net.au/am/s596132.htm>.

be focused upon for the purposes of this discussion are the *paideic* elements of state law, which are embedded within the myths and narratives of the Australian nation. Cover's insights suggest that imperial law is not only weakened if the violence that underpins it is removed, it is also impaired if the narrative within which its meaning is created is destroyed or impaired. Moreover, Cover's insights predict that if the members of a nation-state are highly committed to a common narrative, the state will have little need to rely upon violence to maintain its imperial rule, because division between the members of the state will be less substantial. This proposition is built upon the dichotomy Cover observes between law as power and law as meaning (Minow et al. 1992: 112). Cover locates the source of meaning outside the formal lawmaking structure, where it flourishes uncontrolled and exerts a 'destabilising influence upon power' (Minow et al. 1992: 112). The more contained meaning is the more stable power will be, which will reduce the need for violence. However, when international human rights norms threaten to destabilise the centralised power of the state by creating a new narrative from which meaning may be created, then violence may be used to limit the potential of this meaning source. The Australian Minister for Foreign Affairs, Mr Downer, anticipated this when he predicted that the United Nations would 'end up with a bloody nose' if it advanced alternative narratives within Australia (Garran 2000: 5). What follows is a description of why these alternative narratives threaten the myths and narratives preferred by the Government.

It is significant that in arguing against what they viewed as the 'distorted, sideshow alley mirror image' (Mason 2000) that UN committees created of Australia, the Government used a traditional narrative of Australian nationhood. Liberal Senator Abetz stated:

> This morning ... I was met by Mr Harry Adams of Canberra Legacy and I bought one of the Legacy badges. Legacy honours the memory of our fellow Australian who defended this nation and fought for its sovereignty. Today I rise in this place, defending our right as a sovereign nation against the forelock tugging approach to the United Nations committee system which the ALP and the Democrats seem to be advocating (Abetz 2000).

This excerpt contrasts a strong, sovereign nation founded upon the work and achievements of its members with a weak, sycophantic nation controlled by institutions and outside influences.[19] In doing this it appeals to a traditional image of

19 This is the same approach that the Government took in response to the UN's criticisms of Australia's detention centres in July 2002. Mr Downer (Liberal Party) stated on that issue 'Whatever the rights and wrongs of these issues, we will decide them for ourselves, not have bureaucrats in Geneva decide them for us, unlike you (Labour Party) who want to run off to Geneva and have a lot of United Nations officials decide these things for our country. That is the difference between you and us. You rush to Geneva and get your policies made in Geneva — we decide these things here' (Downer 2002).

Australian nationhood: the male, white ANZAC soldier who fought for Australian democracy and independence. As such, it is part of the mythic narrative of the Australian nationhood within which is posited an exclusive democracy, which prioritises a white, male, enfranchised majority.

Those not within this privileged majority have and continue to increase their participation and their share in the Australian nation. Nevertheless, the strength of minority rights still largely depends upon the discretion of the majority. Sarah Pritchard notes that minority rights within Australia exist on the terms of a 'gentleman's agreement', rather than being enshrined in law through a Bill of Rights. (Pritchard 2000: 12) The result is that, although Australia is widely accepted as a modern democratic country, minority rights within Australia are accommodated to the extent that the majority deems appropriate rather than being entrenched in their own right. With respect to the minority agendas forwarded by both CAT and CEDAW, this means that some minority rights are compromised.

The Government has claimed that the rights of asylum seekers do not need to be protected by the individual complaints mechanism on the grounds that they are already protected by the democratic law of this country and 'have no real case to argue' (Ruddock 2000). This claim is difficult to accept given that a Senate Committee found that Australia had not explicitly or adequately incorporated article 3 of CAT into domestic law (Senate Legal and Constitutional References Committee 2000: 60).[20] Furthermore, with respect to CEDAW, Susan Halliday argues that Australia's domestic laws do not cover all circumstances of discrimination against women (O'Byrne 2000).

The difference between the normative worlds of the Government and of UN committees is not a matter of whether they include minority rights, but a matter of what *meaning* and *character* these rights are given by the narratives of their normative worlds. Thus, the narrative of Federal Attorney-General Daryl Williams' normative world leads him to say that UN committees (in general) seem to focus upon 'minor, marginal issues'. These issues: mandatory detention of asylum seekers; deporting asylum seekers who fear torture; native title legislation and the impact of mandatory sentencing upon race relations within Australia[21] are accorded a completely different place within the international human rights narrative, which sees fundamental principles at stake in these issues.

---

20 See also my discussion of how Australia has failed to ensure that it meets it non-refoulement obligations under CAT (Kinslor 2000: 161).

21 Tim Lester in The 7:30 Report (2000a) 29 August. However, this is not an exhaustive list.

The first difference between the narratives of the UN and the Australian state is the value that is placed upon the individual. The UN places primary importance upon the individual as the repository of inalienable human rights, while the state prioritises the 'common good' and the 'majority', as determined by the elected Parliament, even if individual rights are compromised in the process. Moreover, within the narrative of the UN individuals are prioritised per se, regardless of their identity. Whereas, the values of the nation determine the priority given to particular individuals within the state.

Of significance to the Government is that within their system of meaning the greater rights, and opportunity to be heard that a person/people have, the greater political power they have also. Therefore, in prioritising voices differently to how they have been prioritised within Australia,[22] UN committees are recognised as reorganising political power within Australia. Prime Minister John Howard commented upon how he saw democracy operating in Australia and how he would like it to continue to operate:

> ...it's a free world for most, certainly a free country in Australia, and if people want to criticise this country, they have a right to do so, but we're not going to be willingly part of a process where we don't believe proper regard is paid to expressions of view by the elected Government (The 7:30 Report 2000b).

Senator Newman of the Liberal Party also indicated that she believes the state (represented by Government) should be the primary arbiter of meaning, when she said 'we do not support the right of unelected officials in the UN...to take a perspective on various committees which is not consistent with the information that is given to them by governments' (Newman 2000).

Thus, the form of democracy that has meaning within the Government's normative world is that of majority rule, which is represented in the elected government. Within this normative world UN committees are not seen to be promoting democracy by raising voices that have 'some resonance amongst certain sections, and quite large sections, of the Australian community.'[23] This support extends to government bodies. Christopher Sidoti, former Human Rights Commissioner for the Australian Human Rights and Equal Opportunity Commission, stated that 'not once has a treaty

---

22 With respect to UN committees generally, Opposition party members noted that UN committees reiterated what NGOs and government institutions had already found See Bartlett (2000).

23 Senator Barney Cooney 'United Nations Human Rights Committee System' (2000) 31 August *Australian Federal Parliament: Senate Hansard* at 17131.

committee expressed a view on a particular Australian human rights issue that is at variance with the view expressed previously and repeatedly by the Australian Human Rights Commission itself and human rights groups within Australia.'[24] It is also true of the respect that the UN has accorded the voices of NGOs. Andrew Thompson indicated the Government's disdain for the deference UN committees had accorded to NGOs as significant political entities when he described UN committees as 'a theme park for indulging the fantasies of the global NGO guilt movement'.[25]

With the advancement of globalisation the importance of non-state actors, such as transnational corporations and NGOs has increased. Considering this context helps us to understand the perceived threat of non-state actors to Australia's sovereignty, and the particular perceived threat of NGOs. Opposition members raised the issue of why the Government was so concerned about the growing significance of international NGOs while it supported economic globalisation (Cook 2000), which (according to writers such as Ohmae (1995)) presents the biggest threat to sovereign states. At least two possible responses can be postulated in answer to this query. The first is that the process of globalisation is seeing international bodies take over what has traditionally been viewed as one of the most important functions of state governments: economic management. As a consequence of this the Government is attempting to assert its sovereignty over areas of growing importance[26] that it still has control over.[27] The second answer begins from the completely different premise that NGO movements pose a bigger threat to state control because, while economic multinationals must work within states who provide them with infrastructure (including law[28]), NGOs work from a normative premise that is inimical to the statist

---

24 'Australia's Relations with the United Nations in the post Cold War Environment' (2001) 22 March *Australian Federal Parliament: Joint Committees* at 535.

25 Andrew Thompson is a Backbencher and Former Minister of the Liberal Party. During a television interview Prime Minister Howard did not condemn this comment, but said 'Everybody has a different way of expressing things': (The 7:30 Report 2000b).

26 Hirst and Thompson (1996) explore the idea that economic globalisation necessitates conventional politics will become less significant and that increasing importance will be placed on the politics of morality.

27 The state's control over territory gives it continued control over populations which can still be contained within borders, in comparison with financial and media institutions (Hirst and Thompson 1996: 2).

28 Transnational economic institutions rely upon regulation that they cannot create themselves. Companies are also advantaged by being able to make use of the nation-state's common cultural understandings (Hirst and Thompson 1996: 186).

system and create a culture independent of national culture.[29] Hirst and Thompson support this notion in so far as they think that 'NGOs ... are more credible candidates to be genuine transnational actors than are companies' (1996: 186). Thus, this provides one explanation as to why the Government is more accepting of transnational corporations than NGOs.

Conclusion

Cover's insights help us to understand in greater depth why the Government has taken steps to decrease the presence of UN committees within Australia. By relying upon Cover's insights into the multiplicity of legal norms that inhabit our world we are able to understand that, while UN communications may not override Australia's internal sovereignty in a formal sense, they constitute competing legal norms that threaten to undermine the imperial rule of the Australian state. These competing legal norms judge specific issues using a different value system — a value system that threatens the imperial state as it gains support within the Australian community. UN committees also inhabit a different normative world to the Australian state, which threatens to compete with the Australian state in so far as the state rests upon particular understandings of the Australian nation.

However, Cover's theoretical framework also helps to legitimise the Government's fear of alternative normative worlds. Austin Sarat (1992: 259-60) notes the way in which Cover separates meaning and power[30] as well as interpretation and violence.[31] For Cover, meaning and interpretation exist in the realm of freedom, while power and violence exist in the realm of order. Thus, Sarat criticises Cover for refusing to conceive of order within freedom and neglecting the possibilities of freedom within order: meaning remains a threat to power and power remains a threat to meaning. The Government's concern that UN committees destroy Australian sovereignty and democracy and that the solution to this is to decrease engagement with them suggests that it also conceives of new meanings as incompatible with its power. In fact, Mr Sidoti is of the opinion that 'the present Australian government is more sensitive (to criticism) than almost any other. It has

29 Hirst and Thompson note that it is 'non-economic organisations with a strong ideological mission' that are the most successful at creating a transnational culture with an alternative loyalty to national loyalty (Hirst and Thompson 1996: 186).

30 This should be qualified on the grounds Cover reminds us that systems are never wholly *paideic* or purely imperial. It is multiplicity of meaning that destabilises power.

31 Sarat is correct at this point only in so far as he allows for the fact that violence within Cover's works places outer limits upon interpretations, as discussed above.

not shown itself either mature enough to listen to the view of others or big enough to admit that what it has done in the past or what Australia has done in the past is wrong.'[32] This concern with criticism prevents the Government from searching for new forms of power/law, which can accommodate new meanings/narratives. Instead, it must attempt to maintain power through 'killing off' international human rights 'law',[33] which in turn confirms its imperial position. ●

References

International Legal Materials

M.A. v Canada Communication No. 22/1995, CAT/C/14/D/22/1995

Sadiq Shek Elmi v Australia Communication No 120/1998, CAT/C/22/D/120/1998

UN High Commissioner for Human Rights Fact Sheet 17. <www.unhcr.ch/html/menu6/2/fs17.htm>

UN Treaty Bodies Database at <www.unhchr.ch/tbs/doc.nsf>

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment opened for signature 10 December 1984, 39/46 (entered into force 26 June 1987)

United Nations Convention on the Elimination of All Forms of Discrimination Against Women opened for signature 18 December 1979, 34/180 (entered into force 3 September 1981)

Books and articles

7:30 Report, The 'Govt calls for UN overhaul' *Australian Broadcasting Corporation Transcripts* (2000a) 29 August p 4

7:30 Report, The 'UN's committee process "out of whack": Howard' *Australian Broadcasting Corporation Transcripts* (2000b) 30 August p 4

---

32 C Sidoti 'Australia's Relations with the United Nations in the Post Cold War Environment' 22 March 2001 *Australian Federal Parliament, Joint Standing Committee on Foreign Affairs, Defence and Trade: Joint Committees* Hansard at 535.

33 At this point I have reverted to Cover's use of the word 'law'. Please refer to text under the heading 'Norms, legal norms, legal meaning and law' above.

Abetz Senator E (Liberal Party) 'United Nations Human Rights Committee System' (2000) 31 August *Australian Federal Parliament: Senate Hansard* at 17133

AM 'Howard Questioned Over Asylum Seekers' 2 July 2002 *Australian Broadcasting Corporation News Online* <www.abc.net.au/am/s596132.htm>

Australian Government, Joint media release by the Australian Minister for Foreign Affairs, Alexander Downer; Attorney-General, The Hon Daryl Williams AM QC MP; Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock MP on Tuesday, 29 August 2000. 'Improving the Effectiveness of United Nations Committees' Tuesday 29 August 2000 FA97 <www.dfat.gov.au/media/releases/foreign/2000/fa097.html2000>

Bartlett Senator (Australian Democrats) 'Committees: Treaties Committee Report' (2000) 3 April *Australian Federal Parliament: Senate Hansard* at 13134

Charlesworth H 'Australia's Relations with the United Nations in the Post Cold War Environment' 21 March 2001 *Australian Federal Parliament, Joint Standing Committee on Foreign Affairs, Defence and Trade: Joint Committees Hansard* at 429

Charlesworth H 'Dangerous Liaisons: Globalisation and Australian Public Law' (1999) 20 *Adel LR* at 68-9

Cook Senator P (Labor Party) 'United Nations Human Rights Committee System' (2000) 31 August *Australian Federal Parliament: Senate Hansard* at 17118

Cooney Senator B 'United Nations Human Rights Committee System' (2000) 31 August *Australian Federal Parliament: Senate Hansard* at 1713'

Cover R 'Nomos and Narrative' and "Violence and the Word' in *Narrative, Violence and the Law: The Essays of Robert Cover* (1992) Minow M Ryan M and Sarat A (eds) University of Michigan Press Ann Arbor

Danby M MP (Labor Party) 'Matters of Public Importance — Howard Government: Human Rights' (2000) 5 September *Australian Federal Parliament: House of Representatives Hansard* at 20194

Della Torre E 'Women's business: the development of an Optional Protocol to the United Nations Women's Convention' (2000) 6(2) *AJHR* p 181

Downer A MP (Liberal Party) 'Question Without Notice: United Nations: Treaty

System' (2000) 5 September *Australian Federal Parliament: House of Representatives Hansard* at 20105

Downer A (MP) (Liberal Party) 'Howard Government: Human Rights' (2002) 6 June *Australian Federal Parliament: House Hansard* at 2954

Garran R 'Blood nose to flawed vehicle for change' (2000) August 30 *The Australian* at 5

Hearn J and Eastman K 'Human rights issues for Australia at the United Nations — Australia's non-refoulement obligations under the Torture Convention and the ICCPR' (2000) 6(1) *AJHR* at 216

Hirst P and Thompson G 'Globalization, Governance and the Nation State' (1996) in *Globalisation in Question: The International Economy and the Possibilities Governance* Hirst P and Thompson G (eds) Polity Press Cambridge UK

Kinslor J 'Non-refoulement and torture: the adequacy of Australia's laws and practices in safeguarding asylum-seekers from torture' (2000) 6(2) *AJHR* p 161

Mackay Senator S (Labor Party) 'Question without Notice: United Nations Convention on the Elimination of All Forms of Discrimination Against Women' (2000) 5 October *Australian Federal Parliament: Senate Hansard* at 17973

Mason Senator B (Liberal Party) 'United Nations Human Rights Committees: Australia's Participation' (2000) 5 September *Australian Federal Parliament: Senate Hansard* at 17361

Millett M and Bradley M 'Criminals "better off than asylum seekers"' *Sydney Morning Herald* 7 June 2002 at 2

Minow M Ryan M and Sarat A (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* University of Michigan Press USA

Newman Senator (Liberal Party) in 'Question without Notice: United Nations Convention on the Elimination of All Forms of Discrimination Against Women' (2000) 5 October *Australian Federal Parliament: Senate Hansard* at 17974

O'Byrne M (MP) (Labor Party) 'United Nations: Convention on the Elimination of All Forms of Discrimination Against Women' (2000) 6 September *Australian Federal Parliament: House of Representatives Hansard* at 20320

Ohmae K *End of the Nation State: The Rise of Regional Economies* Harper Collins London 1995

Pritchard S 'Facing the wrong way on human rights' (2000) 31 July *The Sydney Morning Herald* at 12

Rintoul S and Haslem B 'Man ordered home to follow in family footsteps to death' (1998) 20 November *Sydney Morning Herald* at 4

Ruddock P (MP) (Liberal Party) 'Australia's commitment to UN questioned' The 7:30 Report, 7/07/2000, *Australian Broadcasting Corporation* web transcripts at <www.abc.net.au/7.30/s149699.htm>

Sarat A 'Robert Cover on Law and Violence' (1992) in Minow et al pp 259-60

Senate Legal and Constitutional References Committee *A sanctuary under review: An examination of Australia's refugee and humanitarian determination process* The Parliament of the Commonwealth of Australia Canberra June 2000

Sidoti C 'Australia's Relations with the United Nations in the Post Cold War Environment' (2001) 22 March 2001 *Australian Federal Parliament, Joint Standing Committee on Foreign Affairs, Defence and Trade: Joint Committees Hansard* at 535

Stott Despoja Senator N (Australian Democrats) 'Question without Notice: United Nations Convention on the Elimination of All Forms of Discrimination Against Women' (2000) 4 September *Australian Federal Parliament: Senate Hansard* (2000) at 17202

Synder F 'Nomos, narrative, and adjudication: toward a jurisgenetic theory of law' (1999) 40(i5) *William and Mary Law Review* 1623 at 2 and 12