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18 Adolphus Street
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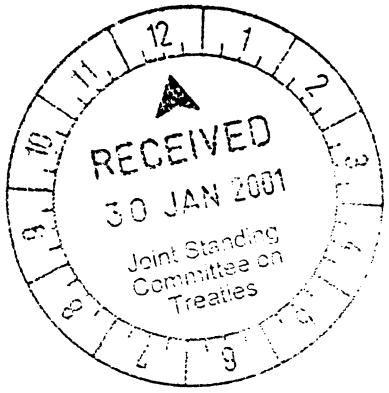
Mr Grant Harrison

Secretary, Joint Standing Committee on Treaties

Parliament House

CANBERRA ACT 2600



Dear Mr Harrison

Further to my telephone discussions last week with you and Mr Bob Morris re the JSCOT public hearing to be held in Parliament House, Macquarie Street, Sydney on Tuesday, 13 February next, I formally confirm my wish to appear before the Committee on that occasion to oppose the Government's proposal to ratify the *Statute of the International Criminal Court*.

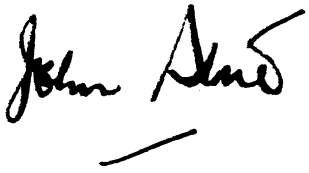
As background to the views which I shall then hope to state, I submit, for the information of Committee members, my paper *Setting the Sovereignty Scene: Use and Abuse of the Treaty Power*, delivered last November to the Twelfth Conference of The Samuel Griffith Society in Sydney. That paper, which relates generally to the work of the Committee rather than to the International Criminal Court proposal *per se*, was largely completed before that matter re-surfaced in

late October (see Endnote 23). Nevertheless it constitutes the fundamental framework from which my remarks on the *Statute* will derive.

On a less substantial note, but one which may be none the less of interest to Committee members, I also enclose a copy of my article *Serious Questions* appearing in the December, 2000 issue of *The Adelaide Review*. As you will see, this article deals generally with the Government's backsliding on the procedure for public consideration of and consultation on treaties, and in particular with the *Statute of the International Criminal Court*.

I shall look forward to hearing from you. Meanwhile, my good wishes.

Yours sincerely



John Stone

* I also enclose a disc, which may assist in your reproduction processes. JS.

Serious questions

JOHN STONE

BEFORE coming to office in 1996 the present federal government had promised to change the way in which previous Australian governments (from *both* sides of politics) had been going about the process of treaty-making. The proposed changes fell far short of what is required, providing the Parliament with only an advisory role rather than one of true power, and leaving the basic problem, the abuse of the external affairs power of the Constitution by successive Executives, wholly unaddressed. Nevertheless, these proposals were a welcome sign of some recognition, by the Coalition parties at least, that Australia's treaty-making history of the past 40 years or so has been disastrous.

How then are we to interpret the action of the Attorney-General, the Hon. Daryl Williams, and the Minister for Foreign Affairs and Trade, the Hon. Alexander Downer, in issuing their joint press release on 25 October this year declaring that the Government proposed to ratify the *Statute of the International Criminal Court*, and that, with a view to speeding up the process of doing so, legislation to give effect to that Statute in Australian domestic law would be introduced into the Parliament before the Christmas recess? How, in particular, are we to interpret the fact that this arrogant proclamation was made before the treaty in question had even been considered by the Joint Standing Committee on Treaties (JSCOT)?

Unfortunately, the answers to these questions are only too obvious. First, these developments derive from the fact that, whatever may be the legal qualifications of the Attorney-General, he is also a political *naif* who, on this matter as on so many others, has been totally captured by his thoroughly reprehensible department. Second, while the Minister for Foreign Affairs and Trade in this case probably carries the lesser burden of responsibility (because of the nature of the topic covered by the treaty), it is unfortunately clear from these developments (and from the whole history of this matter) that Mr Downer also is simply not on top of his portfolio. Third, and probably most importantly, these developments bear all the symptoms of that most repellent of diseases, the Canberra syndrome. After four and a half years in office, the Howard Government, and some of its ministers in particular, are showing all those signs of *hubris* which we have come to recognize in politicians who have grown too comfortable in those big white cars.

The *Statute of the International Criminal Court*, subversive though it is of Australia's sovereignty and dangerous though it is to the rights and liberties of Australian citizens, is merely the latest example – albeit a particularly offensive one – of those treaty-making trends which gave rise to that initial bout of reform-mindedness by the present government four years ago. Indeed, now that the facts about it are emerging, we are reminded that this Statute was originally signed by the present government back in July, 1998, after only two years in office. (Work on it had commenced under the aegis of the previous Minister for Foreign Affairs and Trade, the Hon. Gareth Evans, who, it may be remembered, was widely thought at that time to be angling for a United Nations appointment.) We also learn that, to quote the words of the Attorney-General's and Foreign Affairs and Trade officials:

> Australia played a leading role in the negotiation of the Statute... [That] leading role... allowed it to be closely involved in developing the text of the Statute... The establishment of the Court has been one of the Government's prime human rights objectives...

All this is, to say the least, startling. For a treaty which, according to those same officials:

> ... stands as the third pillar beside the *Charter of the United Nations* and the *Statute of the International Court of Justice*,

there has been an astonishing lack of public discussion. I am, I believe, more immersed in the study of current affairs questions than most Australians; yet I can only recall one previous public mention of this matter, when, regrettably, Australia signed the Statute in 1998. In my opinion, therefore, not only is the Statute itself a bizarre abandonment of Australian sovereignty, but the handling of the matter by the two ministers concerned – particularly the Attorney-General – has been so surreptitious as to be properly describable as deceitful.

By sheer coincidence, The Samuel Griffith Society (of whose Board, I should say, I am a member) had some time ago convened a conference in Sydney over the weekend of 10-12 November last at which the general topic of Sovereignty, and the use and abuse of the treaty power of our Constitution by successive Australian governments, figured largely on the agenda. In his opening address to the

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Society, its President, Sir Harry Gibbs (himself an ex-Chief Justice of the High Court of Australia) remarked upon the recent course of Australia's treaty-making as follows:

> Before the 1960s it was exceptional for a treaty to dictate to a State how it should govern the inhabitants of its territory...
>
> The flood of treaties began to flow strongly in the 1960s. That was the time when the transformation of culture – some would say its disintegration – ... began to accelerate.
>
> It has been argued by a [Non-Governmental Organisation] that the reference to cruel, inhuman and degrading treatment in [the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*] extends to cases of domestic violence. Other, even more bizarre views have been expressed by the [UN] committee set up under the *Convention for the Elimination of all Forms of Discrimination Against Women*...

There is much more to this effect in Sir Harry Gibbs' paper, entitled *The Erosion of National Sovereignty*, and in at least five other papers to the same conference on such related topics as the *UN Convention on Refugees*, the International Labor Organisation, the *Kyoto Protocol* on so-called 'global warming', and the Northern Territory's experience with mandatory sentencing.*

To return, however, to the International Criminal Court proposal, there are some extremely serious questions to which the government should provide some answers. To list only a few of them:

- If the establishment of this body is of a significance equivalent to that of the United Nations itself, how is it that almost no Australian men and women in the street have even heard it mentioned in public discourse?
- If this body is to serve such high moral purposes as its proponents proclaim (a phenomenon invariably suspicious in itself), why has the world's greatest democracy, the United States of America, expressed from the start implacable opposition to its establishment?
- Why – to take but one example – have well-respected US legal scholars said that this body would, if established, threaten the rights of US (and every other country's) citizens to such fundamentals as trial by jury, the right to reasonable bail, the right to a speedy trial, the right to confront their accusers (as distinct from being the subject of anonymous witnesses and hearsay evidence), and the absence of any right to appeal? Is *this* the kind of justice which the Howard Government is prepared to contemplate importing into Australia by the back door via this further, and more than usually egregious, abuse of the external affairs power?
- Why, if this treaty is so morally desirable, have only 22 countries so far ratified it (including only seven which could be described as being of any substance)? Where, in that ratification process, are countries such as the USA (as noted earlier), the United Kingdom, Japan, China, Russia?... and the list goes on.

Space precludes further comment. One thing, however, may finally be said. Not long ago the Government was forced into the most abject of backdowns on its previous intention to ratify the OECD's *Multilateral Agreement on Investment* – a treaty which, whatever may have been its defects, was simply not in the same class of offensiveness as the proposed *Statute of the International Criminal Court*. With that ignominious experience in mind, the Prime Minister would do well to take (one would assume, for the first time!) some interest in this matter. If, by contrast, he continues to leave it to be handled by the two hapless ministers who have so far been entrusted with the carriage of it, he should be aware that the electoral conflagration likely to ensue next (election) year will not only make that earlier MAI experience look like a children's tea-party, but that nothing will so rapidly revive the Hansonism which he has spent so much effort trying to dampen down.

Over to you, Mr Howard. ■

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* Enquiries about these papers, or The Samuel Griffith Society more generally, may be made by referring to its website at www.samuelgriffith.org.au

"Setting the Sovereignty Scene:

Use and Abuse of the Treaty Power"

Paper delivered by

John Stone

to the Twelfth Conference of

The Samuel Griffith Society

Sydney, 11 November, 2000

Setting the Sovereignty Scene: Use and Abuse of the Treaty Power

Some of the ground to be covered in this paper has already been trodden, and more authoritatively, by our President, the Rt Hon Sir Harry Gibbs, in his splendid address to our opening Dinner last night, *The Erosion of National Sovereignty*. Nevertheless, in "setting the sovereignty scene" it is necessary to traverse some of it, albeit briefly, again.

The concepts of sovereignty, on the one hand, and the nation state, on the other, are two sides of the same coin. When the Thirty Years War (1618-48) ended in the Treaty of Westphalia, the Holy Roman Empire finally foundered. In its place there arose a bevy of European nation states, each proclaiming its full territorial sovereignty and its full independence from the "world governance" hitherto imposed (in varying degrees) from Rome.[1]

In recent times it has become fashionable in some circles to say that in this increasingly "globalised" world the nation state has had its day; and that, as a consequence, national sovereignty also is an increasingly out-dated concept. Shallow views of this kind typically emanate from such bodies as the World Economic Forum;[2] the United Nations; bodies of international lawyers; the Foreign Offices of (much of) the world; and other such obviously self-interested quarters.

Other than to dismiss it with the intellectual contempt which is all that it merits, I do not wish to spend time today on that view. Rather, I wish simply to examine the effects of treaty-making on national sovereignty – taking, as I do, both the continuing existence of the nation state, and the importance which its people invariably place upon preserving its sovereignty, as given.[3]

To that end, I shall examine four questions:

- Why do nation states enter into treaties, and how may such treaty-making be categorized?
- In particular, is entering into treaties in the national interest, or merely an expression of the moral vanity of those persons (foreign affairs officials, government Ministers) who do so, ostensibly on behalf of the people of their nation?
- What is the effect on a nation's sovereignty when it enters into a treaty?
- Does treaty-making have implications for the domestic democratic processes of the nation (e.g. via contributing to the so-called "democratic deficit"), and if so, what are the likely consequences?

The last of those questions will lead me to a topic long familiar to members of this Society – namely, the abuse of the external affairs power (s.51(xxix)) of our Constitution both by successive Australian Governments and successive High Courts, and to the corrosive effects of those abuses both upon the federal nature of our Constitution and, over time, upon Australians' respect for the rule of law.

As to my first question, it is useful to begin by asking why Australia enters into treaties at all. In asking that question, it is no part of my case to suggest that we should not do so; no sensible Australian would question the desirability of our entering into treaties where, on all the evidence, it is in our national interest to do so. Clearly, for example, a significant trading nation like Australia finds it advantageous, on balance, to belong to the World Trade Organisation (or its predecessor, the General Agreement on Tariffs and Trade, the GATT), notwithstanding the discomforts which WTO membership can also bring from time to time. But, to go to the opposite extreme, what national interest is served by – or, in more hum-drum language, how do Australians benefit from – our becoming a party to the *U.N. Convention on the Rights of the Child*?[4]

In researching this paper I had occasion to consult the Treaties Secretariat of the Department of Foreign Affairs and Trade.[5] It is salutary to see how that body's *Information Kit*, which "has been put together ..... in the interests of improving understanding of Australia's participation in the treaty process", answers its own question, "Why are Treaties necessary?" Space precludes more detailed examination, but suffice it to say that the Department's answer draws heavily upon the kind of "globalisation" arguments the shallowness of which was dismissed earlier, together with various sweeping generalizations (e.g. "the need for global rules on the protection and promotion of ..... the world's cultural and natural heritage is now widely accepted") which, in most cases (like the one quoted) simply do not stand up to sceptical analysis.

The truth is that the most basic reason why, in the view of the Department of Foreign Affairs and Trade, treaties are necessary, is that the process of treaty-making provides numerous officials of that Department with a well-paid career, much of it spent in the gilded salons of Geneva, New York or wherever else international bureaucrats choose to ply their trade at the expense of their respective taxpayers. In that sense it is, if you like, nothing more than a particular example of so-called "public choice" theory.

Australia today is a party to something in the order of 2,000 treaties – about 300 of which were "inherited", so to speak, from our British origins up to the point where, by the Statute of Westminster (1931), Australia became a fully independent, and hence fully sovereign country. Different observers, surveying these treaties, would doubtless put forward different taxonomies for their classification. For the purposes of this paper, however, the treaties into which we have entered may be usefully separated into the following categories:[6]

- treaties which are of a "technical" nature, as against those of a "political" nature; or
- treaties which might be described as "necessary" in the national interest, or those which, while perhaps not strictly necessary, may still be regarded as, on balance, "useful", as contrasted with those which appear to serve no other purpose than to bolster the moral vanity, and flatter the egos, of those entering into them (together with, of course, their *claques* of supporters). For completeness, it

should be added that it is this last category of "morally vain" treaties which also most comprehensively serves the purpose of those who wish to enter into treaties for the constitutionally subversive purpose of undermining the federal compact which lay at the heart of Australia's Constitution, in order that more power should be concentrated in Canberra.

Many of Australia's treaties are of the "technical" variety, for example:

- the earliest international treaty to which any part of Australia adhered, the International Telegraphic Convention of 1875, to which the Colony of South Australia became a party on 3 June, 1878 (followed in due course by each of the other five Australian Colonies, the last being Queensland in 1896). Via a series of transformations this treaty became the International Telecommunication Convention of 1932, which was ratified by Australia in March, 1934.
- our membership of the Universal Postal Union, which was signed by Britain for the Australian colonies in 1897 and subsequently ratified by Australia in 1904.
- our numerous post-World War II bilateral treaties governing taxation, by Australia and the respective bilateral partners, of income arising in one nation and flowing to the other. The earliest such double taxation treaty, with the United Kingdom (then the chief source of foreign capital for Australia) was entered into in 1946; that with the USA in 1953; that with Japan in 1970; and so on.
- the international agreements on standardisation of national accounts, involving consultations under the auspices of no less than five international organisations.[7]

Judgments will differ as to where this "technical" category of treaties ends and where the "political" category begins. Moreover, within the latter category there are widely differing cases; for example:

- The Australia New Zealand Closer Economic Relations Trade Agreement, entered into between the two countries in January, 1983 signified a political decision by the respective governments to enter into a "closer economic relationship" than previously obtained between either of them and any other countries. The matters covered in this treaty were essentially of a highly political kind, relating principally to trading arrangements and the breaking down of protection of the two countries' industries against each other. It also laid the foundation for a much closer intertwining of their economies – and, in a broad sense, their polities.
- By contrast, the *UN Convention on the Elimination of all Forms of Discrimination against Women*, which was signed by Australia in 1980 (but not ratified until July, 1983) is a typical product of the UN "world governance" élites – allied in this case with the forces of "political correctness" in general and militant feminism in particular.
- In the same vein we have the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, signed by Australia in 1985 and subsequently ratified in 1989. Does anyone assert that Australians need to be widely protected against "torture" (however defined), or "cruel, inhuman or degrading treatment or punishment" (however, and potentially much more

loosely, defined), by their governments, or their fellow Australians? And to the extent that they do, does anyone assert that the remedies already provided under Australian law are not wholly adequate? Given the undeniable answers to those two questions, why then does Australia need to resort to a windy international treaty on such matters?

It is of course questions of that kind which lead me to my alternative treaty taxonomy – the categorisation of treaties into those which are "necessary", "useful" or merely "morally vain". Clearly, many – even most – of those treaties classifiable as "technical" fall into the category of "necessary" treaties. Thus, even in 1878 it made good practical sense for the then Colony of South Australia (including, as it then did, what is now the Northern Territory, where the international telegraph from London first came ashore) to adhere to the International Telegraphic Convention. Today, it would be impossible to maintain our vast, and vastly complex, network of telecommunications with other countries in the absence of an international agreement governing the technical and financial relationships involved. It is no accident that our membership of the International Telecommunications Convention, and of its equally necessary postal counterpart, the Universal Postal Union, are among Australia's earliest treaty relationships. To a nation so affected by "the tyranny of distance", such treaties were more than usually necessary.

How, though, would one classify those other "technical" treaties to which I referred earlier, our double taxation treaties? Strictly speaking, they might not be described as "necessary" – and indeed, were clearly not regarded as such prior to 1946, when the first of them, with the United Kingdom, was drawn up. Even today, it is clearly not thought necessary to have such treaties with a great many other countries – and certainly not with all other members of the United Nations. As a broad generalisation, such treaties are not generally regarded as "necessary", in Australia's case, unless the counterparty has a significant economic interest (generally via capital investment, and the income produced by that investment) in Australia, or *vice versa*. Thus it was no accident that our second such treaty, that with the United States, was entered into with the nation which, after World War II, began to vie with Britain as the most important source of capital investment in Australia.

Consider however another "technical" treaty to which Australia is a party, the *Convention of the World Meteorological Organisation*, ratified by Australia in 1949. It is at least arguable that in Australia's case our membership of this Convention is not strictly "necessary". Unlike most of its other members, we are a long way from anywhere – and in particular, from anywhere from which our weather derives – and it could be argued that, if our membership were terminated tomorrow, our Bureau of Meteorology would not be greatly incommoded. Nevertheless, it can equally be argued that our membership costs us rather little, that our participation in joint activities of the World Meteorological Organisation (WMO) involves no significant interference in our domestic affairs, and that membership of the WMO "club" gives us access to research and other scientific relationships which are of some value to our

scientific community. On that basis, while this technical treaty might not be "necessary", it could probably be regarded as being at least "useful".

Within the category of "political" treaties, consider one such as the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea ... relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, signed for Australia in December, 1995 and subsequently ratified last December, but not yet in force. Australia's waters are, doubtless, home to so-called "straddling fish", and for all I know, to "highly migratory" ones also (although whales, of course, are not fish). On that basis, perhaps one might classify our membership of such a treaty as marginally "useful".

By contrast, the *Agreement governing the Activities of States on the Moon and other Celestial Bodies*, which was adopted by the UN General Assembly in 1979 (after having been developed – one might almost have guessed it! – by UNESCO) and acceded to by Australia in 1986, could be described, almost literally, as moonshine. For one thing, Australia is unlikely ever to undertake independently any activities on the moon (still less, on "other celestial bodies"!). For another thing, any major world power, such as the USA, the USSR (at the time of the Agreement's inauguration), or the European Community, which might undertake such activities at some future time, will then do just what it pleases, and no amount of finger-wagging or other forms of moral posturing by Australia or any other minor power will cause it to do otherwise. (It is worth noting that none of these major powers has acceded to this more than usually nonsensical document; Australia could even be said to be the most significant party to it, of the only 9 nations in that category!). Clearly, such a "political" treaty falls squarely into the "morally vain" category.

At least it may be said of that Agreement that, morally vain though it undoubtedly is so far as Australia is concerned, it probably would not do us much real harm if it were ever to become truly effective. That can certainly not be said of a plethora of other such treaties in the "morally vain" category to which Australia, for reasons best known to those responsible on *both* sides of politics, has chosen to become a party. Consider the following examples:

- The *International Covenant on Civil and Political Rights.*
- The *International Covenant on Economic, Social and Cultural Rights.*
- The *UN Convention on the Elimination of all Forms of Racial Discrimination.*
- The *UN Convention on the Prevention and Punishment of the Crime of Genocide.*

Such examples could be multiplied many times over. Yet, to take only these examples, Australians have long enjoyed all the civil and political rights in question. Australian Parliaments have long made their own judgments (and, unlike the United Nations, been accountable to their electors in the process) as to the economic, social and cultural "rights" appropriate to be bestowed upon the citizenry. Every Australian State has its own legislation governing questions of racial discrimination, providing for legally enforceable penalties against it. As to the crime of genocide, and

notwithstanding the fevered imaginations of people like Sir Ronald Wilson and Mr Pat Dodson, that is not, thankfully, a crime about which Australians have ever needed to be concerned within their own country. Why then – moral posturing apart – has Australia seen fit to ratify a UN Convention which has nothing whatsoever to do with us?

The general answer sometimes given to questions of this kind is that, although there is no real need for Australia to be a party to any of these treaties from a domestic viewpoint, we should nevertheless sign up to them in the interests of being "a good world citizen". Alternatively, there is the *in terrorem* argument that, were we not to accede to treaties of this kind, Australia would become "an international pariah" in the eyes of "the international community". To take but one example, this latter argument was deployed *ad nauseam* by Commonwealth public servants and virtually every journalist writing on the topic in the lead-up to the negotiations on the Tokyo Protocol in respect of so-called "greenhouse warming". In that instance, the argument remains even more unconvincing now than it was then.

Space precludes any exhaustive examination of such generalized defences. Suffice to say that being "a good world citizen" (in the eyes of the Foreign Office élites) butters no more parsnips in today's world than it would have done when, nearly two centuries ago, there was first coined that famous dictum that a nation has no permanent allies, but merely permanent interests. As to "the international community", there is of course no such entity; and hence no need for concern about being regarded as "an international pariah" by that non-entity.

That comment about the non-existence of any such thing as "the international community" may evoke echoes of Mrs Thatcher's (as she then was) famous remark that "there is no such thing as society". Lest I be misunderstood – including, as in Mrs Thatcher's case, deliberately misrepresented – I am *not* saying that Australia need not care how it behaves internationally. In saying that there is no such thing as "the international community", I am saying rather that there are some billions of people in other countries to whom we should behave as we would wish them to behave towards us, but that there is no single entity which could possibly be sensibly described as "the international community".[8] I am also saying that, by and large, Australia's reputation in the world (including our classification or non-classification as "an international pariah") will stand or fall on the basis of how Australians comport themselves in the world both as individuals and as a nation; and that, by and large, we have earned a reputation for having comported ourselves, during the near century of our existence as a nation, rather well. Needless to say, that reputation has nothing to do with our having adhered to a bunch of morally vain pronouncements in the shape of treaties of this kind.

The second of the four questions enunciated at the outset of this paper was whether the entering into of treaties was undertaken in the national interest, or merely as an expression of the moral vanity of those principally involved in treaty-making. From what has already been said, the answer is, obviously, that it is sometimes the former

and only too often the latter. Nevertheless, it may be worthwhile spending a little more time on the issue by posing the basic question: how do we decide when it is in the national interest for Australia to accede to a treaty?

The answer to that question, I suggest, is that it is in Australia's national interest to enter into a treaty (a) when doing so provides us with something that we need; and (b) when we cannot provide that "something" solely by our own actions. Even if those two necessary conditions are satisfied, that may not be sufficient reason to enter into the treaty if the obligations we undertake by doing so outweigh the value of the desired benefits.[9]

Against that yardstick, many – perhaps most – of the treaties earlier categorized as "technical" would probably pass this test. So would many of those earlier categorized as "political", such as the Australia New Zealand Closer Economic Relationship Trade Agreement. Many other treaties in that "political" category would not, however, pass that test, and clearly should never have been acceded to by the Australian Governments of the day.

As for my alternative taxonomy, treaties earlier categorized as "necessary" would almost by definition pass the national interest test. So would many – perhaps most – of those treaties earlier categorized as "useful". Clearly, however, very few, and perhaps none, of those treaties earlier categorized as "morally vain" pass this national interest test. Indeed, it is fair to say that they differ only to the extent to which they *fail* that test.

It would be wearisome – and again, space in any case precludes doing so – to detail the manifold reasons why this "morally vain" category of treaties fails, time and again, to pass the national interest test. However, the posing of even a few simple questions may suggest the general line of argument. For example:

- As noted earlier, do Australians need the United Nations to instruct us not to torture each other (or anyone else, for that matter)?[10]
- Again, do we need the United Nations to instruct us not to discriminate against our fellow Australians but rather to treat them equally? There can be few more genuinely egalitarian countries than Australia in the world.
- Again, do we need the United Nations to instruct us in how to bring up our children? I defy anyone to advance a single instance of the beneficial effects upon Australians of our adherence to the *UN Convention on the Rights of the Child.*

The same point can be made in another way, again by way of example. In 1906 Australia acceded to the 1904 *International Agreement for the Suppression of the "White Slave Traffic"*. Clearly, we did not do this in order to guard against the ravages of that deplorable activity in Australia – where, even in 1906, there would have been laws against such activity (probably, and in my view rightly, harsher laws than exist today). We (or technically speaking, at that time, Britain on our behalf) acceded to that treaty partly in the doubtless genuine hope that it might contribute to

wiping out the traffic in women concerned, but also because doing so flattered the moral vanity of the treaty-makers. Suffice to say that, nearly a century later, the "white slave traffic" – or these days, more often the "brown slave traffic" from countries such as Thailand or The Philippines – is still flourishing, Australia's membership of that treaty, not to mention our own immigration laws, notwithstanding.

It is time now to turn to the third question posed at the outset – namely, what is the effect on a nation's sovereignty when it enters into a treaty? In addressing that question, it is instructive to see what our Department of Foreign Affairs and Trade has to say on the matter in answering its own question, "Does ratification of international treaties result in a loss of sovereignty?"[11]

According to the Department, "ratification of international treaties does not involve a handing over of sovereignty to an international body". Why not? Because:

> "..... implicit in any Australian decision to ratify a treaty is a judgement that any limitations on the range of possible actions [that the treaty may impose on Australia's future capacity to act in particular ways] ..... are outweighed by the benefits which flow from the existence of a widely endorsed international agreement".

Leave aside, for these purposes, the question of who makes that so-called "Australian decision", as well as the fact that by no means all treaties are describable as "widely endorsed international agreements" (e.g., the aforementioned *Agreement governing the Activities of States on the Moon and other Celestial Bodies,* which 20 years later has attracted only 9 member states). Boiled down to its essentials, the Department's statement amounts to saying that while (contrary to its initial statement quoted above) ratification of international treaties *does* "involve a handing over of sovereignty", nevertheless that sacrifice of sovereignty is justified by "a judgment" (again, by whom?) that that sacrifice is "outweighed by the benefits" of doing so. This of course is essentially similar to what I have earlier called "the national interest test".

There is however a vital difference between that test as I have formulated it, and the manner in which it is formulated by the Department. That difference is exemplified in the immediately following paragraph of the Department's exposition, namely:

> ".....ultimately, formal legal sovereignty is retained [when a country enters into a treaty], as the power to enter into such arrangements remains with Government".

This is precious close to saying that we retain our sovereignty because we retain the power to reclaim it after having surrendered it! A similar assertion is made in the conclusion of the Departments' answer, where it is said that, although "ratification of a treaty does require a State to perform its obligations in good faith", nevertheless "this is an exercise, not a relinquishing, of sovereignty". All one can say is that one could have fooled every Australian man and woman in the street on that score.

It is true that, as the Department goes on to say:

> "The Government also retains the right to remove itself from treaty obligations if it judges that on balance the treaty no longer serves Australia's national and international interests.[12] (Since 1996 Australia has tabled documents in Parliament foreshadowing its withdrawal from several multilateral treaties on the basis that these treaties no longer served Australia's interests.)"

Again, this goes to the question of sovereignty. In those (limited number of) cases where Australia has formally denounced treaties into which it had previously entered, it has restored that part of its sovereignty which it had previously yielded up – and as the Department notes, there have been several such examples in recent times.[13] It is therefore certainly important – indeed, absolutely essential – that every treaty into which any Australian Government ever enters should contain within its terms due processes for its denunciation. Apart from any other consideration, it is simply not possible, within our system of parliamentary democracy, for any Parliament (or still more inconceivably, any Executive) to bind for all time the hands of all future Parliaments – not to mention the people whom those Parliaments purport to represent. But the mere fact that (I presume) all of our treaties do contain such terms for denouncing them does not mean that our entering into them has not involved any loss of sovereignty while we remain bound by them.

This brings us to the heart of the matter. On the one hand, we have what appears to be the official view – namely, that so long as any treaty into which Australia enters contains within its terms due processes for its possible future denunciation, then there can be no loss of sovereignty involved. Ratification of a treaty is, in those already quoted words of the Department of Foreign Affairs and Trade, "an exercise, not a relinquishing, of sovereignty".

The opposing view, on the other hand – the view to which I subscribe, and to which I suggest the overwhelming majority of Australians would subscribe – is that when Australia enters into a treaty, some sacrifice of sovereignty *is* involved (in varying degrees, depending upon the scope of the treaty) and that the only question is whether that sacrifice of sovereignty is justified in the national interest by the benefits which accession brings to Australians.[14]

Take, for example, the *UN Convention on Refugees*, which will be the subject of the Hon. Peter Walsh's immediately following paper. If only for that reason, I shall not refer to that treaty in detail. Suffice to say however that, to the average Australian, the obligations under which Australia apparently labours as a result of our accession to that Convention are as amazing as they are, simply, democratically unacceptable. The pass to which we have been reduced – and which must make Australia's name a laughing stock wherever any group of people smugglers is gathered together – is nothing short of extraordinary, as I am sure Mr Walsh will be telling us. It simply does not make sense, under such circumstances, to assert that, those facts notwithstanding, our sovereignty has been in no way impaired merely because the Convention in question contains provisions for us to withdraw from it! That seems to me to verge on doubletalk.

Again, consider another topic on which, later today, we shall also be hearing from two other speakers, M/s Ruth McColl, SC and the Hon. Denis Burke, MLA – namely, mandatory sentencing. Whatever the rights and wrongs of that issue may be, I confidently assert that there would not be one Australian in a thousand who would think it appropriate that the United Nations itself – let alone the miserable collection of international legal activists and other assorted misfits who make up the U.N. Committee on Human Rights – should intervene to lecture us on how we should approach the entirely domestic issues involved.

Considerations of that kind bring me to my fourth initially stated question, namely, does treaty-making have implications for the domestic democratic processes of the nation; and, if so, what are the likely consequences?

Protestations to the contrary notwithstanding, it is clear that treaty-making does have implications for Australia's domestic democratic processes, and that those implications have been seriously malignant.

First, there is the fact that the process of treaty-making has resulted, when taken in conjunction with the enormously expanded interpretation which the High Court in the past twenty years or so has given to the "external affairs power",[15] in a huge expansion in the powers of the Commonwealth at the expense of those of the States. Of course, those who are in favour of greater centralization of power in Canberra (not least, a number of past and present High Court Justices) have doubtless welcomed this development. But anyone who believes in the old adage that "power corrupts" can only deplore it – as well as the fact that, by removing decision-making from the State peripheries and focussing it in Canberra, the Australian people have been relegated to one further remove from that process. Concerns of this kind were at the heart of the formation of this Society, and if only on that score perhaps need not be elaborated further.

There is however another way in which this "democratic deficit" between the decision-makers and the people has been widened via the treaty-making process. It derives from the fact that, increasingly, activists among the ranks of our judiciary, both State and federal, are disposed to seize upon the fact that Australia has ratified a treaty[16] in order to rule for (or against) certain outcomes. The most notorious example of this proclivity to date has been the High Court decision in the *Teoh Case* in 1995;[17] but there is a growing list of other examples.

It was the President of this Society, the Rt Hon Sir Harry Gibbs, who said that the High Court's widening of the interpretation of the "external affairs" power of the Constitution had now advanced so far that one could almost replace the two words "external affairs" in s.51(xxix) by the single word "anything".[18] The seriousness of that statement – and more fundamentally, the seriousness of the situation to which it referred – can hardly be overstated. As Dr (now Professor) Greg Craven has pointed out in several of his papers to this Society analysing the performance of the High

Court of Australia,[19] there is probably no single aspect of judicial activism on that body's part which has done more to bring into disrepute the highest court in our land.[20]

The results are obvious. First, government from Canberra has now intruded into almost every facet of peoples' lives. Powers which, at the time of federation, were carefully withheld from the Commonwealth by the framers of our Constitution, are now exercised almost daily by Ministers in Canberra on the basis that, legally, to do so is necessary for the implementation of some treaty or other into which the Executive has entered and where, according to the High Court, that now means that the Commonwealth's writ must run.

It was a great American who said that you can fool all the people for some of the time, and some of the people for all of the time, but that you can't fool all the people all the time. Gradually, as the truth of what has been done to their Constitution, particularly in the past 20-25 years or so, by the centralists in Canberra has dawned upon the Australian people, there has emerged a mixture of feelings.

There has been anger at the way in which the federal compact has been almost conspiratorially eroded, and without reference (in those respects) to the people via the referendum mechanism of s.128.[21] There has been a growing sense of betrayal. Above all, and most dangerously of all in terms of the long-term health of the nation, there has been a growing loss of faith both in the system and in those who administer it (Commonwealth Ministers, their officials, and the federal judiciary – not excepting even the High Court of Australia). Is it any wonder that this growing sense of despair should give rise to such phenomena as the rise of Pauline Hanson? Or that the seeds of Hansonism should still be there, waiting to be tilled anew, even though that lady herself may have effectively disappeared from the political scene?

Those facts notwithstanding, nobody should be under any misapprehensions that the same constitutional termites which have brought us to this pass are continuing to gnaw at the foundations of our nation. The project to which they have been devoting themselves for some time now is to attain, in effect, a "Bill of Rights" by the back door. Knowing, as they do, that the people will never countenance the bringing in of a Constitutional amendment to that effect,[22] they have set about attaining one, in effect, via the treaty power. But that, like so many other aspects of this huge topic, is a matter for a paper in its own right.

The present Government, to its credit, has taken some small steps to render the exercise of the treaty power somewhat more transparent, and to involve the Parliament somewhat more extensively in the treaty-making (and particularly treaty ratification) processes. Yet nothing has really changed, and even such small crumbs of comfort as this particular Executive has given can, and I predict will, be taken away by a different Executive in future, unless something is done to prevent that happening.[23]

As that comment suggests, there is in truth only one conclusion to be drawn – namely, the need for a constitutional amendment to hobble the Commonwealth's use of the

treaty power for purposes for which, clearly, it was never intended. Such an amendment was drafted some years ago by another speaker to this Society, Dr Colin Howard.[24] Not surprisingly, it has not found favour with even the so-called "conservative" side of Canberra politics – which, when the chips are really down, is just as power-hungry as those who sit opposite it. But, as the recent public utterances of the Chief Minister of the Northern Territory may suggest,[24] its time, I believe, is coming.

Endnotes:

1. It is for this reason that national sovereignty, as commonly understood, is often referred to in academic circles as "Westphalian sovereignty". According to some academic writers, Westphalian sovereignty is only one of several forms of sovereignty (e.g. "domestic sovereignty", "interdependence sovereignty", "international legal sovereignty"). Interesting though some of this dancing upon the points of academic needles may be, however, it is Westphalian sovereignty (the autonomy of the sovereign to act without external let or hindrance within the territory of its own nation) which accords with the understanding of the term by the man (or woman) in the street, and it is around that concept of sovereignty that this paper is constructed. On this and other aspects of sovereignty, as well as some nice historical material, see Stephen D. Krasner, *Sovereignty: Organised Hypocrisy*, Princeton University Press, Princeton, New Jersey (1999).
2. A latter-day successor to its 1970s predecessor, the Club of Rome, whose corporatist effusions on the intellectual fads of those days bore a striking resemblance to those pronounced from on high on Mount Davos today.
3. The enduring quality of the nation state, and the sovereignty which goes with it, has been demonstrated over and over again in recent years, including via the (re-) emergence of such ethnically based new nations as Croatia, Slovakia, Macedonia and so on.
4. For some arguments as to the costs of entering into the *UN Convention on the Rights of the Child*, see Barry Maley, *Importing Wooden Horses*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 10 (1998), 201.
5. Since this paper contains a good many criticisms, both explicit and implicit, of the attitudes of our Department of Foreign Affairs and Trade officials to the whole process of treaty-making, it is only fair to note at the outset that, when I approached the Treaties Secretariat of that Department, the official concerned was extremely helpful – not merely in directing me to the appropriate internet website, but also providing me with hard copy versions of the two major Australian Treaty lists (Bilateral and Multilateral), as well as the Indexes thereto. Regrettably, it must be added that the accompanying departmental *Information Kit* is a highly tendentious document - to the point, in places, of being positively misleading.
6. As noted in the immediately preceding Endnote, treaties are also distinguishable into Bilateral ones (between Australia and one other nation) and Multilateral ones

(involving several, or a multitude, of other nations). However, treaties in both cases are still separable into the categories used in this paper.

7. The International Monetary Fund (IMF), the World Bank, the Organisation for Economic Co-operation and Development (OECD), the Commission of the European Communities (Eurostat) and the United Nations. The System of National Accounts 1993 (SNA93) recently replaced the earlier version published in 1968 (SNA68). See *Implementation of Revised International Standards in the Australian National Accounts*, Australian Bureau of Statistics Information Paper (catalogue 5251.0), Canberra, 1997.
8. It is indeed ironic, in a post-Berlin Wall world, that the Foreign Offices of that world, and their own "club" in the United Nations, should so eagerly continue to embrace the collectivist mentality which the very term "the international community" so strikingly signifies.
9. Stating the conditions for determining the national interest in this general way does not, of course, resolve the question of how those conditions are to be weighed, *and by whom*, before the decision is taken to ratify a treaty. That raises the whole issue of executive authority as against the involvement not only of the Parliament in Canberra, but also of the Governments, and as necessary the Parliaments, of the States. This is a large issue, meriting a paper in its own right, and cannot be pursued further here.
10. Typically, many of the UN member signatories to the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* are themselves nations where cruel, inhuman and degrading treatment and punishment are commonplace, and where even torture is also by no means uncommon. A few examples will suffice: Afghanistan, Albania, Cameroon, China, Democratic Republic of the Congo ..... and the list goes on.
11. *Australia and International Treaty Making: Information Kit,* Department of Foreign Affairs and Trade, Canberra, November, 1999, pp.8-9.
12. Note the phrase "Australia's national *and international* interests". (Italics added). What are Australia's "international interests"? Are they not merely a particular facet of Australia's *national* interests? If so, why should they be stated separately? If not, what are they (other than, perhaps, the "world governance" interests of some of our Foreign Affairs officials)?
13. For example (and apart from the formal – but otherwise not materially significant – denunciation of treaties which had been subsequently superseded by new treaties embracing essentially the same, but updated, obligations), Australia has in recent years formally denounced, and withdrawn from, such treaties as:
    - *Constitution of The United Nations Industrial Development Organisation* (UNIDO). Ratified by Australia in July, 1982. Instrument of denunciation lodged December, 1987 with effect 31.12.1988. (Note that Australia subsequently acceded *again* to this Organisation in January, 1992 and *again* denounced membership in December, 1996 with effect 31.12.97. Clearly, Foreign Affairs officials don't give up easily!)
    - *Statutes of the World Tourism Organisation* (WTO). Instrument of adoption deposited by Australia in September, 1979. Instrument of withdrawal deposited July, 1989 with effect 26.7.1990.

- *Agreement establishing the Common Fund for Commodities*. Ratified by Australia in October, 1981. Letter of withdrawal deposited August, 1991 with effect 20.8.1992.

14. In saying this, I am aware that I am opposing the view recently stated by my friends in the Lavoisier Group in their submission of 28 August, 2000 to the Joint Standing Committee on Treaties Inquiry into the Kyoto Protocol. Thus, on page 4 of that submission it is stated that:

> "The statement [by a Commonwealth public servant on behalf of the Secretary of the Department of the Environment] that 'every agreement to which the Commonwealth Government commits Australia involves some ceding of sovereignty' makes sense only if the treaty contains no withdrawal or repudiation clauses, ..."

With respect, I beg to differ. Indeed, it appears to me a counsel of despair to concede, in effect, that we need not be concerned about loss of sovereignty so long as every treaty into which Australia enters contains a denunciation clause. That is to gain the shadow (formal retention of sovereignty) while sacrificing the substance (practical loss of the nation's freedom of action, to a greater or less extent). On that basis, our Department of Foreign Affairs and Trade – and the governments, from *both* sides of politics, which sanction its actions – can go on ratifying treaty after treaty to their heart's content.

For the sake of completeness, it should also be noted that my difference from the Lavoisier Group position on this matter does *not* imply that I agree with the overall policy position being taken by the Commonwealth public servant whose statement is referred to above – and whose statement on the sovereignty issue, incidentally, appears to be 180 degrees at variance with the official view on that issue as enunciated by the Department of Foreign Affairs and Trade, quoted earlier.

15. Section 51(xxix) of the Constitution, which states:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: .....
>
> (xxix) External affairs."

16. Even where the treaty has not subsequently been enacted into domestic law by the Parliament.

17. *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995), 183 CLR 273. On the import of that decision, one can do no better than to quote the Department of Foreign Affairs and Trade's own *Information Kit* (p.14), as follows:

> "In April 1995, the High Court of Australia handed down its decision in [the *Teoh Case*]. In that case the Court decided that ratification of a treaty gave rise to a 'legitimate expectation' that administrative decision makers would act consistently with the terms of the treaty even if those terms had not been legislated into domestic Australian Law".

18. "It is hardly an exaggeration to say that it would not make any practical difference if the word 'anything' were substituted for 'external affairs' in that provision". Rt Hon Sir Harry Gibbs, Address launching Volume 1 of *Upholding*

the Australian Constitution, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 3 (1993), Appendix I, p.137.

See also:

"The scope of this power of the Commonwealth has thus become completely undefined". Rt Hon Sir Harry Gibbs, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), p.187.

19. "It is literalism [the High Court's approach to interpretation of the Constitution] which renders such provisions as the external affairs power ..... so profoundly dangerous to Australia's federal character, by insisting that they be interpreted in the widest fashion possible, without regard being had to any federal considerations". Dr Greg Craven, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 6 (1995), p.75.
20. Unless it be the High Court's ventures into the so-called "implied rights" area – from which, however, it has since mercifully appeared to retreat as wiser judicial counsels have prevailed within its own ranks.
21. It is no accident that the centralists have chosen, for the most part, to evade the s.128 mechanism. On almost every occasion on which the people have been asked to give more power to Canberra (which is what the overwhelming majority of referendum questions have principally sought to do), they have steadily declined to do so – last year's referendum on the republic issue having been merely the most recent example.
22. Elements of a "Bill of Rights" were included in some of the questions put to the people in the Referendums of 1988. Those elements, like the other questions making up those Referendums, were overwhelmingly rejected.
23. One recent straw in the wind, indicative as it is of the perpetual tendency of the Executive to ignore even the Parliament (let alone the people) on treaty matters, is given by the joint announcement on 25 October, 2000 by the Attorney General and the Minister for Foreign Affairs and Trade, that the Government intended ratifying (and introducing legislation to give domestic legal effect to that action) the *Statute of the International Criminal Court* – to which, with no prior public discussion, the present Government had previously appended its signature in Rome in December, 1998. At the time of the joint ministerial announcement, the matter had not even been considered by the Treaties Committee of the Parliament.
24. "What I would propose is adding, after the words 'external affairs' in s.51(xxix), the following:

    'provided that no such law shall apply within the territory of a State unless

    (a) the Parliament has power to make that law otherwise than under this sub-section; or
    (b) the law is made at the request or with the consent of the State; or
    (c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia'."

    As proposed by Dr Colin Howard, QC in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 5 (1995), p.11.

25. According to a report in *The Age* of 31 October, 2000, Mr Denis Burke, MLA "proposed a bill that would ensure a treaty would need two-thirds support of both Houses of Parliament before Australia entered into it".