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Human Rights around the Pacific — and Mabo

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The International Olympic Committee acted correctly in rejecting the call by a sub-committee of the House of Representatives Foreign Affairs Committee to vote against Beijing on the ground of China's human rights record.

The United Nations has more authority to monitor human rights in China than in the US. More UN human rights conventions have been ratified by China than by the US. The US cannot ratify a convention without the advice and consent of the Senate. Rather than complain about the failures of the Chinese authorities, the US House of Representatives Foreign Affairs Committee should have complained about the failures of the Senate Foreign Relations Committee. (Unlike Australian senators, many US senators are regarded as too old to serve on a committee entitled 'foreign affairs'.)

The UN Committee on the Elimination of Discrimination Against Women can monitor China's observance of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, because

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China ratified the convention of 4 November 1980. Australia ratified the convention on 28 July 1983. The US has not yet ratified it; its neighbours Mexico and Canada did so in 1981.

The UN Committee on the Rights of the Child can monitor China's observance of the 1989 International Convention on the Rights of the Child because China ratified the convention in 1992. USA has not ratified it but Australia, Canada and Mexico have.

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination has been ratified by the United Kingdom (in 1969), Canada (1970), Mexico and Australia (1975) and China (1981). The Committee on the Elimination of Racial Discrimination cannot monitor the performance of UK, Canada, Mexico and China. Australia gave the Committee the authority to do so when, on 28 January 1993, it became the 17th party to lodge the necessary declaration under Article 14 of the Convention. The US will have nothing to do with this Convention because it wants to avoid international scrutiny of the treatment of African Americans.

Nor has the US ratified the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It has been ratified by 72 other countries, including Mexico (in 1986), Canada (1987), China and the UK (1988) and Australia (1989). Moreover, the Committee Against Torture has been authorised by Canada and Australia on 10 December 1989 and 29 January 1993 to receive and consider complaints and communications about their jurisdiction. The UK gave the Committee authority to receive and consider communications from other countries when it lodged the necessary declaration on 8 December 1988.

It is regrettable that China has not ratified the 1966 International Covenant on Civil and Political Rights (ICCPR). That has been ratified by 118 States. The US became the 110th party on 8 June 1992, but it has not recognised the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction; 71 others have, including Canada and Australia. On 8 June 1992 the US also recognised, albeit with an array of reservations and understandings, the competence of the Committee to receive and consider communications by one State Party against another. Nine other States, notably the UK and Germany, have also permitted communications from other parties but not from their own citizens. There is a possible perception that individuals subject to a country's jurisdiction will be less reluctant and inhibited than a foreign country in calling

its human rights record in question before an international monitoring committee.

Persons who have shared my professional and political interests would beyond doubt be more free to pursue them in the US and the UK than in China. Nevertheless, the US is not in a strong position to lecture China on human rights. British pretensions were exposed in 1979 at the Geneva International conference which was held largely in response to Mrs Thatcher's clamour over the influx of Vietnamese refugees into Hong Kong. The UK had become a party to the UN instruments of 1951, 1954, 1961 and 1967 relating to refugees and stateless persons but it had never applied them to any of its territories in the Pacific and Indian Ocean, such as Hong Kong. The US is a party to the 1967 instrument alone. (Australia acceded to the 1951 convention in 1954 but with reservations that were not totally withdrawn till 1971. Australia became a party to the other three instruments in 1973.)

The death penalty affords the greatest contrast between Australia and its regional neighbours in attitudes to human rights. My government abolished the death penalty under Federal and Territory legislation in 1973. By May 1985 every State had removed the death penalty from its statute book. On 15 December 1989 the UN General Assembly recorded a vote on the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. The vote was carried with 59 in favour, 26 against and 48 abstaining. The US was the only country in the Americas which voted against. Between the meridians which traverse Afghanistan and USA, the only other countries which voted to continue the death penalty were Bangladesh, China, Indonesia, Japan, Maldives and Pakistan; Malaysia was absent when the vote was taken but later advised the Secretariat that it had intended to do so. In the climate of wretched religiosity prevalent in the US the right to life is applied to the unborn rather than to adults or even teenagers, including an Australian Aborigine, before the courts.

The Red Cross also has a responsibility for vital human rights. The four 1949 Geneva Conventions on the Laws of War have been ratified by 181 States, including the US (in 1955), China (1956), the UK (1957) and Australia (1958). Two protocols additional to the Geneva Conventions were done at Geneva on 10 June 1977. Protocol I related to the protection of victims of international armed conflicts and Protocol II to the protection of victims of non-international armed conflicts. Instruments of ratification, accession or succession have been deposited by 122 States in respect of Protocol I and by 113 States in respect of Protocol II. China acceded to both in September 1983.

The US and the UK pressured their allies and NATO not to ratify the Protocols lest they were inhibited from using nuclear weapons. Australia and New Zealand agreed to ratify in 1986 but the Reagan Administration sabotaged the Hawke Government's legislation. After Canada and Germany decided to join the rest of NATO in ratifying, the Government summoned up sufficient courage to reintroduce the legislation in August 1990. Canada's, Germany's and Australia's instruments of ratification were lodged in Geneva in November 1990, February 1991 and June 1991 respectively.

Article 90 of Protocol I provides for the establishment of an International Fact-Finding Commission to enquire into grave breaches and serious violations of the Conventions and Protocol. As soon as 20 States made a declaration accepting the competence of the Commission, the depositary State, Switzerland, was to convene a conference to set it up. Canada made the 20th declaration at the time it ratified. Australia still dithered; it did not make its declaration till 22 September 1992. By that time the Commission had been established and Canada and New Zealand elected to it. If Australia under Hawke had acted promptly and fully, Australia would have been elected with them.

Australian Aborigines and Human Rights

Australian Aborigines used to be the victims of the most notorious and sustained denials of human rights in Australian history. In June 1992 the High Court's judgment in *Mabo* brought the Common law of Australia into line with the Common law of New Zealand, USA and Canada and with decisions of the International Court of Justice. The vilest vilifications of the High Court have come from the boss of Western Mining and the Premier of Western Australia. Hugh Morgan and Richard Court advocate an immunity for mining interests which is not to be found in any other Common law country.

I have had some interest in constitutional and administrative matters for 60 years. For the first time in my lifetime the High Court has in Sir Anthony Mason a Chief Justice who is adequate in both national and international terms. In an interview in the July edition of *Australian Lawyer* he has had to point out that he and the Court do not have undisclosed agenda, political agenda.

His two predecessors and some of their brethren did. Queenslanders know that police corruption continued to have immunity as a result of the incompetence of Sir Harry Gibbs as a Supreme Court judge and royal commissioner a generation ago. He was later promoted well above his competence. His political agenda are now revealed in his inappropriate utterances and appearances on behalf of the monarchist movement.

Australia has never had a greater advocate or a worse Chief Justice than Sir Garfield Barwick. He pursued his political agenda by manipulating the dates of High Court hearings and judgements and by bypassing his colleagues. His successors have had to repudiate his distortions of the tax laws and section 92.

The WA situation deteriorated after the notorious deal between Bob Hawke and Brian Burke on the eve of the 1986 State election. Unilaterally Hawke abandoned two ALP commitments:

1. to enact equal suffrage — one vote one value — for all Australian parliaments in accordance with the ICCPR, and
2. to introduce a national code for Aboriginal land rights.

Since then, the Fitzgerald inquiry in Queensland and the Wilson Royal Commission in WA have pointed out that there cannot be responsible government without a representative parliament. WA has neither. In elections for the Legislative Assembly and the Legislative Council the State is divided into metropolitan and non-metropolitan areas. The votes of electors in the metropolitan area are worth half as much as the votes of electors in the non-metropolitan area for the Assembly and one-third as much for the Council. (The Legislative Council of Tasmania is the only other malapportioned house of parliament in Australia.) The Keating Government has still to enact the equal franchise provisions of the ICCPR.

Bob Hawke's deal pulled the rug from under his first Minister for Foreign Affairs, Bill Hayden, who, on 3 November 1983, had stated 'the Government is currently reviewing Australia's position with regard to the Optional Protocol to the ICCPR and the Article 14 procedures under the International Convention on the Elimination of All Forms of Racial Discrimination'. From 1986 to 1991 inclusive the Hawke Government reverted to the Fraser Government's policy of deferring the ratification of international conventions until the States agreed. The conventions were considered by the Standing Committee of Attorneys-General (SCAG), which usually meets three times a year. The Coalition Attorneys-General and the Labor Attorney-General of Western Australia would never agree to Aborigines having the right to approach UN committees about the conduct of State police, custodians, coroners and magistrates.

In the Swan Brewery cases the High Court unanimously called the State Labor Government to account on 20 June 1990 and a full court of the Federal Court unanimously called the Keating Government to account on 30 April 1993. The Keating Government does not have to

cover up for a WA Coalition Government as the Hawke and Keating Governments felt obliged to cover up for WA Labor Governments.

During 1993, the International Year of the World's Indigenous People, the Keating Government is preparing to ratify International Labour Organisation Convention No. 169 — Indigenous and Tribal Peoples, 1989. As soon as Australia ratifies this convention Australian Aborigines will have access to another international forum, the ILO Committee of Experts on the Application of Conventions and Recommendations.

Australia ditched the Hawke-Burke legacy when, on 25 December 1991, it acceded to the Optional Protocol, which had entered into force on 23 March 1976, and on 28 January 1993, when it accepted the competence of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture, which had respectively been in operation since 28 March 1979, 3 December 1982 and 26 June 1987. The Keating Government has still to review the reservations which have been made at the time of ratification. The media does not seem to have reported the meeting of SCAG in Darwin on 24 June 1993.

Some of the least publicised sources and causes of support for the Keating Government in the March elections were to be found among the oldest and newest Australians. The Hewson Government would have halted the progress towards fair treatment of Aborigines and ethnic and religious minorities. Progress should now be ensured by the presence of Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs, in the Prime Minister's own portfolio and the appointment of Nick Bolkus as Minister for Immigration and Ethnic Affairs and Minister assisting the Prime Minister for Multicultural Affairs.

On 16 December 1992 Peter Duncan on behalf of Michael Duffy introduced the *Racial Discrimination Legislation Amendment Bill* to make racial vilification unlawful and to make incitement to racial hatred an offence in conformity with the provisions of the 1965 Convention. The Senate had removed such provisions from the *Racial Discrimination Act* 1975; in ratifying the convention in September 1975 I gave an undertaking to restore them. The 1992 legislation was recommended by three recent inquiries and reports. The Government undertook to proceed with the legislation this year. A fortnight before the elections Peter Costello, as shadow attorney-general, declared that a Hewson Government would not proceed with the legislation. The Keating Government now has a mandate to proceed with it.

The Greiner Government made racial vilification illegal in New South Wales in 1989. Western Australia followed in 1990 and Queens-

land and the ACT in 1991. A *Racial and Religious Vilification Bill* was introduced by the Kirner Government before the Victorian elections but has not been revived by the Kennett Government. There is no law against racial vilification in South Australia, Tasmania or the Northern Territory. It is unfair and absurd that the rights of millions of Australians should vary between one State and another and between one Territory and another. Aborigines and 20th century migrants played no part in determining State borders. Human rights are more important than State rights. Since the 1967 referendum the Federal Parliament has had jurisdiction to make special laws with respect to the people of 'the aboriginal race in any State'.

On 8 February 1993 Michael Duffy made a declaration authorising the Human Rights and Equal Opportunity Commission to monitor any laws or practices in Australia which are inconsistent with, or contrary to, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Declaration had been adopted by the UN General Assembly without dissent in December 1981.

On 26 May (1993) however, two Liberal senators — one since defunct — moved to disallow the Attorney-General's declaration. Next day another Liberal senator did so. There are 14 and 15 sitting days within which the motions must be disposed of; otherwise the Attorney-General's declaration will be deemed to have been disallowed.

At its session commencing on 21 September 1993 the UN General Assembly is expected to proclaim 1995, the 50th anniversary of UNESCO, as the UN Year for Tolerance and to ask UNESCO to prepare a Declaration on Tolerance. The Human Rights and Equal Opportunity Commission could then be mandated to monitor laws and practices in Australia in the light of this further Declaration.

On 3 July 1993 I was asked to speak at the opening of a Canberra club whose members, or their parents, had come from a Balkan country with a long and deep experience of racial discrimination and religious intolerance. I urged those present to press the Keating Government:

1. to reintroduce without further delay the *Racial Discrimination Legislation Amendment Bill,*
2. to initiate prompt steps to reject the Liberal motions on the 1981 Religious Discrimination Declaration, and
3. to give wholehearted support at the UN General Assembly in New York and at the UNESCO General Conference in Paris for the UN Year for Tolerance and the UNESCO Declaration on Tolerance.

The location of Australia and the increasingly diverse backgrounds of Australians give unique responsibilities and opportunities to persons in government, administration, education and the media here. To the extent that such persons learn and understand the appreciation of diversity, Australians will enjoy tolerance and harmony in their own country and earn respect and influence in other countries and in international and regional forums. Australians will have much more credibility in pointing to the beams in the eyes of other nations if they continue to remove the motes in their own.

In June 1993 I arrived in Guangzhou 200 years to the month after George III's mission under Lord Macartney. Westerners are no longer expected to kowtow to the Emperor, nor can they expect China to make obeisances to them. In the coming years Japan will come closer to China than to the US and Europe.

Australians will diminish their influence in China to the extent that they appear as surrogates for the British on Hong Kong and Tibet. At an International Commission of Jurists conference in Bangkok in February 1965 a Chief Justice of Hong Kong, Sir Michael Kelly, was constantly pontificating on the application of the Rule of Law. After a couple of days I appeared to stop him in his tracks when I ingenuously asked him who made the laws in Hong Kong. The latest — last? — Governor is manifesting an interest in the process of law-making not at the 11th hour but at 5 minutes to 12. On Tibet one does not have to go back more than 150 years to Britain's seizure of Hong Kong but fewer than 90 to Britain's invasion of Tibet. In June 1904, Francis Younghusband marched troops from India to Lhasa and forced the then Dalai Lama to sign an Anglo-Tibetan treaty. China aims to incorporate Hong Kong in such a way as to facilitate reunion with Taiwan. Contrary to the efforts of self-appointed activitists, economic integration in Asia is unlikely to be accompanied by political disintegration, as has happened in Europe.

My visit to China last month was my tenth. I made my first in July 1971. On 21 December 1972 Australia normalised relations with China. Despite the pundits in the last few years, China has normalised its relations with India, Vietnam, Indonesia and the Republic of Korea. I have observed the changes of the last two decades. Within the next two decades China may become a more important political and economic entity than Japan. Few would have hazarded the view 200 years ago that the US would inevitably overtake the UK.

If some States are still to be permanent members of the Security Council, the only clear claims are those by USA, Russia and China. If

Australians really want to influence human rights in Asia and the Pacific, they ought to transfer at the UN and ECOSOC, as Australia and New Zealand have in UNESCO and ILO, from the Group of Western Europe and Others (Western Europe, US, Canada, Australia and New Zealand) to the Group of Asia and the Pacific.