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Sent via NHRC website

Dear Consultation Committee,

Submission to National Human Rights Consultation 2009

This submission is made by a group of legal practitioners and scholars working on issues of international law and human rights. It derives from a roundtable discussion jointly organized by the International Section of Australian Lawyers for Human Rights and the British Institute of International and Comparative Law held in London on 1 May 2009. The majority of those who participated were expatriate Australian citizens, with added expertise shared by colleagues working on human rights systems in comparable jurisdictions, including in the United Kingdom and in New Zealand.

Even though many of us live outside Australia, we are still very much connected to the human rights scene in Australia, are keen to contribute to this important initiative on a National Human Rights Consultation, and are committed to improved human rights protection for Australian citizens and others subject to the jurisdiction of Australia.

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Submission to the National Human Rights Consultation 2009

This submission is in four parts:

1. Background information and the reasons for calls for improved human rights protection in Australia.
2. The rights to be included in an Australian Charter of Rights; the scope of limitations and derogations of the rights to be included within an Australian Charter of Rights; and questions of including 'responsibilities' in an Australian Charter of Rights.
3. The proposed model of human rights protection.
4. The roles of various branches of the constitutional system.

1. Background

1. Australia has always been a strong advocate, if not a world leader, of human rights protection on the international stage, being involved in the drafting of many of the core international human rights treaties and becoming a party to almost all of them.[1] It has also shown considerable support and commitment to the workings of international human rights bodies.[2]

[1] Australia has ratified or acceded to, for example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1966 International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocol, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment of Punishment (UNCAT), the 1989 Convention on the Rights of the Child (CRC) and its two Optional Protocols, the 1998 Statute of the International Criminal Court (ICC), the 2003 Protocol to Prevent, Suppress and Punish the Trafficking in Persons, Especially Women and Children, and the 2006 Convention on the Rights of Persons with Disabilities (CRPD). Australia has more recently also supported the UN Declaration on the Rights of Indigenous Peoples and the Federal Parliament issued an apology to indigenous Australians in 2008.

[2] E.g., Australia has secured membership of a number of independent experts on various human rights treaty bodies over the years, such as Elizabeth Evatt and Ivan Shearer on the Human Rights Committee, Phillip Alston on the Committee on Economic, Social and Cultural Rights, Elizabeth Evatt on the Committee on the Elimination of Discrimination against Women, and Ronald McCallum on the Committee on the Rights of Persons with Disabilities.

2. There is, however, an enlarging gap between our international obligations and our domestic legal framework and performance record on human rights protection. At one time a world leader in its commitment to human rights, Australia has now fallen behind comparative countries. Australia is the only western liberal democracy without a "Bill of Rights" (broadly defined).

3. Ideals of egalitarianism, equality, and a "fair go for all" form part of our cultural tradition and national identity. Human rights are, therefore, part of our social vision rather than being at odds with it. Nonetheless, it is insufficient to simply rely on ideologies and national concepts to protect human rights. As Australia proceeds to develop further its identity as a nation based on principles of equality and fairness, it must ensure that there is a firm legal foundation for these ideals.

A time for change

4. With the enactment of state and territory human rights legislation in Victoria and the Australian Capital Territory, and with the likelihood of other state legislation to follow,[3] there is growing consensus on the need for better rights protection in Australia. We are a different nation from our beginnings in 1901. We now look not only to protect the economic interests of states vis-à-vis other states, but also to the rights and needs of individuals. Consequently there is a clear mandate to address the protection of individual rights at a constitutional level through exercising the 'external affairs' power in the Australian Constitution.[4]

5. The adoption of a constitutional Charter of Rights (which is our preference, see below) or federal human rights legislation that applies at all levels of government is the next logical step in the development of a robust system of human rights protection in Australia. Leaving human rights protection to individual states and territories, or creating a two-tiered system of protection at federal and state levels, should be avoided. Such a system would lead to inconsistency and fragmentation in rights protection between states, render the system unnecessarily cumbersome and complicated and thereby inaccessible to members of the public, and lead to a lack of accountability. One of the fundamental tenets of human rights law is that rights are universal. Only a constitutional or federal framework would achieve this.

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[3] Other states that have held consultations and which have endorsed the need for better human rights protection include the Northern Territory, Tasmania, and Western Australia. For further information see, http://acthra.anu.edu.au/

[4] s. 51 (xxix), Australian Constitution.

6. In its most recent Concluding Observations on Australia's report on its human rights performance, the United Nations Human Rights Committee (HRC) recommended:

> The State party should: (a) enact comprehensive legislation giving de-facto effect to all the Covenant [on Civil and Political Rights] provisions uniformly across all jurisdictions in the Federation; (b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; (c) provide effective judicial remedies for the protection of rights under the Covenant; and (d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.[5]

The need for change

7. Reliance on the existing framework of rights protection (a mixture of some constitutional, some legislative, and some common law protections) is inadequate and is full of gaps. In particular, there is no right to an effective remedy in the case of many human rights violations.

8. Anti-discrimination legislation is far too easily set aside by executive action. The Racial Discrimination Act 1975, for example, was suspended by the Howard government in 2007 by virtue of the Northern Territory Emergency Response Act 2007, under the guise of a temporary special measure in a declared 'emergency'. In a 2006 sex discrimination case, it was noted that no party claiming relief on a ground of discrimination, whether under federal or state discrimination laws, had succeeded before the High Court in the past decade.[6] The long-established common law protection of habeas corpus was also overridden by judicial interpretations of national migration legislation, permitting what amounted to indefinite detention de facto.[7] The HRC in its most recent comments on Australia's human rights record noted its regret "that judicial decisions make little reference to international human rights law".[8]

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[5] Concluding observations of the Human Rights Committee on Australia, UN Doc. CCPR/C/AUS/CO/5, 2 April 2009, at p. 2.
[6] *NSW v Amery & Ors* [2006] HCA 14, at 86 (per Kirby J.).
[7] *Al-Kateb v. Godwin* [2004] HCA 37.
[8] Concluding observations of the Human Rights Committee on Australia, UN Doc. CCPR/C/AUS/CO/5, 2 April 2009 at p 2.

9. It is time to provide for domestic human rights protection that enables individuals affected by the decisions and acts or omissions of Australian public authorities to have an effective remedy. At present, persons affected by any such decisions/acts/omissions may have recourse to the international human rights treaty body system after exhausting their domestic remedies, albeit a system with its own shortcomings. A "home grown" system of human rights protection can reduce the need to have recourse to human rights monitoring and dispute settlement bodies and is preferable than reliance on international systems.

2. Rights to be included in an Australian Charter of Rights

10. The Australian Government should embrace the opportunity to enrich the rights framework currently in place by incorporating rights contained in international human rights instruments to which Australia is a party into an Australian Charter of Rights.[9] This should include, at a minimum, rights protected under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both the ICCPR and the ICESCR were the products of extensive and inclusive negotiation, of which Australia played an active and important part. Both have been ratified by Australia in 1980 and 1976 respectively.

11. The rights contained under the ICCPR and the ICESCR are indivisible, interdependent and mutually reinforcing. The perceived dichotomy between these two sets of rights at the international level has its roots in the historical-political context of the Cold War that is no longer relevant in the Australian context.

12. Several of these rights are already protected by the common law[10] or by statute,[11] but the system is ad hoc and does not necessarily reflect contemporary human rights discourse. The inclusion of rights within a single instrument has the advantage of simplifying a diffuse and complicated system, and in turn improving accessibility, and accountability.

[9] Australia's is a party to most of the international human rights treaties, see n. 1 above.
[10] E.g., rights already protected in Australia include the prohibition against arbitrary detention, the prohibition on the use of torture evidence in criminal proceedings, the right to just compensation for compulsory property acquisition, etc.
[11] E.g., federal and state non-discrimination legislation.

13. At the level of international law[12] and in many comparable national jurisdictions,[13] civil, cultural, economic, political, and social rights are typically protected in a single human rights instrument. There is also considerable jurisprudence emerging that recognizes the justiciability of economic, social and cultural rights.[14] The Australian government is encouraged to promote the adoption of a rights framework that includes the full range of rights – civil, cultural, economic, political, and social rights – in order to retain its position as a leader in human rights standard-setting and protection. Anything less would be considered a step backwards for human rights.

14. It will be necessary to educate the Australian legislature, the Australian judiciary and the Australian public as to the scope, nature and meaning of human rights generally, and economic, social and cultural rights in particular, to avoid the propagation of existing misconceptions. This educational function should be assumed by the Australian Human Rights Commission, and shared by all arms of government (see below).

15. An Australian Charter of Rights should ensure everyone is able to enjoy and benefit from the Charter provisions regardless of race, colour, sex, sexuality, language, religion, political or other opinion, national or social origin, property, birth, indigenous status, marital status, or any other status. It should also contain stand-alone rights to equality between women and men and equal protection for all persons before the law. Guidance should be sought from the wording of the ICCPR (Arts. 3 and 26), the International Convention on the Elimination of All Forms of

[12] E.g., Optional Protocol to the ICESCR; Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (The CEDAW contains a number of economic, social and cultural rights alongside civil and political rights); Protocol 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) protects rights inter alia to peaceful enjoyment of possessions and the right to education. Other international and regional treaties contain both economic, social and cultural rights alongside civil and political rights, such as the Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities; the African Charter on Human and Peoples' Rights and the American Convention on Human Rights (e.g. Art. 21 (right to property) and Ch. III).

[13] E.g. economic, social and cultural rights are protected by the national legal framework in Canada, India, South Africa, and the UK (in relation to the rights contained in Protocol 1 of ECHR).

[14] See, database on case law on economic, social and cultural rights highlighting decisions before the South African Constitutional Court, the Supreme Court of India, the African Commission on Human and Peoples' Rights, etc.: http://www.escr-net.org/caselaw/ and C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 *Hum. Rts L. Rev.* 617-646.

Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women on discrimination provisions. More particularly, broad interpretations of equality and non-discrimination that match developments at international law and other comparable jurisdictions[15] should be supported. This would include moving beyond the narrow idea of formal equality (or equality of opportunity or access) to substantive equality (or equality of outcome and equality in process), and recognition that temporary measures of affirmative action may be needed to overcome the disadvantage of individuals belonging to particular groups. The concepts of non-discrimination and equality should not be understood as requirements to treat everyone the same or identically, but to eliminate disadvantage of particular groups and to end underlying hierarchies between persons (especially between women and men) in pursuit of the dual goals of empowerment and agency.

16. An Australian Charter of Rights should deal explicitly with the advancement of civil, cultural, economic, political, and social rights for Indigenous Australians.

Limitations and Derogations

17. Not all of the rights contained in the ICCPR and ICESCR are absolute. It is important that any limitation on any of the rights contained in an Australian Charter of Rights is narrowly framed and has a clearly defined rationale. The formulation of the limitations to those rights should not necessarily replicate the formulation contained in the ICCPR and ICESCR, but any limitations should be based on the principles of legality (limitations should only be permitted if regulated by law), proportionality, and necessity in a democratic society. Any limitation should require a case-by-case analysis.

18. The Australian Charter of Rights should recognize the special nature of and need for protection of certain absolute rights – the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal prosecution,

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[15] E.g., in relation to Canada, see K.E. Mahoney, 'Canadian Approaches to Equality Rights and Gender Equity in the Courts', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 437.

non-discrimination, and the right to be recognized as a person before the law. These rights should not be subject to limitations or derogations.

19. Any derogation provision should similarly be narrowly framed and have clearly defined rationale.

Jurisdiction

20. The Australian Charter of Rights should apply to all people within the jurisdiction of Australia regardless of their status as Australian citizens or permanent residents. It should also apply to people who are not in Australia but who are affected by Australian laws or decisions of Australian public authorities.

Ratione personae

21. The Australian Charter should contain an express provision to the effect that only human beings have human rights. Corporations as defined by the Corporations Act 2001 (Cth) should be expressly excluded from any human rights protection measures.[16]

The question of responsibilities

22. The language of 'responsibilities' can be unhelpful and potentially misleading. A review of international and comparative material illustrates that the concept of 'responsibilities' has no universal coherent meaning and is not contained within instruments that constitute part of Australia's international obligations. The inclusion of 'responsibilities' could potentially be used as an interpretative mechanism to curtail rights or to impose legal obligations on an individual, both of which are undesirable and could undermine the aims and intentions of an Australian Charter of Rights.

23. It is acknowledged however that implicit in rights are correlative duties and that the values of mutual respect and duties to the community are enshrined in the post-war human rights framework (see Universal Declaration of Human Rights

[16] *Corporations Act 2001* (Cth), ss. 9, 57A.

Articles 1 and 29). However, these duties are more appropriately dealt with via expressly stated limitations and derogations (discussed above).

3. Proposed model for an Australian Charter of Rights

Option 1: A Constitutional Bill of Rights

24. It is our view that a constitutional instrument of human rights protection is the preferable option for Australia. Australia is familiar with constitutional judicial review by the courts as a necessary component of Australian democracy.[17]

25. The comparative experience of countries that have a written constitution, for example, the United States, Canada and South Africa, is that they have constitutionalised rights protection.[18] The United Kingdom and New Zealand, which have adopted legislative human rights instruments,[19] do not have written constitutions. In the United Kingdom, however, the relevant legislation has been interpreted as a "*constitutional statute",* that is, legislation of a special character which is not subject to the doctrine of implied repeal.[20] By opting for a legislative instrument, Australia would continue to lag behind other western democracies in its protection of individual rights. A constitutional bill of rights would further avoid the 'politicisation' of a legislative instrument facing some other jurisdictions.[21]

26. However as the National Human Rights Consultation is limited in its terms of reference to considering a legislative instrument,[22] which we find disappointing, our suggestions below put forward a particular notion of a "higher order" legislative instrument.

[17] s. 76, Australian Constitution and related jurisprudence.
[18] Bill of Rights to the US Constitution; Canadian Charter of Rights and Responsibilities 1982; South Africa Bill of Rights 1996. In the case of Canada, the Charter was enacted following the failure of an earlier human rights law, the *Canadian Bill of Rights 1960*, to achieve any real impact on the courts' interpretation of legislation or on Parliament's legislative practices. The 1960 Act is still operative.
[19] *Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK).
[20] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), per Laws LJ.
[21] See, UK Green Paper, *Rights and Responsibilities: Developing Our Constitutional Framework*, available at: http://www.justice.gov.uk/news/newsrelease230309a.htm
[22] See, Consultation Committee's Terms of Reference, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsofReference_TermsofReference.

Option 2: A legislative instrument

27. An Act of Parliament has the advantage of not requiring a constitutional amendment, which has proven to be a difficult process in the past. For ease of reference, we refer to the future instrument as the *Australian Charter of Rights*, to emphasise its "special character" (explained below). The following paragraphs address certain aspects of the general form of the Charter. Later paragraphs address specific aspects of the role of Parliament, the executive and the courts under the Charter.

28. A human rights instrument, if not a constitutional instrument, would need nonetheless to take an elevated form above any ordinary statute. This instrument is intended to have an enduring or systemic effect, and affect all other legislation, including future legislation. The question that arises is *how* to create this enduring effect through an Act of Parliament and within the framework of Australia's Constitution. There are two possibilities.

29. First, the *Charter* could include a provision that indicates that the statute cannot be impliedly repealed, thus putting it into a category of 'special statutes' of a constitutional nature. As noted above, the UK has a conventional tradition of "special statutes" because it has no written constitution, rather it has a series of statutes that are said to make up its constitutional framework. Without such a tradition in Australia, it would be up to Parliament to make express statements in the *Charter* to create this effect.[23]

30. Second, the *Charter* could function, in part, similarly to the *Acts Interpretation Act 1901* and provide rules guiding the interpretation of all Acts of Parliament. Here, the existing statutory human rights instruments in other jurisdictions provide examples of interpretative provisions that may be adopted (as noted above).[24] We suggest as robust an interpretative provision as possible should

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[23] This would not of course remove the power of Parliament to repeal this provision of the Charter, but it would require an express repeal of the Charter and thus give the Charter a more entrenched character than other ordinary Acts of Parliament.

[24] Section 3 of the Human Rights Act (UK) provides that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Slightly different formulations can be found under the

be included. To reduce the potential for implied repeal, Parliament should be encouraged to declare its intention to act inconsistently with the *Charter* expressly through two devices: (1) an obligation (discussed below) on the relevant Minister to declare whether or not bills introduced to Parliament are intended to be compatible with the *Charter*; and (2) the *Charter* might include an express exception in the same terms as included in Article 33 of the Canadian Charter of Rights and Freedoms that 'Parliament may expressly declare its intention in an Act of Parliament that the Act or a provision thereof shall operate notwithstanding the Charter'. However, as is the case in Canada, a 'notwithstanding the Charter' statement should only be operative for a limited time period, such as the life of the Parliament, allowing a future Parliament to re-evaluate the necessity of any legislation operating notwithstanding the *Charter.*

31. Where there is a conflict between an Act of Parliament and the *Charter*, there are two possibilities available:

1. The Act will be interpreted so as not to violate rights under the Charter. This will not prevent Parliament deciding to reinstate the legislation in a way that violates the *Charter*, but it must do so with an express statement that the legislation operates notwithstanding the *Charter*.
2. Alternatively, if it is not possible to interpret the legislation in a way that is consistent with the *Charter*, the legislation continues to operate, but the Courts are able to issue a declaration that the Act infringes human rights, leaving it to Parliament to decide whether to amend the legislation at issue.

32. Under the second possibility, there will need to be a duty on the government to respond to such declarations with reasons within a specified period of time.

4. Roles of various branches of the constitutional system

Parliament

33. We support the creation of a Joint Committee of both Houses of Parliament to be responsible for reviewing legislation and policy for consistency with the *Charter*.

New Zealand Bill of Rights Act s. 6, the ACT Human Rights Act s. 30 and the Victorian Charter of Human Rights and Responsibilities, s. 32.

The experience of the United Kingdom has shown that the creation of a specific human rights committee is necessary to ensure that legislation is systematically scrutinised, and that the public and parliamentarians have the benefit of a second opinion on the compatibility of legislation with human rights and on proportionality.

34. We recommend that the Joint Committee be provided with drafts of legislation which raise human rights issues prior to Second Reading. It is at this stage the United Kingdom Joint Committee on Human Rights has been able to suggest usefully amendments to allow legislation to respect and promote human rights better. This process would also allow the Committee to report to Parliament on the human rights implications of legislation by the Second Reading Debate. This would allow for more informed parliamentary debate on any human rights concerns at Second Reading.

The Executive (and public authorities)

35. We recommend that, in keeping with all other legislative human rights instruments, each Bill presented to Parliament for consideration be accompanied with a statement addressing the Bill's compatibility with the *Charter*, along the lines of section 19 of the UK Human Rights Act. A statement from the Minister as to whether or not each Bill is compatible with the *Charter* will be helpful in determinations as to whether future Acts can be interpreted consistently with the *Charter*. We further suggest that a statement accompanied by reasons is far more useful to Parliament and public debate than simply a conclusory statement as to whether the Bill is or is not compatible with human rights. We therefore recommend that a human rights impact statement should accompany all new Bills.

36. An Australian human rights instrument should seek to advance the mainstreaming of human rights through policy formation and administrative action. The *Charter* should place an obligation on public authorities to respect human rights and promote respect for human rights. In specific terms, this would involve a requirement that human rights considerations have to be taken into account by public authorities in the course of exercising their powers. This is already the case in relation to Australia's international treaty obligations,[25] and should be extended to domestic human rights obligations under any *Charter*.

[25] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

37. We recommend that there also be an independent cause of action for individuals whose rights are violated by a public authority, as is the case in the Australian Capital Territory,[26] the UK,[27] New Zealand[28], Canada,[29] and South Africa.[30]

38. The *Charter* should define what is meant by a public authority. At the very least, in order to fulfill Australia's international obligations, this should extend to those bodies and persons whose actions or omissions are attributable to the state for the purposes of international law.[31] The definition of "public authority" should include "tribunals, the courts, government departments, statutory authorities, government business enterprises, State-owned companies, [the] police, [the military], local government, Ministers of Parliament, members of Parliamentary Committees acting in an administrative capacity, anyone whom Parliament declares to be a public authority for the purposes of the Charter and an entity whose functions are or include functions of a public nature…"[32] We draw attention to the fact that national courts and the military are most certainly State agencies under international law, and should not be excluded from the operation of the *Charter*.

The Courts

39. As already noted, we recommend that an Australian human rights instrument should provide for a free-standing cause of action for the violation of human rights by public authorities. This will enable victims of human rights violations an effective remedy within Australia. It remains an unfortunate anomaly that one of the sole routes available to a victim of a human rights violation in Australia is to take a claim to the UN Human Rights Committee in Geneva, under the First Optional Protocol to

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[26] Human Rights Act 2004 (ACT), Pt 5A.
[27] Human Rights Act 1998 (UK), s. 6.
[28] Although there is no explicit enforcement provision for citizens to the NZ Bill of Rights Act 1990, the NZ Court of Appeal has held that compensation may be obtained from government agencies for any breach of the rights in the Act: *Simpson v. Attorney General* [1994] 3 NZLR 667.
[29] Canadian Charter of Rights and Freedoms, s. 24.
[30] South African Constitution, s. 38.
[31] See, ILC Articles on State Responsibility, Chapter II and 'due diligence' responsibilities developed at the level of international human rights law: see e.g., *Velasquez Rodriguez v. Honduras,* Judgment of 27 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988).
[32] Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania,* Report No. 10, Oct. 2007, Recommendation 8 – What is a 'public authority'?, p. 5.

the ICCPR. Providing a free-standing cause of action is also required by virtue of the right to an effective remedy contained in the ICCPR.[33]

40. There should be both a duty placed on public authorities to act in accordance with human rights as well as a right to a remedy for victims of human rights violations. Courts should be empowered to devise an effective remedy, noting that the types of remedies suitable in cases of human rights violation may be unconventional and may include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[34]

[33] ICCPR, Art. 2 (3).

[34] See, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly resolution 60/147, 16 Dec. 2005.

Persons who participated in the roundtable discussion, as well as those who were unable to attend, and who agree with the general views put forward in this submission:

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