

# **From Convention to Classroom: The Long Road to Human Rights Education**

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# **Abstract**

A core function of the United Nations over the past six decades has been the promotion and protection of human rights. In pursuit of this goal, the UN General Assembly has adopted numerous human rights treaties covering a vast array of rights. Because it has the highest number of ratifications, the Convention on the Rights of the Child (CROC), is often lauded as the most successful of all the human rights treaties.

Although the breadth and depth of human rights treaties is impressive, the amount of research into their effectiveness is not. Very little scholarship has been undertaken to evaluate the extent to which human rights treaties are being complied with by countries that have ratified them and whether ratification of a human rights treaty has a positive impact on the human rights situation within a State Party's jurisdiction. The research that has been undertaken has been largely quantitative and limited to studies of compliance with civil and political rights. This thesis builds on this limited scholarship by qualitatively analysing the 'compliance' levels of two States, Australia and the United States, with the norm in Article 29(1) of CROC relating to human rights education (HRE). Although the United States has not ratified CROC, it was selected as one of the case studies for this research in order to enable comparison to be made between HRE in a State that has ratified CROC, and a State that has not, thereby shedding light on whether ratification of a human rights treaty makes a difference.

Various theories have been developed to explain States' compliance, or lack of compliance, with international law. These range from rational actor theories that focus on States' power and self-interest to normative theories that highlight the persuasive power of binding legal obligations. When applying these theories to the empirical data relating to Australia and the United States' conduct surrounding Article 29(1) of CROC, this thesis found that none of the theories adequately explained the this conduct. Aspects of rational actor theories were useful in understanding Australia's decision to ratify, and the United States' decision not to ratify, CROC, while the normative theories that were more helpful in explaining domestic behaviours relating to HRE. However, no single theory entirely explained these two States' practices. In particular, existing theories overemphasise the significance of international influences at the expense of domestic factors which were found to significantly impact on whether a State is likely to comply with an international norm. This thesis found that constitutional structures (federalism), and the presence or absence of a domestic bill of rights, were particularly significant when it came to giving effect to the norm in Article 29(1) of CROC.

# **Declaration**

This is to certify that:

- (i) this thesis comprises only my original work towards the PhD except where indicated in the Preface;
- (ii) due acknowledgement has been made in the text to all other material used; and
- (iii) the thesis is less than 100,000 words in length, exclusive of tables, bibliographies and appendices.

Paula Gerber

## Preface

The idea for this thesis came to me in a bombed out building in war-torn Kosovo. In July 2001 I was teaching human rights to a class of Muslim law students at the University of Prishtina as part of an international program to rebuild the university which had, for the past decade, only been open to Serbian students. When preparing my lectures, I had assumed that my students would have a basic understanding of human rights, the human rights treaty system and the United Nations (UN) in general. I was wrong, and had to quickly adapt my teaching to a more elementary level. This led me to question why I had presumed that these students would have knowledge of fundamental human rights. I had not learnt about human rights during my secondary school education in Australia, so why did I assume that Kosovar students would have?

Living in a city so recently traumatised by war and now overtaken by thousands of peacekeepers, I contemplated how international human rights law *responds* to human rights violations, but appears to be powerless to *prevent* them. It seemed to me that the human rights system of the last half century was very much based on a reactive rather than proactive imperative. These thoughts regarding the deficiencies of international human rights law stayed with me when, on my way back to Australia from Kosovo, I became stranded in the United States following the September 11 attacks in New York and Washington DC, and as I finally returned home to be greeted by the Tampa crisis (the Australian Government refused to allow the Norwegian cargo ship *MV Tampa* to enter Australian waters because it had onboard 433 asylum seekers that had been rescued from a sinking ship), the children overboard saga (the Australian Government falsely accused asylum seekers on a boat of throwing their children overboard in a ploy to secure rescue by the Australian naval vessel seeking to prevent them entering Australian waters), and the controversial Pacific Solution whereby asylum seekers arriving by boat are subjected to mandatory incarceration in off-shore detention centres on Christmas Island, Manus Island in Papua New Guinea, and Nauru. The apparent widespread support for the manner in which the Australian Liberal-National Government dealt with refugees (it was re-elected in November 2001) astounded many, particularly those working and studying in the field of human rights. Those who called on the government to abide by international human rights norms and treaties, were labelled ‘elites’, ‘members of the chattering class’ or ‘bleeding hearts’ by conservative politicians. How had this happened, and more importantly how it could be reversed?

Listening to talk back radio, and reading the letters to the editors in the newspapers, it soon became clear that many of the opinions being expressed about human rights were ill-informed and based on fundamental misunderstandings about human rights law and the role of the UN. Once again I was surprised by the degree of people’s ignorance, and again I remonstrated with myself for presuming that the general population knew and understood the fundamental concepts of human rights. Once more I was reminded that most people’s limited knowledge of human rights came from

the mainstream media rather than through formal education. While there are some human rights classes taught at universities, these are, of course, not accessible to the majority of the population.

My experiences in 2001 started me on a train of enquiry regarding the general efficacy of international human rights law and, more specifically, how to ensure that the education children receive in schools includes education about human rights. I was amazed to discover that there was a plethora of international law regarding human rights education including the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic Social and Cultural Rights (Article 13), the UNESCO Convention Against Discrimination in Education (Article 5), the Convention on the Elimination of Racial Discrimination (Article 7) and the Convention on the Rights of the Child (Article 29). In addition, I was stunned to learn that we were over half way through the UN Decade for Human Rights Education (1995-2004). Was this the UN's best kept secret? What had gone so wrong that all the UN's efforts to promote human rights education had apparently not been successful, at least in Australia? It was these events and questions that prompted me to undertake the research that culminated in this thesis.

# Acknowledgements

This thesis is the result of seven and half years of stimulating and rewarding work which could not have been achieved without the support and encouragement of many people. In particular, this project would have been impossible without the input of numerous dedicated teachers and other education professionals who so generously gave their time in completing surveys and being interviewed. I am deeply grateful for all the support they gave to this study.

I have been privileged to have great scholars oversee my work. My sincere thanks go to my supervisors: initially Professor Gillian Triggs and subsequently Associate Professor Di Otto. Their knowledge, wisdom and guidance were invaluable, and their dedication to my research and insightful comments stimulated my thinking and growth during the PhD process. I am grateful for their influence, and for all that they have taught me.

Completion of this thesis would not have been possible without the encouragement and support of my partner, Lauren Costello who was my source of strength throughout. She has loved, encouraged and stood by me along this journey, and no amount of thanks can ever truly express the gratitude I feel towards her for her patience and unwavering faith in me.

Thanks also to my father, who passed on to me his love of the law and who has been a tremendous role model and inspiration throughout my life. In addition, I am grateful for his consummate editing of the final draft. I am also extremely indebted to Margaret Costello who is the mother I never had, and who provided me with tremendous practical and emotional support that sustained me during the final stages of my candidature.

Finally my thanks go to my daughter Alexandra Lucinda Gerber, born 26 July 2006, who provided the ultimate motivation for completing this thesis. I look forward to enjoying quality time with her away from the shadow of the PhD!

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## **CHAPTER 1 – INTRODUCTION**

### **Contents**

**1.1 Research Questions**

**1.2 Socio-Legal Nature of Research**

**1.3 Thesis Structure**

**1.4 Literature Review – Are Human Rights Treaties being Complied with in the Domestic Arena?**

*Compliance with and effectiveness of international human rights law remains a dark corner into which few have bothered to peer.<sup>1</sup>*

## 1.1 Research Questions

States have put enormous effort and resources into negotiating, drafting and ratifying international human rights conventions. Despite this, there has been surprisingly little empirical research conducted into whether States subsequently make genuine efforts to domestically implement, and comply with, the international human rights treaties they have ratified. Furthermore, existing theories on commitment to, and compliance with, international law do not adequately explain States' behaviour when it comes to human rights treaties. It should be noted that the terms 'commitment', 'implementation', 'compliance' and 'effectiveness' have generally accepted meanings in international law, namely: 'commitment' refers to a State's pledge to obey international law as evidenced by its ratification of a treaty; 'implementation' refers to the manner in which international law is transformed into domestic law, for example by way of legislative enactment or administrative directive; 'compliance' refers to the next step in the process, namely whether States are actually abiding by their procedural and substantive international law obligations; and finally 'effectiveness' looks at whether the international norm in question is achieving its policy objective, for example do environmental treaties result in an improved environment, do arms control measures reduce armament levels?<sup>2</sup> It is these definitions of the key terms that will be used throughout this thesis.

There is a great deal of uncertainty as to whether international human rights treaties positively impact on States' behaviour vis-à-vis human rights. Indeed one

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<sup>1</sup> Hathaway, Oona 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935, 1943.

<sup>2</sup> Alvarez, Jose E. 'Why Nations Behave' (1998) 19 *Michigan Journal of International Law* 303, 304.

scholar suggests that treaty ratification is not only *not* associated with better human rights practices, but in many instances is actually associated with worse conduct.<sup>3</sup> This thesis, consisting of a modest qualitative study of commitment to, implementation of and compliance with, a single human rights norm, complements the few large quantitative studies of compliance with human rights treaties (analysed in section 1.4 below). The qualitative study in this thesis is a comparison of the commitment to, implementation of, and compliance with, the human rights norm contained in Article 29(1) of the Convention on the Rights of the Child (CROC) by the United States, specifically Boston, Massachusetts and Australia, specifically Melbourne, Victoria. These jurisdictions have been selected, *inter alia*, because the United States has not ratified CROC and Australia has, thus providing useful empirical data about whether ratification of an international human rights treaty makes any difference to actual domestic practices.<sup>4</sup>

Article 29(1) of CROC provides:

States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

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<sup>3</sup> Hathaway, above n 1, 1940.

<sup>4</sup> Australia signed CROC on 22 August 1990 and ratified it less than four months later on 17 December 1990.

Article 29(1) includes a number of wide-ranging matters relating to the content of education, not of all of which are directly linked to education about human rights. For the purpose of this study, paragraphs (b), (c) and (d) of Article 29(1) are abbreviated to the expression ‘human rights education’ (HRE), and references to Article 29(1) refer to only these three sub-paragraphs. A detailed analysis of what exactly this term means is the subject of Chapter 3, entitled: ‘Human Rights Education: A Slogan in Search of a Definition’. Thus, this thesis examines the commitment to, implementation of, and compliance with, the international norm relating to the human rights component of education that children receive. The purpose of this comparative analysis is to determine what factors influence whether a State provides HRE in accordance with Article 29(1) of CROC in the two States chosen for this case study.

All the major human rights treaties create mechanisms to monitor States’ implementation of, and compliance with, the particular treaty. These mechanisms take the form of expert committees empowered to receive and respond to periodic reports from State Parties regarding steps they have taken to give effect to the treaty provisions.<sup>5</sup> While treaty committees may *monitor* States’ compliance they do not have the capacity to *measure* the extent of compliance. This is because the reports are prepared by State Parties themselves, and therefore do not represent an objective reporting of the human rights situation within their jurisdictions.<sup>6</sup> In addition, States can obfuscate their actual human rights record by referring the committee to formal constitutional or legislative protections (implementation) rather than providing information about the reality of human rights in practice (compliance). Furthermore, many States fail to submit reports in a timely manner, thus escaping even minimal monitoring of their human rights record. Independent empirical research such as that undertaken for this thesis, is therefore necessary in order to measure a State’s actual compliance with a particular human rights norm.

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<sup>5</sup> For example Article 43 of CROC establishes the Committee on the Rights of the Child and Article 44 requires State Parties to submit reports to the CRC every five years.

<sup>6</sup> Steiner, Henry J. and Alston, Philip *International Human Rights in Context: Law, Politics, Morals* (2<sup>nd</sup> ed, 2000) Oxford University Press, Oxford, 710. The provision of shadow reports by NGOs only partly offsets this problem.

This thesis seeks to contribute to the existing body of knowledge regarding compliance with human rights treaties in two ways. First, it provides an in-depth qualitative study of the commitment to, implementation of, and compliance with, a specific human rights norm, which complements and contrasts earlier quantitative studies that examine a multitude of human rights norms. While large-scale quantitative studies provide broad, statistical data on the human rights behaviour of a significant number of States, the analysis, of necessity, remains superficial. Small-scale qualitative case studies, such as the one undertaken for this thesis, allow for in-depth analysis that can explore all the complexities of the data.

The second contribution of this study is in the use of the data to test existing theories about the way States behave with respect to their international legal obligations. It has been said that ‘theory without practice is as lifeless as practice without theory is thoughtless’.<sup>7</sup> This thesis seeks to avoid being either lifeless or thoughtless by measuring existing theories on States’ compliance with international human rights law against States’ practice. Current theories, namely rational actor models which seek to explain State behaviour regarding international law by reference to a State’s power and self-interest,<sup>8</sup> and normative models which assert that a State’s behaviour is dictated by the persuasive power of international legal obligations,<sup>9</sup> fail to fully account for the many complex factors that influence State behaviour. The data collected and analysed for this thesis suggests that no single theory adequately explains States’ behaviour, at least when it comes to Australia and the United States’ conduct surrounding the norm in Article 29(1) of CROC. However, these States’ behaviour can be explained by merging aspects of a number of rational actor and normative theories.

Just as important as identifying what this research is about, is specifying what the research is *not* about. In particular, this study does not aim to measure the impact

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<sup>7</sup> Koh, Harold Hongju ‘A United States Human Rights Policy for the 21<sup>st</sup> Century’ (2002) 46 *Saint Louis University Law Journal* 293, 330.

<sup>8</sup> Morgenthau, Hans Joachim *Politics among Nations: The Struggle for Power and Peace*, (7<sup>th</sup> ed, 2005) Revised by Thompson, Kenneth W. McGraw-Hill, 4.

<sup>9</sup> Koh, Harold Hongju ‘Why Do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2599.

that human rights education has on recipients, that is the effectiveness of international human rights norms mandating HRE; this has already been done, at least to some extent, by others.<sup>10</sup> This research also does not seek to justify the importance of HRE, or respond to critics who say human rights education is too political, or a tool for propaganda.<sup>11</sup> Nor does it aim to evaluate the different pedagogical approaches to HRE; there are education experts better qualified to undertake that kind of research. Finally this thesis does not aim to provide a definitive answer to the broad question: do human rights treaties make a difference? The in-depth study of a small sample does not make this possible. Rather, this research aims to make a modest contribution to the body of knowledge on commitment to, implementation of, and compliance with, international human rights treaties by supplementing existing theories and identifying additional factors that influence States' practices vis-à-vis international human rights treaties.

## 1.2 Socio-Legal Nature of the Research

There is a dearth of socio-legal research into States' commitment to, implementation of, and compliance with international human rights law, and Laura Dickinson has observed that:

international law would greatly benefit from the kind of rich, multifaceted studies that characterize sociolegal scholarship. Such studies would help us develop a more complete understanding of the complex and multivariate processes through which states and the various actors within states ... internalize, ignore or resist the norms and values encoded in international law.<sup>12</sup>

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<sup>10</sup> See for example Andreopoulos, George J. and Claude Richard Pierre (eds) *Human Rights Education for the Twenty-First Century* (1997) University of Pennsylvania Press, Philadelphia; Paul , Martin, J. *The Design and Evaluation of Human Rights Education Programs*. (2000) Columbia University, Center for the Study of Human Rights, New York; Tibbitts, Felisa *Evaluation in the Human Rights Education Field* (1997) Netherlands Helsinki Committee and Human Rights Education Associates, The Hague; and Howe, R. Brian and Covell, Katherine *Empowering Children: Children's Rights Education as a Pathway to Citizenship* (2005) University of Toronto Press, Toronto.

<sup>11</sup> See for example Hart, Stuart, Cohen, Cynthia, Erickson, Martha and Flekkøy, Målfrid *Children's Rights in Education* (2001) Jessica Kinglsey Publishers, Philadelphia; and Claude, Richard Pierre *Educating for Human Rights: The Philippines and Beyond* (1996) University of Philippines Press, Quezon City.

<sup>12</sup> Dickinson, Laura A. (ed) *International Law and Society* (2007) Ashgate Publishing Limited, Hampshire, xii.

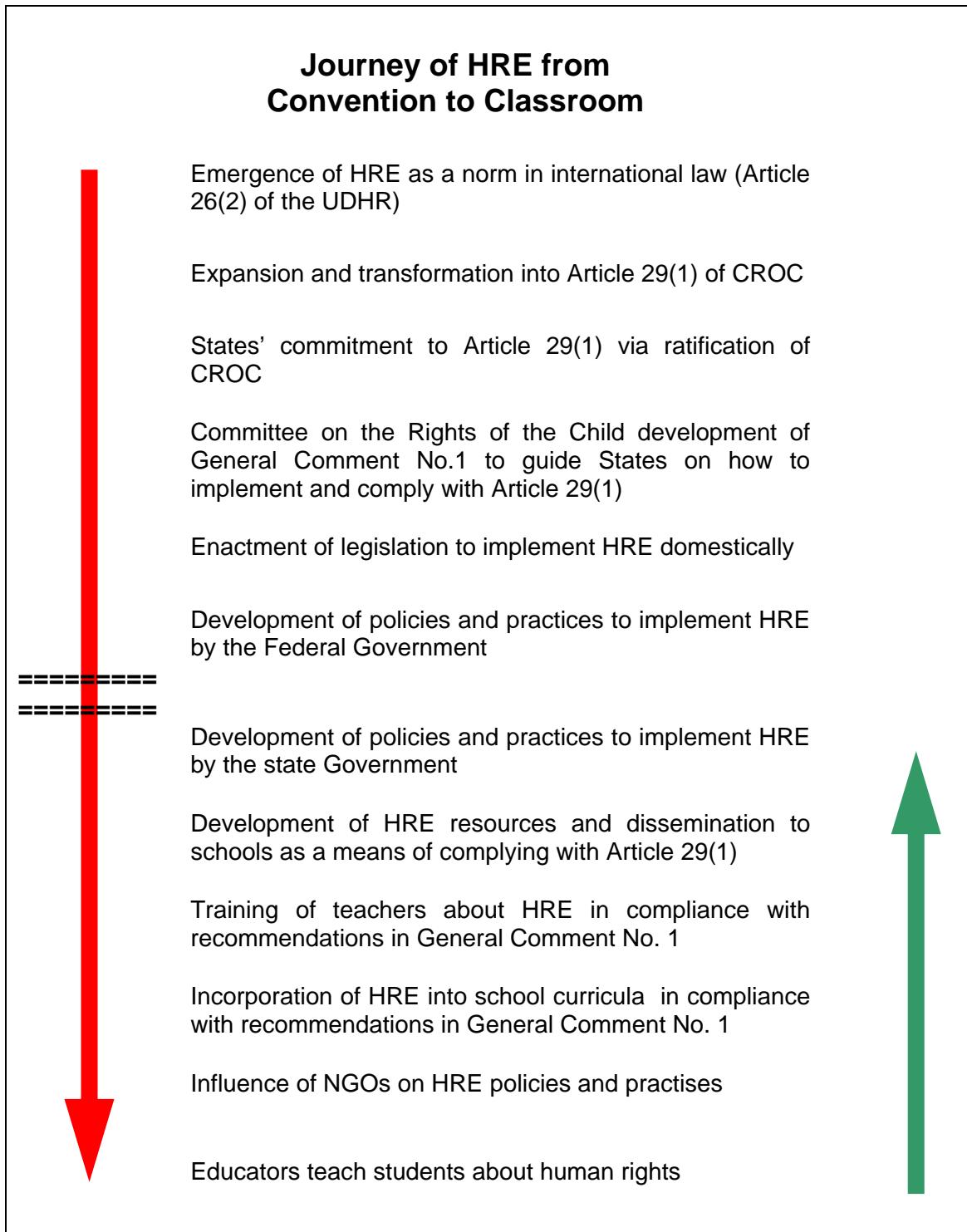
This thesis uses socio-legal methodology to track Australia and the United States' involvement with HRE at the international and domestic levels. The research begins by examining these States' involvement in the drafting of Article 29(1) of CROC, and then follows the journey of this norm through domestic laws and policies, and into schools where teachers' practices regarding HRE are identified and analysed. Previous research undertaken on HRE has tended to focus *either* on the legal aspects, or on the educative aspects.<sup>13</sup> There has been no socio-legal examination that follows the continuum of HRE from its international genesis in the Universal Declaration of Human Rights (UDHR) to its implementation in the domestic school system.

The following figure sets out the various HRE-related activities that occur along this journey from international organisation to local classroom, and which are analysed in this thesis. It illustrates that there are numerous steps that must be completed – in law, as well as in educational policies and practices – before the HRE contemplated by Article 29(1) of CROC can become a reality.

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<sup>13</sup> Examples of legal research undertaken in relation to HRE include, Alfredsson, Gudmundur 'The Right to Human Rights Education' Chapter 15 in *Economic, Social and Cultural Rights* (2<sup>nd</sup> ed, 2001) Kluwer Law International, Netherlands; Beiter, Klaus Dieter *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (2006) Martinus Nijhoff Publishers, Leiden; Frost, Lynda 'Human Rights Education Programs for Indigenous Peoples: Teaching Whose Human Rights?' (1995) 7 *St. Thomas Law Review* 699; and Okafor, Obiora Chinedu and Agbakwa, Shadrack C. 'Re-Imagining International Human Rights Education in Our Time: Beyond Three Constitutive Orthodoxies' (2001) 14 *Leiden Journal of International Law* 563.

Examples of educational research undertaken in relation to HRE include, Cole, Mike (ed) *Education, Equality and Human Rights* (2000) Routledge Falmer, London; Erazo, Ximena, Kirkwood, Mike, de Vlaming, Frederiek (eds) *Academic Freedom 4 Education and Human Rights* (1996) World University Service, London; and McInerney, Peter *Making Hope Practical: School Reform for Social Justice* (2004) Post Pressed, Flaxton, Queensland; Hornberg, Sabine 'Human Rights Education as an Integral Part of General Education' (2002) 48(3-4) *International Review of Education* 187; and Lohrenscheit, Claudia 'International Approaches in Human Rights Education' (2002) 48(3-4) *International Review of Education* 173; and Keet, Andre and Carrim, Nazir 'Infusing Human Rights into the Curriculum: The Case of the South African Revised National Curriculum Statement' (2005) 23(2) *Perspectives in Education* 1.



The downward arrow on the left side represents the journey that ideally should take place, that is, it illustrates the process that the Committee on Rights of the Child envisage will lead to HRE being transformed from an international norm into an educational reality. The break in the arrow between the federal and state

government initiatives symbolises the blockage that can occur because of federalism, as discussed in Chapter 6. The upward arrow on the right side represents what is actually happening, that is concurrently with the ‘top-down’ push for HRE, there is a ‘bottom-up’ grass roots domestic movement pushing for HRE. Thus, this thesis will demonstrate that the progression of HRE from convention to classroom is not an uninterrupted, one-way, linear journey, but rather a more complicated multi-dimensional, multi-directional process.

By analysing each of the steps in the above diagram, which include both legal and educational measures, this thesis aims to bridge the divide between law and education. This approach enables an examination of how a particular legal norm is understood and applied (or not applied, as the case may be) in the education sphere. By adopting a socio-legal approach, this thesis seeks to illuminate the relationship between law in action, and law on the books.<sup>14</sup> The use of a socio-legal methodology allows for greater insight into what effect the law is having on social function. In the case of this thesis, the social function being observed and analysed is education, which is the area Article 29(1) of CROC seeks to influence. Looking beyond what the law says about HRE, into what is actually taking place in schools, provides an opportunity to determine whether educational practices in fact reflect international law as articulated in Article 29(1) of CROC. This study is therefore concerned with the journey of international human rights law, from its formal inception to commitment, implementation and compliance by States.

### 1.3 Thesis Structure

This section outlines the configuration of this thesis by way of a general overview of the thesis as a whole, followed by an elaboration of the contents of each individual chapter. The thesis is divided into three distinct parts. The first consists of four chapters that lay the foundations for this research – this introduction, a definitional chapter, a theory chapter and a methodology chapter. Part II is devoted to the analysis of the data collected for this research. It consists of three

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<sup>14</sup> Kagan, Robert A. ‘What Socio-Legal Scholars Should Do When there is Too Much Law to Study’ (1995) 22(1) *Journal of Law and Society* 140.

chapters – Chapter 5 looks at the efforts of Australia and the United States in the international arena relating to HRE, specifically the drafting of Article 29(1) of CROC and participation in initiatives such as the UN Decade for HRE and the subsequent UN World Programme for HRE; Chapter 6 examines their endeavours pertaining to HRE in domestic law and policies; and Chapter 7 analyses the data concerning HRE, collected from teachers in Melbourne and Boston. Finally, Part III consists of two chapters which set out the theoretical implications of the findings and the conclusions reached.

The theoretical framework outlined in Chapter 2 allows for a critical analysis of States' compliance with human rights treaties. The chapter considers the two main groups of theories, namely rational actor and normative theories on why States ratify (or fail to ratify) treaties, and why they comply (or fail to comply) with treaty obligations. It analyses eight distinct theories on compliance with international law, namely realism; institutionalism; and liberalism from the rational actor theories; managerial model; fairness model; transnational legal process model; and domestic salience from the normative theories; and a hybrid model that incorporates aspects of both rational actor and normative theories. This chapter explores the strengths and weaknesses of these theories and provides the framework for examining the findings of the research undertaken for this thesis.

Before considering the behaviour of Australia and the United States regarding HRE, it is necessary to define what this term means. This is not as easy as it might first appear. Like many international human rights norms, Article 29(1) suffers from vagueness and overly legalistic language. The Committee on the Rights of the Child (CRC) has sought to remedy this by elaborating on this norm in General Comment No. 1 on the aims of education.<sup>15</sup> Furthermore, HRE is interpreted

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<sup>15</sup> General Comments 'provide authoritative interpretations of the general wording of the treaty text, thus assisting states parties to understand and fulfil their obligations under the treaties ... they play an increasingly important role in promoting a shared understanding of treaty norms and developing agreement about the detail of their content.' Otto, Dianne "Gender Comment": Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) *Canadian Journal of Women and the Law* 1, 3.

differently by different people and organisations. Chapter 3 analyses how HRE is understood by three important sectors, namely the relevant parts of the UN human rights machinery (specifically the CRC and the General Assembly); Governments in Australia and the United States (both federal and relevant State Governments); and human rights NGOs such as Amnesty International and Human Rights Education Associates.

As is demonstrated in section 1.4 below, most of the studies regarding States' commitment to, implementation of, and compliance with human rights treaties have been of a quantitative nature. While this has progressed understanding in this area, it has also left significant gaps; gaps that can only be filled by qualitative in-depth studies of individual State's behaviours. Chapter 4 explains the selection of the research design for the qualitative study undertaken for this thesis, as well as the research methods employed to gather the necessary empirical data. It elucidates both the advantages and disadvantages of undertaking a small comparative case study in the field of human rights treaty commitment and compliance, and ultimately concludes that this type of research is necessary in order to build on the knowledge acquired through earlier quantitative investigations. The purpose of Chapter 4 is to demonstrate that the selection of a qualitative, comparative, case-study approach was not only appropriate, but also essential if knowledge of States' commitment to, and compliance with human rights treaties is to progress. To this end, Chapter 4 sets out the process of designing the methodological framework (qualitative, comparative, case-study) and the choice of the research methods employed (surveys and interviews).

Part II of this thesis moves on to more substantive issues, beginning with Chapter 5 which analyses the involvement of Australia and the United States at the international level with the development of Article 29(1) of CROC as well as other international HRE initiatives such as the UN Decade for Human Rights Education and the World Programme for Human Rights Education. This chapter demonstrates that while both States were involved in the drafting of Article 29(1) of CROC, Australia made a more significant contribution.

Chapter 6 examines whether Australia and the United States' commitment to HRE at the international level, as illustrated in Chapter 5, is reflected in the domestic arena. Three distinct stages of governmental conduct are examined, namely, ratification; federal legislation and policy; and state legislation and policy. The first step reviewed is the different processes and approaches that Australia and the United States have taken to ratification of CROC. The extensive literature surrounding the United States' refusal to ratify CROC is examined, as is the literature concerning Australia's decision to ratify. Secondly, the federal system that operates in both the United States and Australia means that there is a constitutional division of power over various subject matters. In both countries it is state governments that have responsibility for education. However, this has not stopped the federal governments exerting a degree of influence over education through policy initiatives and financial incentives, and these national programs are analysed in light of the requirements of Article 29(1). The third stage of analysis is state government legislation and policy pertaining to HRE. The policies of the Massachusetts and Victorian Governments are evaluated through an examination of various initiatives including, the extent to which HRE forms part of the Curriculum Frameworks developed by the Departments of Education, and relevant legislative enactments. This analysis of initiatives at the state government level reveals the influence of 'bottom-up' HRE movements, in the absence of 'top-down' international or federal pressure to implement Article 29(1) of CROC.

The focus of Chapters 5 and 6 is on the law, both international and domestic, relating to HRE. Chapter 7 shifts to an examination of the extent of HRE in schools, thus moving from the legal arena to the educational perspective. For it is in classrooms that the long journey of the norm in Article 29(1) of CROC comes to ground; and it is here that compliance with this international law provision can ultimately be measured. Chapter 7 is pivotal to the entire thesis, because it is here that the comparative analysis of the actual extent of HRE in schools in Australia and the United States takes place. Thus the detailed investigation of these States' practices on the international stage, in domestic laws and policies, and in the education sector, enables a determination as to whether Australia and the United

States' different expressions of commitment to HRE in the international arena, are reflected in different levels of 'compliance' in the domestic arena.<sup>16</sup>

Chapter 8 considers the implications of the empirical data analysed in Chapters 5, 6 and 7 for the theories reviewed in Chapter 2. It assesses the eight theoretical models previously examined, and concludes that no single theory adequately explains the practices of Australia and the United States in respect of HRE. While rational actor theories appear to account for these States' actions surrounding commitment to CROC, the normative theories seem to better explain compliance behaviours relating to Article 29(1). However, both groups of theories fall short of providing a complete explanation for the practices of these two States. The case study suggests that additional factors need to be taken into account in order to make some of the theories more useful. In particular, when it comes to predicting compliance more attention needs to be paid to domestic factors, including whether a State is a federation, and if so the constitutional distribution of power relevant to the norm under consideration.

Chapter 9 concludes this thesis by summarising the empirical data and situating the findings within the existing studies analysed in section 1.4 below. It also provides an assessment of the usefulness of existing theoretical models and highlights ways in which these theories could be reconceptualised to make them more applicable to the practices of developed, democratic nations with respect to ESC rights.

#### **1.4 Literature Review – Are Human Rights Treaties Being Complied with in the Domestic Arena?**

While many legal scholars have questioned the effectiveness of international human rights law,<sup>17</sup> only a few have actually conducted empirical research to

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<sup>16</sup> It is acknowledged that since the United States has not ratified CROC, it is not strictly speaking correct to evaluate its compliance with Article 29(1).

<sup>17</sup> See for example Donnelly, Jack 'International Human Rights: A Regime Analysis' (1986) 40(3) *International Organizations* 599; Kennedy, David 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101; and Ratner, Stephen R.'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 *New York University Journal of International Law and Politics* 591.

support their views about whether international human rights law makes a difference. However, Laura Dickinson has observed that the:

Lack of emphasis on empirical studies in international law has begun to change. Perhaps spurred on by the general trend towards empiricism in the legal academy, legal scholars are beginning to test the impact and efficacy of international law. However, this work is still in its infancy and tends to be informed primarily by the methodologies of quantitative political science research. Accordingly the study of international law has not sufficiently embraced the broad range of empirical approaches.<sup>18</sup>

The ten empirical studies that have been undertaken into the efficacy of international human rights law are analysed in this section for the purposes of recognising the contribution they have made to the discipline, providing a context for the research undertaken in this thesis, and identifying some concerns regarding the research theory, design, methodology and analysis of results in these studies. The overwhelming majority of the scholars undertaking empirical studies have employed large-scale quantitative methods (Linda Keith,<sup>19</sup> Oona Hathaway,<sup>20</sup> Darren Hawkins and Jay Goodliffe,<sup>21</sup> Emile Hafner-Burton and Kiyoteru Tsutsui,<sup>22</sup> Eric Neumayer,<sup>23</sup> Todd Landman,<sup>24</sup> Jana von Stein,<sup>25</sup> and Wade Cole<sup>26</sup>) with only two groups of researchers using qualitative methodologies (Christof Heyns and

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<sup>18</sup> Dickinson, above n 12, xi.

<sup>19</sup> Keith, Linda Camp 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?' (1999) 36(1) *Journal of Peace Research* 95.

<sup>20</sup> Hathaway, above n 1.

<sup>21</sup> Hawkins, Darren and Goodliffe, Jay 'Explaining Commitment: States and the Convention Against Torture' (2006) 68(2) *Journal of Politics* 358.

<sup>22</sup> Hafner-Burton, Emilie M. and Tsutsui, Kiyoteru 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373.

<sup>23</sup> Neumayer, Eric 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49(6) *Journal of Conflict Resolution* 925.

<sup>24</sup> Landman, Todd 'Measuring Human Rights: Principle, Practice, and Policy' (2004) 26 *Human Rights Quarterly* 906 and Landman, Todd *Protecting Human Rights: A Comparative Study* (2005) Georgetown University Press, Washington D.C.

<sup>25</sup> von Stein, Jana 'Making Promises, Keeping Promises: Ratification and Compliance in International Human Rights Law' Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, 7-10 April, 2005, accessed at: [www-personal.umich.edu/janavs/vonStein-humanrights.pdf](http://www-personal.umich.edu/janavs/vonStein-humanrights.pdf).

<sup>26</sup> Cole, Wade 'Sovereignty Relinquished: Explaining Commitment to International Human Rights Covenants, 1960-1999' (2005) 70(3) *American Sociological Review* 472.

Frans Viljoen<sup>27</sup> and Thomas Risse, Stephen Ropp and Kathryn Sikkink<sup>28</sup>). As discussed in Chapter 4, there is a dominance of quantitative research in this field, and a need to balance these studies with more qualitative research.

(i) *Keith*

One of the first to undertake a practical investigation into the implementation of human rights treaties was political scientist Linda Keith, who conducted a large-scale quantitative study into the effect of ratification of the International Covenant on Civil and Political Rights (ICCPR) on the domestic enjoyment of ICCPR rights.<sup>29</sup> Her hypothesis was that becoming a party to an international human rights agreement makes a difference to a State's actual human rights behaviour. She tested this hypothesis by examining the human rights behaviour of 178 States over an eighteen year period (1976 - 1993) in two distinct ways. First, Keith considered States' human rights behaviour before and after ratification of the ICCPR. Second, she compared the human rights behaviour of States that had ratified the ICCPR with the behaviour of States that had not.<sup>30</sup> Overall, Keith concluded that 'it may be overly optimistic to expect that being a party to this international covenant will produce an observable impact.'<sup>31</sup> She found little support for her hypothesis that States who become parties to human rights treaties respect human rights more than those that do not.

Keith's empirical research has undoubtedly made a valuable contribution to the study of the nature and extent of States' compliance with international human rights treaties. However, there are arguably some flaws in her methodology that bring her ultimate findings into question. The first criticism relates to the way in which she categorised States. She used only two categories: States that had

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<sup>27</sup> Heyns, Christof and Viljoen, Frans 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 *Human Rights Quarterly* 483.

<sup>28</sup> Risse, Thomas, Ropp, Stephen and Sikkink, Kathryn (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge University Press, Cambridge.

<sup>29</sup> Keith, above n 19.

<sup>30</sup> At the time of the study there were 125 State Parties to the ICCPR, which is approximately two thirds of the States that Keith included in her study.

<sup>31</sup> Keith, above n 19, 112.

ratified or acceded to the ICCPR, and those that had not. This is an oversimplification, since the second category includes States that have taken no action whatsoever with respect to the ICCPR, and those that have signed the covenant but not yet formally ratified it. Keith adopted this approach because signing a treaty does not make it legally binding on a State. While this is true, signing a treaty is not without consequence: a State that has signed, but not yet ratified a treaty, is required to refrain from acts which would defeat the object and purpose of the treaty.<sup>32</sup> Thus to include parties who are obliged to refrain from acts that might defeat the purpose of ICCPR in the same category as States with no such obligation potentially distorts the data.

The use of only two categories is also unhelpful because it does not adequately deal with the situation of States that have made derogations from the covenant.<sup>33</sup> Keith also included these States with those that have not ratified the ICCPR. This treatment of the data possibly skews the results. It is artificial and misleading to suggest that a derogation (which can only relate to some of the ICCPR rights and must be temporary) makes a State Party the same as a non-State Party. A better approach might have been to include derogating parties in a separate category during the period of their derogation.

Keith's comparison of a State Party's human rights record before and after ratification found no support for the hypothesis that human rights behaviour improves significantly after becoming a party to the ICCPR. She speculates that this may be because 'a State's change in behaviour precedes its formal adherence to the treaty, especially if the State was involved in a long ratification process.'<sup>34</sup> This highlights one of the shortfalls of large-scale quantitative studies; there is no scope for nuanced, in-depth analysis that could provide greater insight into the reasons that a State's human rights behaviour may not have changed after

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<sup>32</sup> Article 18 of the *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969, Entered into force 27 January 1980.

<sup>33</sup> Article 4 of the ICCPR allows State Parties to derogate temporarily from a limited number of obligations in the Covenant in times of 'public emergency which threatens the life of the nation'.

<sup>34</sup> Keith, above n 19, 106.

ratification. Large-scale macro-analysis does have its advantages, in that it can shed light on global trends, but only small-scale micro-analysis can provide insightful and detailed analysis.

In her conclusion, Keith suggests that small-scale qualitative research might be useful, adding that ‘few studies have actually examined systematically which aspects of constitutional or statutory laws protect human rights best.’<sup>35</sup> This thesis aims to make a contribution to filling these gaps by examining the role of domestic law in the United States and Australia in promoting the particular human rights norm under consideration in this thesis, and considering the significance of bills of rights in encouraging and informing HRE in schools.

#### (ii) *Hathaway*

The second major empirical study in this area was undertaken by Oona Hathaway. Although Hathaway and Keith included similar numbers of countries in their studies – 166 and 178 respectively – Hathaway’s study is more comprehensive than Keith’s in many respects. First, while Keith analysed one human rights treaty, Hathaway examined the implementation of human rights laws in five different subject areas – genocide, torture, civil liberty, fair trial and political representation of women – as required by four separate treaties.<sup>36</sup> Second, Hathaway’s data commences at an earlier point in time (1960 compared to 1973), and covered a significantly longer period than Keith’s study (39 years compared to 18).

The thrust of Hathaway’s research was to empirically test whether Louis Henkin’s assertion that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’<sup>37</sup> holds true for human

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<sup>35</sup> Ibid, 113.

<sup>36</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* Adopted by General Assembly Resolution 260 A (III) on 9 December 1948, entered into force 12 January 1951; *Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment* Adopted by General Assembly Resolution 39/46 on 10 December 1984, entered into force 26 June 1987; *ICCPR* Adopted by General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force 23 March 1976; and *Convention on the Political Rights of Women* Adopted by General Assembly Resolution 640(VII) on 20 December 1952, entered into force 7 July 1954.

<sup>37</sup> Henkin, Louis *How Nations Behave* (2<sup>nd</sup> ed, 1979) Columbia University Press, 47.

rights law.<sup>38</sup> Overall, Hathaway's findings concur with those of Keith, namely that human rights behaviour does not appear to improve with treaty ratification. However, in a somewhat surprising outcome, Hathaway concludes that 'treaty ratification is not infrequently associated with worse human rights ratings.'<sup>39</sup>

Perhaps because Hathaway's findings were so counterintuitive, they have been subjected to much review. The harshest critics have been Ryan Goodman and Derek Jinks who condemned her research on many levels.<sup>40</sup> They assert that her basic research design was flawed, in that she measured only a few human rights areas, and from this drew conclusions relating to overall levels of compliance with particular treaties. Goodman and Jinks use the example of Latin America in the late 1970s and early 1980s to illustrate the deficiencies of this model.<sup>41</sup> During this period the prevalence of torture, political imprisonment and unfair trials declined, but the number of disappearances increased. By not factoring in the human rights abuses that developed in place of torture, political imprisonment and unfair trials, a very inaccurate picture emerged of the actual level of compliance of Latin American States with the relevant treaty.<sup>42</sup> As the research being undertaken for this thesis, involves a single norm in a single treaty – Article 29 of CROC – potentially the same criticism could be levelled. However, to address this, this thesis limits its conclusions to modest claims that concern only the narrow issue of HRE, as articulated in Article 29(1), and does not seek to make broad generalisations regarding States' overall compliance with human rights treaties.

Goodman and Jinks also find fault with Hathaway's study because of the data she used to support her findings. Hathaway, like most others who have conducted

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<sup>38</sup> Less well known scholars have asserted, somewhat pessimistically, and in direct contrast to Henkin's statement that: 'most international laws will fail in most places most of the time'. Hafner-Burton, Emilie M. and Ron, James 'Seeing Double: Human Rights through Qualitative and Quantitative Eyes' (2006), paper accessed at: [www.princeton.edu/~ehafner/pdfs/seeing\\_double.pdf](http://www.princeton.edu/~ehafner/pdfs/seeing_double.pdf) on 2 June 2007, page 13.

<sup>39</sup> Hathaway, above n 1, 1940.

<sup>40</sup> Goodman, Ryan and Jinks, Derek 'Measuring the Effects of Human Rights Treaties' (2003) 14(1) *European Journal of International Law* 171, 172.

<sup>41</sup> Ibid, 174.

<sup>42</sup> Ibid, 174.

statistical analysis of human rights behaviour, relied on *reported and recorded* human rights violations. The problem with these measures is that they may be quite different from the *actual* level of violations.<sup>43</sup> For example, an extremely repressive regime may have no reported cases of torture, making it look more compliant than a regime that has a limited number of cases of torture, but torture cases are reported and this information is readily accessible because of the existence of a free and open media.<sup>44</sup> Thus Hathaway's model does not differentiate between a State in which torture has increased post-ratification, and a State in which the incidences of torture have actually declined post-ratification, but appear to have increased because there has been an increase in documenting and reporting such cases.<sup>45</sup> The bluntness of Hathaway's measurement casts doubt on her findings.

Hathaway counters these arguments by saying that Goodman and Jinks have misread her analysis or taken issue with trivial points.<sup>46</sup> For example, Hathaway asserts that empirical research regarding human rights can only ever be based on *reported and recorded* human rights abuses since what actually occurred can never be known.<sup>47</sup> While this may be true for large scale quantitative studies, it is not the case for qualitative research. Thus, in-depth interviews, of the type conducted for this thesis, seek to measure the actual practices of teachers relating to HRE, rather than just what is reported in, for example, Australia's Periodic Reports to the Committee on the Rights of the Child.<sup>48</sup>

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<sup>43</sup> Ibid, 175.

<sup>44</sup> Lopez, George and Stohl, Michael 'Problems of Concept and Measurement in the Study of Human Rights' in Jabine, Thomas B. and Claude, Richard P. (eds) *Human Rights and Statistics: Getting the Record Straight* (1992) University of Pennsylvania Press, Philadelphia, 226.

<sup>45</sup> Goodman, above n 40, 175.

<sup>46</sup> Hathaway, Oona 'Testing Conventional Wisdom' (2003) 14(1) *European Journal of International Law* 185, 187.

<sup>47</sup> Ibid, 190.

<sup>48</sup> Australia's First Report under Article 44(1)(a) of the Convention on the Rights of the Child CRC/C/8/Add, December 1995 and Australia's Combined Second and Third Reports under the Convention on the Rights of the Child CRC/C/129/Add.4, 29 December 2004.

Overall, Hathaway's findings are consistent with the other quantitative studies analysed in this section and her large scale study provides useful additional insight into States' behaviour vis-à-vis human rights treaties. However, the results should be used with caution in light of the concerns raised by Goodman and Jinks.

(iii) *Hawkins and Goodliffe*

Darren Hawkins and Jay Goodliffe conducted research designed to explain why States do, or do not, commit to the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT).<sup>49</sup> They evaluated the practices of the 55 States that had not ratified CAT, and the 139 States that had, between 1985 and 2000. They used quantitative analysis to test two hypotheses, namely that a State's decision to ratify is affected by regional influences; and that a State's decision about whether it will commit to a human rights treaty is based on an evaluation of the costs involved. In particular they looked at three different types of costs, namely: the extent to which domestic policies, practices and laws need to be changed in order to comply with the treaty; the extent of unintended consequences, that is the risk of there being unforeseen ramifications that flow from ratification, for example an activist judge in a common law jurisdiction using the treaty in unintended ways; and the foreclosure of policy options, that is the extent to which the treaty will limit a government's flexibility in responding to uncertainty and threat.<sup>50</sup>

Hawkins and Goodliffe found that if a country's neighbours had ratified CAT, then that country was more likely to also ratify that treaty, and to do so sooner.<sup>51</sup> This does not help to explain the United States' decision not to ratify CROC. Not only have all its neighbours ratified this treaty, but almost all the countries in the world have. Therefore, one must question whether Hawkins and Goodliffe's finding in this regard is applicable to a Super Power such as the United States.

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<sup>49</sup> Hawkins, above n 21.

<sup>50</sup> Hawkins, above n 21, 361.

<sup>51</sup> Ibid, 365.

With respect to the costs of compliance, Hawkins and Goodliffe found that all three costs were to a greater or lesser degree, influential. With respect to policy changes, the researchers found that two of the four measures supported the hypothesis that the more extensive the changes required, the less likely a State is to commit. According to one of the measures non-democratic countries with higher rates of torture are more likely to commit to CAT. They assert that this echoes Hathaway's findings<sup>52</sup> and is explained by such States needing the 'normative cover provided by committing to the CAT.'<sup>53</sup> In other words, international pressure diminishes, at least in the short term, when a State ratifies CAT. The State effectively 'buys' several years of non-scrutiny until its first report is due to the treaty committee.

With respect to the second cost – unintended consequences – the authors found these were a factor in a State deciding whether to commit to CAT. In particular, they found that wealthy and powerful States were more likely to ratify because they were better able to control and minimise unintended consequences. Furthermore, States with common law jurisdictions were less likely to ratify CAT, which the authors explained in terms of concern about how judges might interpret and apply the treaty.<sup>54</sup> While their statistics are no doubt correct, the authors do not establish any causal connection. Their conclusions provide one explanation for their findings but there are many other explanations for why powerful States ratify CAT in greater numbers, and why common law States are less likely to ratify CAT than non-common law States. One would need to conduct in-depth qualitative research, such as interviews with relevant government officials, in order to ascertain what actually motivated a State's decision-making about the ratification of CAT.

With respect to the third cost measured – the forbearing of policy – Hawkins and Goodliffe found that countries involved in inter-State disputes involving the use of force were less likely to ratify CAT. They explained this by asserting that States

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> The authors gave as an example of this type of concern the way the courts in Spain and Britain exercised universal jurisdiction to hold Pinochet accountable for the crime of torture. Ibid, 360.

involved in such conflicts were more likely to want the freedom and flexibility to use torture if they felt it necessary.<sup>55</sup> Again, the authors failed to establish any causal connection between this factor and ratification.

Overall, Hawkins and Goodliffe concluded that the cost of ratification varies among States and that this variation substantially influences commitment patterns.<sup>56</sup> Thus they suggest that States make their decisions regarding ratification of international treaties after a calculated assessment of their self-interest. Hawkins and Goodliffe make an important contribution to our understanding of why States might commit to CAT. However, their failure to establish causal links between the alleged costs of commitment and ratification limits the usefulness of the findings, and more nuanced qualitative research is required to supplement their conclusions.

(iv) *Hafner-Burton and Tsutsui*

In their 2005 study, Hafner-Burton and Tsutsui set out to test the hypothesis that ‘Ratification of human rights treaties has had no direct positive effect on States’ compliance in practice and may even have a significantly negative effect, corresponding to increasing repression.’<sup>57</sup> They used data relating to 153 States between the years 1976 and 1999. Like the others before them, these scholars analysed the data quantitatively, and focused on civil and political rights. They found that:

There is no evidence to suggest a systematically positive correlation between official government acceptance of an international law to protect human rights and the actual behaviour of government elites to protect those rights. More disturbing is evidence to suggest that the ratification of human rights treaties may actually hide worsening State compliance with human rights norms enshrined in those treaties, at least in the short term.<sup>58</sup>

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<sup>55</sup> Hawkins, above n 21, 366.

<sup>56</sup> Ibid, 368-369.

<sup>57</sup> Hafner-Burton, above n 22, 1389.

<sup>58</sup> Ibid.

One concern regarding this study is that while measuring violations of only four civil and political rights (murder, torture, forced disappearances and political imprisonment), the authors nevertheless took into account ratification of all six core human rights treaties.<sup>59</sup> This seems inappropriate and likely to distort the findings. The four rights being measured are not, for example, covered in the International Covenant on Economic, Social and Cultural Rights (ICESCR), so whether a State has ratified this covenant seems irrelevant to the research. When comparing the effect of human rights treaties on States' practices it is appropriate that there be a direct correlation between the treaties selected and the human rights practices being measured.

A further criticism of this research concerns the extrapolation of the results to human rights compliance in general. The researchers only examined four types of violations, and while they are undoubtedly fundamental, these rights cannot be used to draw conclusions about the human rights practices in general. For example, a State may have extremely high levels of compliance with ICESCR, while failing to respect ICCPR rights; a situation that Hefner-Burton's and Tsutsui's model does not take into account. For this reason, it is suggested that the conclusions from this study should be confined to the rights that were measured, and broad generalisation about overall levels of human rights compliance should be avoided.

Finally, Hefner-Burton and Tsutsui explored a second issue, namely the effect that ratification of human rights treaties has on civil society. They concluded that the international human rights legal framework 'provides much leverage for nongovernmental actors to pressure rights-violating governments to change their behaviour'.<sup>60</sup> They refer to this as the 'paradox of empty promises'; that despite weak enforcement mechanisms, international human rights laws are not without

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<sup>59</sup> ICCPR; International Covenant on Economic, Social and Cultural Rights; CAT; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Adopted by General Assembly Resolution 34/180 on 18 December 1979, entered into force 3 September 1981; Convention on the Elimination of All Forms of Racial Discrimination (CERD) Adopted by General Assembly Resolution 2106 (XX) on 21 December 1965, entered into force 4 January 1969; and CROC.

<sup>60</sup> Hafner-Burton, above n 22, 1401.

significance, since civil society is able to use the treaties to make demands on governments to improve their levels of compliance.<sup>61</sup> Thus Hefner-Burton and Tsutsui are somewhat more positive about the overall effect of human rights treaties than Keith and Hathaway because of what they see as a beneficial side effect of States' ratification.

(v) *Neumayer*

Eric Neumayer similarly conducted empirical research into States' levels of compliance with a broader but still limited range of rights, namely: freedom from unlawful and political imprisonment, torture, unlawful harm, cruel and inhumane treatment (classified as personal integrity rights), and the right to a fair trial, freedom of speech, freedom of assembly and association, and freedom of religious expression (classified as civil rights).<sup>62</sup> This study produces the most recent statistics on human rights violations, covering the period 1980 to 2001. In a first, Neumayer analysed not only UN human rights treaties (ICCPR, First Optional Protocol to the ICCPR and CAT) but also regional human rights instruments.<sup>63</sup> This is a welcome extension of the analysis of human rights treaties, as previous studies have generally ignored the effect of regional human rights instruments.

Like Hefner-Burton and Tsutsui, Neumayer was interested in studying the links between human rights compliance and the activities of non-government organisations (NGOs). He therefore included NGO participation in his model. However, as Neumayer himself acknowledged, the large-scale nature of the research meant that the NGO data suffered from measurement error.<sup>64</sup> In particular, the research did not differentiate between general NGOs and human

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<sup>61</sup> Ibid, 1378.

<sup>62</sup> Neumayer, above n 23, 935.

<sup>63</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, Opened for Signature 4 November 1950, entered into force 3 September 1953; European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment ETS 126, 27 I.L.M. 1152, entered into force 1 February 1989; American Convention on Human Rights O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978; Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force 28 February 1987; and African Charter on Human and People's Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>64</sup> Neumayer, above n 23, 937.

rights NGOs, and thus the reported number of NGOs may be quite misleading since it is not known how many of these have a human rights mission. Furthermore, there is no data on the size, membership or organisation of the NGOs. As a result we do not know whether the NGOs included in the data are very small or large global organisations such as Amnesty International. To use this vague data to draw the conclusion that ‘ratification becomes more beneficial the stronger is civil society’<sup>65</sup> is problematic.

Overall, Neumayer concluded that the impact of treaty ratification varied according to the strength of civil society, and that ratification of human rights treaties was associated with worse human rights practices when there was no, or limited, civil society.<sup>66</sup> He also found that the more democratic a country, the more likely treaty ratification would have a positive benefit.<sup>67</sup> Thus Neumayer’s research supports the earlier studies to the effect that there appears to be no general correlation between treaty ratification and improved human rights practices.

#### (vi) *Landman*

Todd Landman’s research into States’ compliance involved comparative quantitative analysis of civil and political rights in 193 countries during the period 1976 to 2000.<sup>68</sup> In many ways Landman’s data, methodology and analysis is the most comprehensive of all the quantitative studies. One variable that Landman took into account, that other researchers did not, was the extent to which States made reservations at the time of their ratification. States were classified according to whether they made any reservations to a treaty, and if so, whether the reservation(s) had a minor, noticeable, or major impact on a State’s obligations under the treaty.<sup>69</sup> This inclusion of reservations makes a positive contribution

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<sup>65</sup> Ibid, 941.

<sup>66</sup> Ibid, 941 and 943.

<sup>67</sup> Ibid, 941.

<sup>68</sup> Landman, Todd (1) ‘Measuring Human Rights: Principle, Practice, and Policy’ (2004) 26 *Human Rights Quarterly* 906 and Landman, Todd (2) *Protecting Human Rights: A Comparative Study* (2005) Georgetown University Press, Washington D.C.

<sup>69</sup> Ibid (2), 42.

since it enables a more accurate picture of States' intentions and true level of commitment to the treaty at the time of ratification. Landman also separated out States that had signed, but not ratified a treaty, from States that had taken no action whatsoever in respect of a treaty. Thus Landman was able to overcome one of the criticisms of Hathaway's research, and conduct a more nuanced analysis of the data.

Landman found that 'old democracies protect human rights better and ratify fewer treaties, whereas newer democracies have a worse record at human rights protection, yet ratify more treaties.'<sup>70</sup> Landman concluded that human rights protection improved after ratification, but that his evidence was merely suggestive of a correlation and did not actually establish a causal link between ratification and improved respect of human rights.<sup>71</sup> Overall, he found that treaty ratification had a limited, but significant, effect on reducing human rights violations.<sup>72</sup> He reached a more positive conclusion about the impact of treaty ratification than the other empirical scholars, but still concluded that there is a significant gap between rights as set out in international law, and rights as practiced by States.

Significantly, Landman found that factors other than treaty ratification have a greater influence on the level of human rights protection. In particular, he found the level of democracy, how long a State has been democratic, economic wealth, whether the State is involved in any internal or external conflicts, and population size to all be strong indicators of a State's level of compliance with international human rights obligations.<sup>73</sup>

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<sup>70</sup> Ibid (2), 124. Also newer democracies make fewer reservations when they ratify, Ibid, 133.

<sup>71</sup> Ibid (2), 126.

<sup>72</sup> Ibid (2), 147.

<sup>73</sup> Given the nature of the States selected for this case study, these are factors which are not relevant to the this thesis.

(vii) *von Stein*

The most recent empirical research into the nature and extent of States' compliance with human rights treaties is Jana von Stein.<sup>74</sup> Unlike previous researchers, she did not examine UN treaties, but instead focused on two International Labour Organisation (ILO) conventions namely, the Convention Concerning the Minimum Age for Admission to Employment,<sup>75</sup> and the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.<sup>76</sup> The conclusion that von Stein reached was that democracies wait to ratify these conventions until they are already in compliance, and therefore that ratification has no independent constraining impact on children's and women's rights in democracies.<sup>77</sup> In contrast, von Stein concludes that for non-democratic States, the extent of compliant behaviour has no bearing on the decision whether or not to ratify.

The conclusion von Stein draws is that the key to understanding a State's commitment to, and compliance with, international human rights treaties lies in its domestic enforcement mechanisms. In particular, she identifies three factors that she asserts influence compliance with international human rights laws, namely: the existence of domestic courts in which individuals can file complaints for transgressions of their rights; the conduct of regular elections at which citizens can hold their leaders accountable; and a free press where individuals can openly criticise their government and subject it to public scrutiny.<sup>78</sup> This emphasis on domestic factors influencing levels of compliance with international treaties supports the conclusions reached in this thesis. However, the domestic factors that the study undertaken for this thesis found to be most influential were not the three identified by von Stein, but rather the constitutional arrangements, in

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<sup>74</sup> von Stein, above n 25.

<sup>75</sup> Convention C138, adopted by the General Conference of the International Labour Organisation on 26 June 1973.

<sup>76</sup> Convention C100, adopted by the General Conference of the International Labour Organisation on 29 June 1951.

<sup>77</sup> von Stein, above n 25, 2.

<sup>78</sup> Ibid, 7.

particular whether the State in question is a federation and whether there are domestic human rights laws, such as a bill of rights, that supports a culture infused with knowledge and understanding of human rights.

The criticisms of quantitative studies that have previously been articulated also apply to von Stein's research, namely that large scale statistical analysis does not allow for in-depth nuanced examination. Furthermore, the classification of such a large amount of data often leads to potential manipulation or distortion of the facts to suit the study. For example, von Stein could not access accurate data about the rates of pay for males and females in the workforce on which to assess whether States were complying with the equal pay provisions of the relevant ILO convention, so instead she measured the rate of participation of women in the labour force. She justified this approach by asserting that there can be a legitimate assumption that when there is an increase in the wage women can earn outside the home, more women will join the workforce.<sup>79</sup> Similarly, when it came to measuring child labour practices, von Stein could only readily access data regarding children in the work force between the ages of 10 – 14. Thus children under 10 were excluded from the data, which may well have skewed the results.

(viii) *Cole*

Wade Cole undertook research to ascertain whether the *content* of international human rights treaties and the *cost* of ratification influenced States' decisions regarding committing to these laws.<sup>80</sup> He did this by examining data concerning ratification of the ICCPR, the First Optional Protocol to the ICCPR, and ICESCR from 130 countries between 1966 and 1999. His research was not concerned with whether States complied with treaties they had ratified, but rather the narrower question of what influenced a State's decision to ratify, or not ratify, a particular human rights treaty.

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<sup>79</sup> Ibid, 16.

<sup>80</sup> Cole, above n 26.

Cole differentiated between the three treaties primarily on the basis of the enforcement mechanisms. While the First Optional Protocol to the ICCPR allows the Human Rights Committee<sup>81</sup> to receive and investigate communications from individuals alleging violations of their ICCPR rights, the Economic, Social and Cultural Rights Committee established by the Economic and Social Council (ECOSOC) to monitor ICESCR, has no such power. Its role is limited to monitoring States' compliance through receiving and commenting on State Parties' periodic reports regarding their compliance.<sup>82</sup>

Cole found that the predictors of ratification of ICESCR and ICCPR were substantively similar, namely that democratic States are more likely to ratify than non-democratic States, and States with closer ties to international institutions and civil society are more likely to ratify than those with limited global participation.<sup>83</sup> However, the factors influencing whether a State ratified the First Optional Protocol to the ICCPR were significantly different.<sup>84</sup> In particular, a country's treatment of individuals within its territory was a key predictor of whether a State was likely to ratify the First Optional Protocol to the ICCPR, as was the extent of its participation in international organisations.<sup>85</sup> Cole interpreted these findings as showing that instruments which allow for more intrusive monitoring and enforcement mechanisms are less likely to be ratified by States with poor human rights record, since ratification exposes the State to the risk that its human rights practices will be reported and investigated. Similarly, the greater a State's participation in international civil society, the greater the risk that individuals within that State will be aware of their rights and make use of the grievance procedures, and therefore the less likely that such a State will ratify the First Optional Protocol.

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<sup>81</sup> Established under Article 28 of the ICCPR.

<sup>82</sup> This is the same for States that have ratified the ICCPR but not the First Optional Protocol - the Human Rights Committee can only receive and respond to State Party reports, not individual complaints.

<sup>83</sup> Cole, above n 26, 477.

<sup>84</sup> Ibid, 485.

<sup>85</sup> Ibid, 490-491.

The conclusion Cole reaches is that content of a human rights treaty, in terms of whether it is protecting civil and political rights or economic, social and cultural rights, is not a strong predictor of whether a State will ratify a treaty. However, the strength of a treaty's monitoring and enforcement mechanisms was an extremely influential predictor of non-ratification. From this, Cole concludes that ratification of treaties with weak enforcement mechanisms – arguably most human rights treaties – expresses a symbolic, but not actual, commitment to human rights. Furthermore, Cole argues that countries will not join a treaty *of consequence* unless they are willing and able to abide by the commitment.<sup>86</sup> Cole's research, by focusing on commitment rather than compliance, provides new insight into the decision-making of States regarding ratification of human rights treaties.

(ix) *Heyns and Viljoen*

Christof Heyns and Frans Viljoen were the first international law scholars to conduct *qualitative* research into the impact of human rights treaties.<sup>87</sup> The study was initiated in collaboration with the UN Office of the High Commissioner for Human Rights to evaluate the influence of the six core human rights treaties in twenty countries spread across the five UN geographic regions.<sup>88</sup>

The methodology employed was to identify a correspondent in each country who was charged with completing a questionnaire for each of the treaties. The questionnaire had to be answered on the basis of interviews with relevant people and a review of pertinent documents.<sup>89</sup> The researchers made two distinct findings as a result of this research, namely:

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<sup>86</sup> Ibid, 492.

<sup>87</sup> Heyns, above n 27, and Heyns, Christof and Viljoen, Frans *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) Kluwer Law International, The Hague.

<sup>88</sup> The countries investigated were, Egypt, Senegal, South Africa and Zambia in the African region; India, Iran, Japan and the Philippines in the Asian region; the Czech Republic, Estonia, Romania and Russia in the Eastern European Region; Brazil, Columbia, Jamaica and Mexico in the Latin America and Caribbean region; and Australia, Canada, Finland and Spain in the Western Europe and Others region.

<sup>89</sup> Over 265 people were interviewed as part of this study. Pertinent documents included country reports and concluding observations from relevant UN committees, official State documents, newspaper articles, court decisions, academic writings and NGO publications. Heyns, above n 27, 486.

The first is the fact that the international system has had its greatest impact where treaty norms have been made part of the domestic law more or less spontaneously (for example as part of constitutional and legislative reform), and not as a result of norm enforcement (through reporting, individual complaints, or confidential inquiry procedures). The second is that insofar as international norm enforcement plays a role, its influence is very unevenly spread among countries that are part of the system.<sup>90</sup>

One of the criticisms that may be made of Heyns and Viljoen's work is that they have not placed their research within the existing body of knowledge. It would have been preferable for them to identify previous studies and how their work fits within that literature. Thus they make no attempt to discuss the theoretical models that have been developed in this field, or analyse how their findings sit with those models. The research is thus weakened by its isolation. It also would have been preferable for the paper to be less descriptive and more analytical. Although the published work is over 50 pages long, most of this is mere description of the results, with little effort made to question and explore the findings.

Nevertheless, Heyns and Viljoen's study produced much useful data. The relatively small-scale of the research facilitated the collection of rich, detailed information. For example, the authors concluded that the primary reason why States ratify international human rights treaties relates to international diplomacy, that is, they want to be seen as supporters of human rights.<sup>91</sup> However, in the case of Australia and ratification of CROC, they found that it was Australia's significant participation in the drafting of this treaty that was the most influential factor in Australia's prompt ratification.<sup>92</sup>

Heyns and Viljean included, as part of their study, analysis of the extent to which States reviewed their constitution and legislation, either before or after ratification, to determine whether it was compatible with the treaty obligations. They found that

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<sup>90</sup> Heyns, above n 27, 487-488.

<sup>91</sup> Ibid, 491.

<sup>92</sup> Ibid, 493.

such compatibility studies were done prior to ratification with respect to all six core human rights treaties by five countries.<sup>93</sup> A further nine countries undertook a compatibility study with respect to only some of the treaties, or only to a limited extent, prior to ratification.<sup>94</sup> Thus 70% of States in the study conducted some sort of review of their domestic law prior to committing to a treaty, and in some cases that process resulted in the domestic law being amended to make it conform to the international norm.<sup>95</sup> This may go part way to explaining the findings in the quantitative studies that there is no improvement in the protection of human rights post-ratification, as States may have taken steps to remedy deficiencies prior to committing themselves to the treaty.

Heyns and Viljoen conclude with some recommendations for improving the impact of human rights treaties at the domestic level. These include, every country adopting a national plan of action on human rights, which should include details of how treaties are to be implemented; treaties should be incorporated into domestic law; governments should develop a central body and database for all UN treaty reporting; there should be extensive educational efforts regarding human rights treaties; governments should support and encourage human rights NGOs; and, perhaps most importantly, that treaty norms should be reflected in an enforceable bill of rights.<sup>96</sup>

Unfortunately, the authors provide almost no detail about their methodology so it is impossible to review their methods of data collection. However, it is noted that different persons gathered the data in each jurisdiction, which means that there is a risk that there was inconsistency in the manner and method of collection, which cannot be identified from the information published. When doing qualitative

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<sup>93</sup> Brazil, Canada, Egypt, Japan and South Africa.

<sup>94</sup> Australia, Finland, India, Iran, Jamaica, Romania, Senegal, Spain and Zambia.

<sup>95</sup> Finland, for example, amended its *Penal Code* before ratifying CERD.

<sup>96</sup> Heyns, above n 27, 527-530.

research, it is preferable to minimise the number of persons involved in collecting and coding the data, in order to ensure uniformity.<sup>97</sup>

The study by Heyns and Viljoen was not designed to compare the human rights behaviour of States that have ratified treaties with States that have not. Nor did it compare human rights behaviour before ratification with behaviour post ratification. For this reason, it does not provide any real illumination as to whether ratification of human rights treaties makes a difference. The very nature of qualitative research means that broad generalisations cannot be made. Instead, studies such as that undertaken by Heyns and Viljoen provide greater insight into what actually happens ‘on the ground’ when a State commits itself to a human rights treaty. If understanding the implementation of human rights treaties is viewed as a jigsaw, then Heyns and Viljoen have provided a few more pieces of the puzzle.

(x) *Risse, Ropp and Sikkink*

Thomas Risse, Stephen Ropp and Kathryn Sikkink oversaw a large qualitative project designed to better understand the influence of human rights ideas and norms on the behaviour of States and individuals.<sup>98</sup> They chose to examine this issue through evaluating progress on the right to life, and to be free from torture and arbitrary arrest and detention, in pairs of countries in five distinct geographical regions.<sup>99</sup>

In contrast to Heyns and Viljoen, Risse, Ropp and Sikkink undertook an in-depth analysis of the data, existing literature and theoretical perspectives, and from this developed a five-phase ‘spiral model’ to explain the process by which States internalise and implement international human rights obligations.<sup>100</sup> This spiral model has been called the ‘theory of transnational human rights advocacy

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<sup>97</sup> Punch, Keith *Introduction to Social Research: Quantitative and Qualitative Approaches* (2<sup>nd</sup> ed, 2005) Sage Publications London.

<sup>98</sup> Risse, above n 28.

<sup>99</sup> In Africa: Kenya and Uganda; in the Arab region: Tunisia and Morocco; in Eastern Europe: Poland and the former Czechoslovakia; in Latin America: Chile and Guatemala; and in South East Asia: The Philippines and Indonesia.

<sup>100</sup> Risse, above n 28, 3.

networks'. The five phases of the model can be briefly described as, first *Repression and Activation of Network* in which human rights violations are recorded and shared with the international community through advocacy networks. The second phase is *Denial*, where the State is on the international agenda as a result of the work undertaken in phase one, and western States and international NGOs mount pressure to shame the target State. The initial reaction of the State is invariably one of denial, on the basis that the criticism is an illegitimate intervention in its internal affairs. The third phase is *Tactical Concessions* where if international pressure continues and escalates, the State will make cosmetic changes to appease the critics. Such moves could include release of prisoners, or liberalising laws relating to political protests. The concessions are invariably strategic to gain economic assistance, or reduce international isolation. The fourth phase is *Prescriptive Status* which occurs when the dialogue surrounding the violations involves the regular use of human rights norms, that is, the behaviour complained of may still continue, but the validity of the claim is no longer controversial. This may be evidenced by ratification of the relevant human rights treaty, incorporation of the norm into domestic law, and/or the establishment of institutions where citizens can complain of human rights breaches. Thus in this phase, governments no longer mount the argument that international monitoring is a violation of their sovereignty. The final phase is *Rule-Consistent Behaviour* which is achieved when norm compliance becomes habitual and is enforced by rule of law.<sup>101</sup>

Risse, Ropp and Sikkink assert that this spiral model explains the causal mechanisms by which international human rights norms become socialised within a State, leading to structural change in domestic systems and practices. How long a State spends in each phase can vary significantly, depending on local circumstances and the level of international attention paid to the human rights violations.

It is unfortunate, that the authors did not include any older, well established democracies in the case studies. The research would have benefited from the

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<sup>101</sup> Ibid, 22-35.

inclusion of the United States, Canada, Australia or countries from western Europe. The model developed by Risse, Ropp and Sikkink appears to be limited to countries with a recent history of repression. The authors seem to be of the view that human rights violations only happen in non-western countries. Thus, in the final chapter they refer to ‘what western governments can do to best promote human rights’<sup>102</sup> and how human rights should be a greater focus in ‘western foreign policies’.<sup>103</sup> This kind of narrative is unfortunate, as it appears to reinforce the idea that human rights are a form of western imperialism.<sup>104</sup>

### *Conclusion of Literature Review*

As the above makes very clear, the majority of empirical research to date regarding commitment to, and compliance with, human rights treaties has focused exclusively on civil and political rights, and has been quantitative in nature. This is likely to be due to a number of factors, including that civil and political rights are simpler to measure – it is arguably easier to establish how many people have been executed or tortured than to evaluate the extent to which individuals have adequate housing, education or access to health care. Furthermore, civil and political rights are required to be implemented immediately<sup>105</sup> whereas States are only required to realise economic, social and cultural rights (ESC rights) progressively ‘to the maximum of available resources’.<sup>106</sup> It can be problematic to evaluate whether a State has taken all possible steps, given available resources, to realise ESC rights. It is for this reason that ESC rights are often referred to as ‘unenforceable’ and ‘aspirational’ rather than ‘real’ rights,<sup>107</sup> and considered to be matters of politics,

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<sup>102</sup> Ibid, 235.

<sup>103</sup> Ibid, 277.

<sup>104</sup> Bauer, Oanne R. and Bell, Daniel A. (eds) *The East Asian Challenge for Human Rights* (1999) Cambridge University Press.

<sup>105</sup> Article 2(2) of the ICCPR.

<sup>106</sup> Article 2(1) of the ICESCR.

<sup>107</sup> Arbour, Louise *Statement to the Open-Ended Working Group established by the Commission on Human Rights to consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 14 January 2005, accessed at [www.unhchr.ch/hurricane/hurricane.nsf/0/ECAE2629449C1EBCC1256F8C0035047D?opendocument](http://www.unhchr.ch/hurricane/hurricane.nsf/0/ECAE2629449C1EBCC1256F8C0035047D?opendocument) on 31 March 2006.

rather than law.<sup>108</sup> However, there is a growing body of jurisprudence<sup>109</sup> and research<sup>110</sup> that demonstrates that ESC rights are enforceable and justiciable, and the ESC Committee has recognised that some ESC rights ‘are capable of immediate application by judicial and other organs in many national legal systems.’<sup>111</sup> Thus, it is possible, and appropriate, for scholars to conduct empirical research into State Parties’ levels of compliance with ESC provisions of international human rights treaties.

None of the ten studies analysed above found any consistent evidence that ratification of a human rights treaty was associated with improved human rights practices by a State. Many of the researchers found democratic States more likely to comply with treaty obligations than non-democratic States. Furthermore, several of the scholars found that domestic structures and the strength of civil society within a State have an impact on levels of compliance. This scholarship would be strengthened by both the addition of research into States’ commitment to, and compliance with, with ESC rights and by qualitative studies. While it is important to ascertain connections between international human rights law and practices on the ground, large-scale quantitative analysis is not necessarily the most effective way of doing this. Indeed, Hathaway acknowledges the imprecise nature of the human rights data relied on in the quantitative studies.<sup>112</sup> The research designs that have been employed by the scholars discussed above have flaws which mean they are less than an ideal method for measuring the effectiveness of human rights treaties. As Goodman and Jinks stated ‘perhaps the answer is to discard this type of

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<sup>108</sup> Mason, Sir Anthony ‘Rights Bill a Matter for Judgement’ *The Age* (Melbourne) 28 March 2006 .

<sup>109</sup> See for example *Government of the Republic of South Africa v Grootboom* [2001] 4 SA 46 (CC) on the right to housing and the Indian decision in *Unni Krishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645 on the right to free compulsory education for children under 14.

<sup>110</sup> See Otto, Dianne and Wiseman, David ‘In Search of ‘Effective Remedies’: Applying the International Covenant on Economic, Social and Cultural Rights to Australia’ (2001) 7 *Australian Journal of Human Rights* 5.

<sup>111</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 3, UN Doc E/1991/123, paragraph 5. See also *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, The International Commission of Jurists, UN Doc E/C.4/1987/17, paragraph 21, and *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), paragraph 8, accessed at [www1.umn.edu/humanrts/instre/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instre/Maastrichtguidelines_.html) on 27 April 2006.

<sup>112</sup> Hathaway, above n 1, 1963.

statistical modelling and adopt a softer kind of empiricism, something more sociological than economic.<sup>113</sup> Hathaway agrees that there should be greater use made of qualitative methods when measuring compliance with human rights treaties, but argues that they should be used in tandem with quantitative methods, rather than replace them.<sup>114</sup> By concentrating on an ESC right (Article 29(1) of CROC), and by using qualitative rather than quantitative methodology, this research aims to complement the research that has been done to date on the impact of human rights treaties.

A final point of interest regarding the existing empirical research, is that it has overwhelmingly been carried out by political scientists, sociologists and international relations scholars. The only international law scholars to conduct empirical research in this field are Hathaway and Heyns and Viljoen. It is curious to observe that non-lawyers seem more interested in the effectiveness of international human rights treaties than do international law scholars. One reason for this may be that the latter are not generally trained in quantitative methodologies.<sup>115</sup> However, international law academics may be comfortable doing qualitative research, particularly case studies, and thus are well placed to fill this gap in the research.<sup>116</sup>

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<sup>113</sup> Goodman, above n 40, 183.

<sup>114</sup> Hathaway, above n 46, 194.

<sup>115</sup> Ratner, Steven ‘Empirical Work in Human Rights’ (2004) 98 *American Society of International Law Proceedings* 197.

<sup>116</sup> Ibid.

## CHAPTER 2 – THEORETICAL FRAMEWORK

### Contents

#### **2.1 Introduction**

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#### **2.5 Conclusion**

*More problematic is the lack of theoretical specificity in current human rights research<sup>1</sup>*

## 2.1 Introduction

In 1914, German Chancellor Theobald von Bethmann-Hollweg famously dismissed a treaty committing Germany to respecting Belgian neutrality, declaring it to be no more than a ‘scrap of paper’.<sup>2</sup> This sort of conduct prompted international law scholars to ask the question: ‘Why do States respect, or fail to respect, international treaties?’ and the question continues to be asked to this day.<sup>3</sup> Another closely related question is: ‘Why do States commit to treaties in the first place?’ And even more perplexing, why do States voluntarily undertake international obligations, particularly with respect to human rights, which clearly impinge on their national sovereignty?<sup>4</sup> These questions are at the heart of this research which examines, *inter alia*, the United States’ decision not to ratify CROC, and Australia’s decision to ratify CROC, and these two States’ domestic behaviours regarding implementing and complying with the HRE norm set out in Article 29(1).

As the quote at the beginning of the chapter indicates, all too often research regarding the commitment to, implementation of, and compliance with, human rights law is not grounded in a strong theoretical framework. This research seeks to situate its study within existing theories explaining State behaviour regarding human rights treaties. To this end, this chapter analyses current theories relating to commitment to, implementation of, and compliance with,

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<sup>1</sup> Cole, Wade ‘Sovereignty Relinquished: Explaining Commitment to International Human Rights Covenants, 1960-1999’ Working Paper produced for the Centre on Democracy, Development and the Rule of Law, Stanford Institute of International Studies, September 2004. Accessed at: [www.iis-db.stanford.edu/pubs/20730/Sovereignty\\_Relinquished.pdf](http://www.iis-db.stanford.edu/pubs/20730/Sovereignty_Relinquished.pdf) on 17 April 2006, page 38.

<sup>2</sup> Accessed at: [www.firstworldwar.com](http://www.firstworldwar.com) on 23 February 2006.

<sup>3</sup> See for example, Koh, Harold Hongju ‘Why Do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2599.

<sup>4</sup> For a fuller discussion on the links between sovereignty and human rights see, Bennoune, Karima ‘Sovereignty vs. Suffering? Re-Examining Sovereignty and Human Rights Through the Lens of Iraq’ (2002) 13(1) *European Journal of International Law* 243.

international law, which will be returned to in Chapter 8 when they will be re-evaluated in light of the data collected and analysed in Part II of this thesis.

At the outset, it should be noted that different theoretical considerations apply to compliance with human rights laws as compared with other international laws. This is because as Louis Henkin observed: ‘the forces that induce compliance with other law... do not pertain equally to the law of human rights.’<sup>5</sup> Unlike multilateral trade agreements, human rights treaties do not generally allow for retaliatory sanctions, and compliance is not influenced by competitive commercial market forces.<sup>6</sup> While there have occasionally been instances of economic sanctions imposed in an attempt to end human rights violations, for example against South Africa during the apartheid regime,<sup>7</sup> and military action has occasionally been justified as necessary to curtail human rights abuses,<sup>8</sup> the reality is that these are exceptions to the rule, and States are rarely subjected to retribution for human rights violations occurring within their own jurisdiction. Furthermore, the beneficiaries of human rights, and the victims if they are violated, are individuals, not States, so unlike trade agreements, the breach of a human rights treaty has little or no effect on other State Parties to that treaty. For these reasons, this thesis will limit its scrutiny of theories to those pertinent to States’ behaviour vis-à-vis human rights treaties.

Theories about why States commit to, and comply with, international human rights treaties have historically fallen into two schools; the first being the ‘rational actor’ school, and the second, the ‘normative’ school. Each of these contain many theoretical strands.<sup>9</sup> More recently a third theoretical model has

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<sup>5</sup> Henkin, Louis *How Nations Behave: Law and Foreign Policy* (2<sup>nd</sup> ed, 1979) Columbia University Press at 235.

<sup>6</sup> Hathaway, Oona ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935, 1938.

<sup>7</sup> For a comprehensive discussion of the multilateral trade and arms sanctions imposed on South Africa in the 1980s see Levy, Philip I. ‘Sanctions on South Africa: What did they Do?’ (1999) 89(2) *The American Economic Review* 415.

<sup>8</sup> The doctrine of humanitarian intervention was used to justify the NATO intervention in Kosovo in 1999, Tanzania’s intervention in Idi Amin’s Uganda throughout the 1970s, and Vietnam’s intervention into Pol Pot’s Cambodia in the late 1970s.

<sup>9</sup> The theories selected for examination in this thesis are almost the same as those analysed by Hathaway in her study: ‘Do Human Rights Treaties Make a Difference?’ above n 6. These are the dominant theories used by scholars seeking to explain States’ behaviour regarding human rights treaties, and therefore are appropriate for consideration in this thesis. The notable difference is that

emerged which incorporates aspects of both schools.<sup>10</sup> While each of these theoretical models will be examined, the conclusion that this thesis ultimately reaches is that none of these theories adequately explain the behaviour of the States examined in this empirical study. A number of the theoretical models explain some, but not all, of the United States and Australia's conduct surrounding Article 29(1) of CROC.

## 2.2 Rational Actor Models

The rational actor models, also known as rational choice theory, emerge from the discipline of international relations, rather than from international law. At the core of this school of theories is the belief that States' behaviour is dictated by their self-interest, which is determined by examining a number of potential courses of action and rationally selecting the one that is most beneficial to them.<sup>11</sup>

International law scholars have tended to largely ignore rational choice theories, favouring the normative models considered below.<sup>12</sup> One explanation for this reticence towards rational choice theory is that international law scholars tend to be committed to international law, to favour its development, and believe in its efficacy, and are therefore cautious about theories that they perceive as denigrating the significance or impact of international law.<sup>13</sup> International law scholars are more interested in normative theories, since these tend to endorse their view of the strength and purpose of international law. They want to be able to claim that States comply with international law because they consider themselves bound to follow binding legal principles, not because they have calculated whether it is their interests to comply with the laws. The rational actor

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Hathaway failed to consider the normative theory of 'domestic salience' which is particularly relevant to this research, and therefore included in the analysis for this thesis.

<sup>10</sup> Hafner-Burton, Emilie M. and Tsutsui, Kiyoteru 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373.

<sup>11</sup> Morgenthau, Hans Joachim *Politics among Nations: The Struggle for Power and Peace*, (7<sup>th</sup> ed, 2005) Revised by Thompson, Kenneth W. McGraw-Hill, 4.

<sup>12</sup> Goldsmith, Jack L. and Posner, Eric A. 'Introduction' (2002) 31 *Journal of Legal Studies* 1.

<sup>13</sup> Kennedy, David W. 'A New World Order: Yesterday, Today and Tomorrow' (1994) 4 *Transnational Law and Contemporary Problems* 329, 335.

theorists, by suggesting that compliance with international law is based on calculations of self-interest, can be seen to be weakening the very essence of international law by implying that it is not law at all.<sup>14</sup>

However, international law scholars dismissal of rational choice theories may weaken their ability to explain non-compliant or inconsistent State behaviour. For this reason, the three most significant rational choice theories, realism, institutionalism and liberalism are considered in this chapter in order to provide a context with which to analyse the behaviour of Australia and the United States in relation to Article 29(1) of CROC.

### 2.2.1 Realism

Realism is a rational actor model which was developed after World War II by leading international relations theorists such as Hans Morgenthau,<sup>15</sup> E. H. Carr,<sup>16</sup> Nicholas Spykman<sup>17</sup> and Reinhold Niebuhr.<sup>18</sup> Realists focus on power as the key variable in assessing why States comply with international law,<sup>19</sup> and assert that States, as unitary actors, make decisions based on a rational calculation of how to most effectively enhance their power.<sup>20</sup> Traditional, or classical, realists view States as motivated exclusively by their geopolitical interests, only creating and complying with international law as a by-product of promoting their own self-interest on the international plane.<sup>21</sup> Classical realists dismiss international institutions as irrelevant to State behaviour.<sup>22</sup> They see the international order as being anarchic; States, as sovereign entities and the

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<sup>14</sup> Goldsmith, above n 12, 3.

<sup>15</sup> Morgenthau, above n 11.

<sup>16</sup> Carr, E.H. *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (2001) Palgrave Macmillan, Basingstoke, Hampshire.

<sup>17</sup> Spykman, *Nicholas America's Strategy in World Politics: The United States and the Balance of Power* (1942) Harcourt, Brace and Company, New York.

<sup>18</sup> Niehubr, Reinhold *The Nature and Destiny of Man* (1941) Westminster John Knox Press, Louisville, Kentucky.

<sup>19</sup> Morgenthau, above n 11.

<sup>20</sup> Scott, Shirley V. 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 *European Journal of International Law* 1.

<sup>21</sup> Hathaway, above n 6, 1944.

<sup>22</sup> Mearsheimer, John 'The False Promise of International Institutions' (1995) 19(3) *International Security* 5.

primary actors in international law determine their relations with other States independently, rather than because an international organisation develops governing rules.<sup>23</sup>

In the 1970s and 1980s, classical realism was widely rejected, because States' behaviour was not adequately explained by reference solely to concepts of power. Classical realists' narrow focus excluded too many other factors that also affected States' behaviour. These deficiencies led to the development of neorealism. Also known as structured realism, neorealism was developed by Kenneth Waltz, who in his seminal treatise adopted many of the fundamentals of classical realism, including the unitary nature of States, but differed from classical realism by asserting that international structures act as a constraint on States' behavior.<sup>24</sup> The kind of international structures that neorealists see as impacting on States' behaviour are not international institutions such as the UN, but rather alliances between State actors, relationships of economic interdependence, and the influence of transnational actors.<sup>25</sup> Thus neorealism factors in the influence of international power structures on States' assessment of their self-interest, and neorealists began to explore the East-West and North-South dynamics, rather than just the power of individual States.<sup>26</sup>

Both classical and neorealist theories can explain some aspects of States' behaviour surrounding international law, for example States' self-interest and power are evident in the negotiation of trade agreements,<sup>27</sup> and in environmental initiatives such as the Kyoto Protocol,<sup>28</sup> where Australia and the United States are notable non-participants, with both countries citing self-

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<sup>23</sup> Carr, above n 16.

<sup>24</sup> Waltz, Kenneth *Theory of International Politics* (1979) McGraw-Hill, USA.

<sup>25</sup> Baldwin, David A (Ed) *Neorealism and Neoliberalism: The Contemporary Debate* (1993) Columbia University Press.

<sup>26</sup> Nye, Joseph S. Jnr 'Neorealism and Neoliberalism' (1998) 40(2) *World Politics* 235, 237.

<sup>27</sup> Although decisions in the WTO are based on consensus, there is evidence that, powerful States such as the United States, and blocks of countries such as the EU, use 'carrots and sticks' to gain support for their position on trade agreements from less powerful States: Steinberg, Richard 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56(2) *International Organizations* 339, 346.

<sup>28</sup> The Kyoto Protocol is an amendment to the United Nations Framework Convention on Climate Change. It opened for signature on 11 December 1997 and entered into force on 16 February 2005.

interest reasons as the basis for their refusal to ratify.<sup>29</sup> However, realist theorists have difficulty explaining exactly what self-interest motivates States to voluntarily relinquish their ability to unilaterally use their power over persons within their sovereign jurisdiction, that is, what calculation of self-interest would motivate a State to ratify a human rights treaty. It is perhaps easier to understand self-interest that may motivate developing countries to commit to human rights laws. For example, States seeking aid from institutions such as the World Bank or IMF, or those looking for entry into the European Union (EU) may commit to human rights treaties as a condition of obtaining funding, or entry into the EU.<sup>30</sup> However, the impact of this kind of pressure from international economic organisations is better explained by institutionalists, discussed below, than neorealists, who eschew the influence of international institutions. In anarchical international society, neorealists maintain that international institutions have little or no influence since they can only seek to persuade States to change their behaviour, and that will have no impact unless it coincidentally enhances a State's power and self-interest.<sup>31</sup>

Whether realism can explain the ratification decisions of Australia and the United States regarding CROC is explored in Chapter 8 after the relevant data has been analysed. However, it is worth noting at this stage that realism appears to be more applicable to predicting States' decisions to commit or not commit to international human rights norms, than it is to predicting whether or not States will implement and comply with international norms to which they have committed themselves. It is also apparent that realism is limited by its exclusive focus on international influences to the exclusion of domestic factors.

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<sup>29</sup> The Australian Prime Minister stated that 'It is not in Australia's interests to ratify the Kyoto protocol... for us to ratify the protocol would cost us jobs and damage our industry' (House of Representatives Hansard 5 June 2002, Answers to Questions Without Notice, p. 3163) while the United States Senate passed the Byrd-Hagel Resolution to the effect that the U.S should not ratify the Kyoto Protocol because it 'would result in serious harm to the economy of the United States'. (105th Congress, 1st Session, S. RES. 98, 25 July 1997).

<sup>30</sup> Risse, Thomas, Ropp Stephen C. and Sikkink, Kathryn (Eds) *The Power of Human Rights: International Norms and Domestic Change* (1999) Cambridge University Press, Cambridge.

<sup>31</sup> See Johnston, Alastair Iain 'Treating International Institutions as Social Environments' (2001) 45(4) *International Studies Quarterly* 487.

### 2.2.2 *Institutionalism*

The proponents of realism, with their focus on States as anarchic actors, are unable to adequately explain the proliferation of international organisations, such as the UN and the WTO and regional organisations such as the EU and African Union.<sup>32</sup> These organisations, if not all-powerful, are certainly influential, and according to theorists such as Robert Keohane, their significance cannot be ignored.<sup>33</sup> The need for a theory that acknowledges the role of international institutions saw the development of ‘institutionalism’, which builds on concepts of realism and neorealism, including that States are motivated by self-interest, and that the distribution of power amongst States influences behaviour. Where institutionalism differs from realism is that it recognises that international organisations are one of the forces that shape the behaviour of States.

International institutions, also referred to as ‘regimes’, are seen by institutionalists to be a critical element in explaining States’ behaviour because they provide a forum in which States can engage in cooperative activities that allow them to pursue their self-interest.<sup>34</sup> That is, co-operation may be necessary to maximise self-interest, and international institutions provide the means to enable this cooperation to take place.<sup>35</sup> More recently, institutionalists have been examining not just international institutions as forums where cooperation can take place, but also as organisations from which international law emanates.<sup>36</sup> This acknowledgment by international relations scholars that international law does have a part to play in explaining how States

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<sup>32</sup> Formerly the Organization of African Union. The structure and name of the body was changed in July 2001.

<sup>33</sup> Keohane, Robert O. ‘International Institutions: Two Approaches’ (1988) 32 *International Studies Quarterly* 379.

<sup>34</sup> Keohane, Robert O. ‘The Demand for International Regimes’ (1982) 36 *International Organizations* 325.

<sup>35</sup> McCormick, James M. ‘Alternate Approaches to Evaluating International Organizations: Some Research Directions’ (1982) 14(3) *Polity* 531.

<sup>36</sup> Koremenos, Barbara, Lipson, Charles and Snidal, Duncan *The Rational Design of International Institutions* (2003) Cambridge University Press, Cambridge.

behave is a small step towards greater convergence between international relations theory and international law.<sup>37</sup>

How do Institutionalists explain States' decisions to commit or not commit to international treaties? They assert that when States' self-interest dictates the need for collective action, they will do so through an international organisation, because this increases efficiency.<sup>38</sup> States will commit to agreements reached in international forums in order to obtain agreement from others, and will comply with the agreement reached so long as the cost of compliance is less than the cost of violation.<sup>39</sup> Costs of violations are generally measured by damage to reputation and by sanctions that might be imposed.<sup>40</sup>

Although institutionalists assert that States ratify treaties in order to obtain agreement from others, they appear to provide no empirical support for this proposition. There may well be anecdotal evidence of negotiations between States taking place in the corridors of the UN regarding decisions to ratify or not ratify a treaty, but there appear to have been no substantive studies done on whether States' decision-making regarding treaty ratification is in fact influenced by the institutions from which the treaty emanates. In the absence of such evidence, it is difficult to assess the general utility of institutionalism in explaining States' ratification practices. The specific utility of this theory to explain Australia's ratification, and the United States' non-ratification, of CROC is considered in Chapter 8.

Institutionalists have devoted significantly more effort to explaining compliance levels, than they have to explaining ratification practices. They assert that compliance is influenced by two distinct factors, namely the threat of sanctions for violation of an international obligation, and reputational damage that flows

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<sup>37</sup> Hathaway, above n 6, 1949.

<sup>38</sup> Abbott, Kenneth W. and Snidal, Duncan 'Why States Act Through Formal International Organizations' (1998) 42(1) *Journal of Conflict Resolution* 3, 5.

<sup>39</sup> Guzman, Andrew T. 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823, 1874.

<sup>40</sup> Ibid, 1861-1865.

from a State not honouring a commitment it has undertaken.<sup>41</sup> However, these two factors do not appear to be particularly relevant when it comes to explaining States' compliance with international human rights treaties. In relation to the first factor, this is due to a number of reasons, including that the cost of violations, which in theory motivates a State to comply with its international obligations, is generally not great when it comes to human rights treaties. As previously noted, those who suffer if the obligations are not adhered to are individuals within the violating States' borders, rather than other State Parties to the agreement, which means that there is little incentive to impose sanctions, because no other State has suffered a direct detriment as a result of the breach. In addition, the imposition of direct sanctions (that is economic or military) for breach of a human rights treaty are so rare as to be perceived by most States as a very low risk.<sup>42</sup>

Another form of sanctioning that may flow from breach of a human rights treaty is criticism by the treaty committee responsible for monitoring compliance. Thus, after consideration of a State Party's periodic report, the CRC may include negative comments in its concluding observations.<sup>43</sup> However, this form of criticism by a treaty committee can be an ineffective way of bringing about compliance because the committee's observations rarely stimulate domestic discourse on the issue, and there is inadequate follow-up of State Parties by the committee.<sup>44</sup> Thus treaty committees, particularly ones like the CRC that lack the capacity to receive individual complaints, are generally unable to effectively sanction a non-complying Party.

According to institutionalists, the other potential cost of violation, that motivates States to comply with their treaty obligations, is loss of reputation. However,

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<sup>41</sup> Keohane, above n 33, 387-388.

<sup>42</sup> Hufbauer, Gary Clyde, Schott, Jeffrey J. and Elliott, Kimberly Ann (eds) *Economic Sanctions Reconsidered* (2<sup>nd</sup> ed, 1990) Institute for International Economics, Washington D.C.

<sup>43</sup> This generally takes the form of the CRC identifying factors and difficulties impeding the implementation and noting their principal areas of concern. See 'Working Methods of the Committee on the Rights of the Child' accessed at [www.ohchr.org/english/bodies/crc/workingmethods.htm#a2c](http://www.ohchr.org/english/bodies/crc/workingmethods.htm#a2c) on 5 September 2007.

<sup>44</sup> Steiner, Henry J. and Alston, Philip *International Human Rights in Context: Law, Politics, Morals* (2<sup>nd</sup> ed, 2000) Oxford University Press, Oxford, 774-775.

research into treaty compliance suggests that maintaining a good reputation is actually a relatively weak motivation for compliance with international treaties.<sup>45</sup> In particular, it has been argued that States do not have a single ‘reputation’, but instead have many, that vary according to the type of treaty, the past dealings with particular States, and the power of the State whose reputation is at stake.<sup>46</sup> Thus, it has been suggested that a State breaching an environmental treaty, or not complying with a human rights treaty is unlikely to cause other States to reassess their opinion about whether they should enter into a trade or security agreement with the non-conforming State.<sup>47</sup> As one scholar noted ‘Saudi Arabia’s failure to comply with the women’s rights treaties it has ratified does not appear to have led the US to conclude that it is unlikely to comply with international trade and finance obligations it has assumed.’<sup>48</sup> It therefore appears that while reputation concerns may influence a State’s decision to *commit* to a human rights treaty,<sup>49</sup> it does not appear to be influential when it comes to *compliance*. There are thus a number of concerns about the efficacy of institutionalism in terms of how well it can explain why States do or do not ratify human rights treaties, and/or comply with, international human rights treaty obligations.

### 2.2.3 Liberalism

The third rational actor model to be considered is ‘liberalism’, which differs markedly from the realist and institutionalist models in that it seeks to explain States’ commitment to, and compliance with, international law by reference to domestic rather than international influences and processes. This theoretical

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<sup>45</sup> Downs, George W. and Jones, Michael A. ‘Reputation, Compliance and International Law’ (2002) 31 *Journal of Legal Studies* 95.

<sup>46</sup> Smaller and newer States are more likely to be sensitive to potential damage to their reputation than large, powerful States. *Ibid*, 102 and 112.

<sup>47</sup> Downs, above n 45, 109.

<sup>48</sup> von Stein, Jana ‘Making Promises, Keeping Promises: Ratification and Compliance in International Human Rights Law’ Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, 7-10 April, 2005, accessed at: [www-personal.umich.edu/~janavs/vonStein-humanrights.pdf](http://www-personal.umich.edu/~janavs/vonStein-humanrights.pdf) on 3 June 2007, 4.

<sup>49</sup> For a discussion of the influence of reputation concerns on States’ ratification decisions see the empirical research of Heyns and Viljoen analysed in Chapter 1. Heyns, Christof and Viljoen, Frans ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 *Human Rights Quarterly* 483, 491.

model, based on the work of Immanuel Kant, argues that States' behaviour regarding international law can only be understood by examining domestic laws and policies.<sup>50</sup> As Hargard and Simmons have noted, how States behave vis-à-vis international treaties 'is integrally related to domestic structures and processes'.<sup>51</sup> Furthermore, liberals place the individual, rather than the State, at the centre of international law, on the basis that the rights and power of States are derivative of the rights and interests of the individuals who reside within them.<sup>52</sup> Graham Allison, in his ground breaking analysis of the Cuban Missile crisis, found that it was national organisational structures and domestic politics that had a significant impact on how States behaved, much more than a rational calculation of self-interest.<sup>53</sup>

Liberals assert that liberal democratic States are more likely to ratify and comply with human rights treaties, because this is necessary for their political survival in the domestic arena.<sup>54</sup> Thus, ratification of, and compliance with, human rights treaties is a rational choice based on internal influences, rather than external pressures.<sup>55</sup> Andrew Moravcsik argues that because States ratify human rights treaties based on national influences, newly democratised States are more likely to ratify human rights treaties in order to protect their still unstable democratic system from opponents who might attempt to overthrow them.<sup>56</sup> He provides convincing evidence that in Europe in the early 1950s, the initial supporters of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>57</sup> were newly democratising States, while the more

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<sup>50</sup> Kant, Immanuel *Perpetual Peace and other Essays on Politics, History and Morals* [First published in 1795] (1983) Hackett Publishing Company, Indianapolis.

<sup>51</sup> Haggard, Stephan and Simmons Beth A. 'Theories of International Regimes' (1987) 49 *International Organization* 491, 499.

<sup>52</sup> Teson, Fernando 'The Kantian Theory of International Law' (1992) 92(1) *Columbia Law Review* 53.

<sup>53</sup> Allison, Graham and Zelikow, Phillip *Essence of Decision: Explaining the Cuban Missile Crisis* (2<sup>nd</sup> ed, 1999) Longman, New York.

<sup>54</sup> Moravcsik, Andrew 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) *International Organizations* 217.

<sup>55</sup> Schmitz, Hans Peter and Sikkink, Kathryn 'International Human Rights' Chapter 27 in Carlsnaes, Walter, Risse, Thomas and Simmons, Beth A. (eds) *Handbook of International Relations* (2002) Sage Publications, Thousand Oaks, 522.

<sup>56</sup> Moravcsik, above n 54, 220.

<sup>57</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms* CETS No. 005, Opened for Signature 4 November 1950, entered into force 3 September 1953.

well-established democracies initially failed to support this treaty.<sup>58</sup> Thus liberal theories place critical importance on the type of domestic regime existing within a State as a predictor of whether States will commit to a human rights treaties, and hypothesise that totalitarian States are unlikely to commit to such treaties.<sup>59</sup>

There is doubt concerning the scope of application of Moravcsik's theory as it does not seem to hold true in respect of CROC, which, as noted earlier, has been ratified by all States except the United States and Somalia. Obviously the 193 States that have committed themselves to CROC include many undemocratic States, as well as established democracies and newly created democracies.

Further, it has been suggested that Moravcsik's supposition does not apply to Latin America, where established democracies supported both regional and international human rights systems from the start.<sup>60</sup> In addition, when Latin American States were re-establishing democracies in the late 20<sup>th</sup> century, and ratifying human rights treaties as part of that process, it may not have been to strengthen the national government against potential domestic challenges, but rather to signal to the international community, their re-established democratic identity and their re-entry into the community of democratic States.<sup>61</sup>

The above analysis relates to liberal theory concerning States' ratification of human rights treaties. The next question that must be asked is how liberals explain States' behaviour regarding compliance or non-compliance with human rights treaties they have ratified. The answer seems to be, as Hathaway observed, that human rights treaties are more likely to be ratified by liberal democratic States, and liberal States are more likely to accept that once a treaty

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<sup>58</sup> Moravcsik, above n 54, 230.

<sup>59</sup> Helfer, Laurence R. 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832, 1843.

<sup>60</sup> Lutz, Ellen and Sikkink, Kathryn 'International Human Rights Law in Practice: The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1, 7.

<sup>61</sup> Ibid.

is entered into, it creates an obligation that must be obeyed,<sup>62</sup> which appears to be more in keeping with the normative models, than rational actor theories. Furthermore, liberal States are more likely to comply with human rights treaties, because they are more likely to have human rights institutions and structures that facilitate compliance, and are also more likely to have human rights activist groups that can exert pressure on their government to comply.<sup>63</sup> However, evidence abounds of liberal States not complying with human rights treaties, notwithstanding the presence of human rights institutions and a strong civil society,<sup>64</sup> which suggests that liberalism may be better at explaining liberal States' *compliance* with human rights treaties, than it is at explaining liberal States' *non-compliance* with such commitments.

For all these reasons, it is argued that while liberalism goes some way towards explaining States' behaviour surrounding ratification of, and compliance with, human rights treaties, it does not provide a complete explanation. Like realism and institutionalism, it exhibits many shortcomings, and it is these deficits that have motivated others to develop normative theoretical models.

### 2.3 Normative Models

Theories that are grouped under the broad label of normative models are generally favoured by international law scholars more than international relations scholars, because all these theories, to a greater or lesser degree, focus on the persuasive power of binding legal obligations.<sup>65</sup> Adherents to normative models explain States' behaviour regarding compliance with international law by reference to the socialisation of the obligation to comply with treaty obligations, rather than a calculation of costs and benefits.

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<sup>62</sup> Hathaway, above n 6, 1954, relying on Helfer, Laurence R. and Slaughter, Anne-Marie 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273 where they made a similar argument with regard to supranational adjudication.

<sup>63</sup> Hathaway, above n 6, 1954.

<sup>64</sup> See the studies reviewed in section 1.3 in the previous chapter, many of which found human rights abuses by liberal states that had ratified the human rights treaties being measured.

<sup>65</sup> Koh, above n 3.

Normative theorists assert that by concentrating on self-interest and power dynamics, rational actor theorists are ignoring significant factors that influence the practices of States when it comes to human rights treaties. They argue that by failing to take into account the normative value of human rights treaties, rational actor models are inherently flawed;<sup>66</sup> that is, they ignore a key factor in States' behaviour, namely the persuasive power of international law.

### 2.3.1 Managerial Model

This theory was propounded by Professor Abram Chayes and Antonia Handler Chayes in the mid-1990s.<sup>67</sup> They developed the managerial model based on their experience regarding treaty compliance in the disparate fields of environmental law and arms control. At the outset, it should be noted that this model does not seek to explain why States do or do not ratify international treaties, but rather applies only to why States do, or do not, comply with international law. The Chayes assert that States have a general propensity to comply with obligations because of three factors: efficiency, national interest and regime norms.<sup>68</sup> By 'efficiency', they mean that States have limited resources, and these resources can be conserved if there is continuity of policy. Therefore, unless circumstances have changed, States will comply with treaty obligations they have undertaken, rather than continuously re-calculating the costs and benefits of compliance.<sup>69</sup> The second factor, national interest, is similar to the realist position; the Chayes assert that States do not consent to be bound by international law unless that law is in their interests. States involved in treaty negotiation are likely to ensure that their national interests are reflected in the treaty. If they achieve this, then they are likely to not only ratify, but also comply with the treaty because they do not negotiate treaties with the idea that they will violate the obligations contained in them.<sup>70</sup> However, this rationale

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<sup>66</sup> Donnelly, Jack 'International Human Rights: A Regime Analysis' (1986) 40 *International Organizations* 599.

<sup>67</sup> Chayes, Abram and Chayes, Antonia Handler *The New Sovereignty: Compliance with International Regulatory Agreements*. (1995) Harvard University Press, Cambridge.

<sup>68</sup> Chayes, Abram and Chayes, Antonia Handler 'On Compliance' (1993) 47(2) *International Organization* 175,178.

<sup>69</sup> Ibid,178-179.

<sup>70</sup> Ibid,179-184.

appears to oversimplify States' decisions regarding treaty ratification, and there may be many reasons that ratification of a treaty is in a State's interest, even though compliance with the norms contained therein is not. Some of these reasons have been previously highlighted in this chapter and include a State wanting to send a signal to the international community that it respects human rights; a State wanting to alleviate international pressure to commit to human rights treaties; or a State using its own ratification as a tool to encourage other States to ratify.

The third factor, which the Chayes assert explains the general propensity of States to comply with international treaties, is the fact that they are law, and as such perceived by States to be legally binding – *pacta sunt servanda* – treaties must be performed by State Parties in good faith.<sup>71</sup> Thus States assume that entering into a treaty commitment will constrain their actions, and that other State Parties will feel similarly constrained.<sup>72</sup>

Thus the Chayes are a precursor to the hybrid model in relying on both rational actor and normative theories to support their proposition that States have a general propensity to comply with international treaty obligations. When non-compliance does occur, they theorise that it must be due to one of three reasons, namely ambiguity in the treaty language; lack of capacity to carry out the treaty obligations; or because there has been insufficient time for a State to perform its obligations.<sup>73</sup> In endeavouring to overcome these three possible obstacles to compliance the Chayes explore two potential strategies – the 'enforcement model' and the 'managerial model'.<sup>74</sup> They found the former, which involves coercive devices such as military action or economic sanctions, was unlikely to succeed. In particular, they assert that the philosophy of mirroring domestic legal systems, by including coercive measures in order to achieve compliance, is inapplicable to international law.<sup>75</sup> Such sanctions

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<sup>71</sup> Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331, 8 I.L.M. 679, opened for signature 23 May 1969, entered into force 27 January 1980, Article 26.

<sup>72</sup> Chayes, above n 68, 185-187.

<sup>73</sup> Chayes, above n 67, 15.

<sup>74</sup> Chayes, above n 68, 204.

<sup>75</sup> Chayes, above n 67, 2.

(usually military or economic) are too expensive – both politically and economically – with the result that they are rarely imposed. Because they are so scarcely used, they fail to act as a deterrent.<sup>76</sup>

Managerial theorists argue that treaty compliance can be achieved by use of a managerial model that relies on a co-operative problem solving approach.<sup>77</sup> Thus breaches of treaty obligations should be managed rather than punished. If ambiguity is the cause of non-compliance, it should be addressed by using international dispute resolution procedures. If lack of capacity is a problem, then technical and financial assistance should be rendered, and if there has been insufficient time, then guidance should be given on policy decisions that may, over time, increase compliance with agreed international standards.<sup>78</sup> Thus the Chayes see persuasion rather than coercion as the key to compliance. By engaging in a process of ongoing discourse, non-complying States are persuaded to move towards compliance. In this way the managerial model shares some similarities with the transnational legal process model discussed in section 2.3.3 below, which emphasises interaction as a key to States internalisation of norms.

Managerialism has been strongly criticised by George Downs, David Rocke and Peter Barsoom, who argue that this theory is only valid where the degree of change a State is required to make in order to comply with the treaty is minimal.<sup>79</sup> They assert that the treaties used by the Chayes in their study were all of a kind that required States to depart only minimally from what they would have done if they had not ratified the treaty. Downs et al are sceptical that States will comply with treaty obligations that require significant changes by the State if there is no enforcement regime.<sup>80</sup> Thus the choice of treaties used by the Chayes in developing their theory distorts the results, and the theory will not

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<sup>76</sup> Ibid, 2-3.

<sup>77</sup> Ibid, 3.

<sup>78</sup> Chayes, above n 68, 204.

<sup>79</sup> Downs, George W, Rocke, David M and Barsoom, Peter N. ‘Is the Good News about Compliance Good News about Cooperation?’ (1996) 50(3) *International Organization* 379, 380.

<sup>80</sup> Ibid, 387.

hold true when applied to treaties that require more commitment and genuine change by States.

Neither Downs, Rocke and Barssoom nor the Chayes attempted to apply the managerial model to States' practices vis-à-vis human rights treaties. The examples they predominantly used were trade agreements (often bilateral rather than multilateral) and environmental treaties. As has been previously explained, these agreements are inherently different from human rights treaties, and as a result there are doubts about the applicability of the managerial theory to human rights treaties, and in particular Article 29(1) of CROC.

### 2.3.2 *Fairness Model*

One of the main proponents of this theoretical model is Thomas Franck, who asks: 'Why do powerful nations obey powerless rules?', and provides the answer that it is 'because they perceive the rule and its institutional penumbra to have a high degree of legitimacy'.<sup>81</sup> Franck suggests four indicators of a norm's legitimacy, namely: the rule's clarity or 'determinacy', that is, whether what is required of States is transparent; its symbolic validation, that is, the rituals and other formalities signal that it is an important part of the international system; its conceptual coherence, that is whether it is consistent in its application and consistent with other rules of the same system; and its adherence to 'right process' or conformity with the 'organized normative hierarchy' of the international rule system.<sup>82</sup> If an international law satisfies these criteria it is, according to Franck, legitimate and fair and, as such, exerts a pull to compliance.<sup>83</sup> Like the Chayes, Franck's model is applicable only to compliance with international law, and is silent when it comes to why States commit to international treaties in the first place. Thus, it cannot help to explain why Australia decided to ratify CROC and the United States has refused to do so.

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<sup>81</sup> Franck, Thomas *The Power of Legitimacy Among Nations* (1990) Oxford University Press, USA, 3 and 25.

<sup>82</sup> Ibid at 41-207.

<sup>83</sup> Ibid at 24.

In applying Franck's four indicators to human rights treaties, it has been suggested that the second and fourth criteria are readily satisfied, because human rights treaties have high levels of symbolic validation, and are supported by the institutional framework of the international community.<sup>84</sup> However, whether human rights treaties satisfy the determinancy and coherence criteria is questionable because the way that human rights treaties are monitored by treaty bodies is not always consistent or effective.<sup>85</sup> Despite the potential failure of human rights treaties to satisfy two of the four criteria, Franck argues that such treaties are inherently fair, and therefore have strong compliance pull and, as a result, States are likely to comply.

Franck's theory has been criticised by some for failing to answer the causal question of why States comply with international law. For example Robert Keohane has argued that:

[L]egitimacy is difficult to measure independently of the compliance that it is supposed to explain. ... Franck describes a rule's compliance 'pull power' as 'its index of legitimacy.' Yet legitimacy is said to explain 'compliance pull,' making the argument circular.<sup>86</sup>

The argument is essentially that States comply with international law because it is legitimate, and it is legitimate because States comply with it. Yet, with regard to human rights treaties, this is not necessarily true, since numerous human rights violations continue to be committed in States that have ratified human rights treaties.<sup>87</sup>

Other critics of the fairness model come from the Kantian school of thought who argue that Franck's four-pronged legitimacy test is flawed because it fails to

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<sup>84</sup> Hathaway, above n 6, 1959.

<sup>85</sup> For a comprehensive analysis of the shortcomings of treaty bodies see Anne Bayefsky's report 'UN Human Rights Treaty System: Universality at the Crossroads' (2001) accessed at: [www.bafesky.com/report/finalreport.pdf](http://www.bafesky.com/report/finalreport.pdf) on 2 March 2006. Bayefsky undertook a comprehensive analysis of the human rights treaty system, focusing on the extent of States' compliance with the reporting requirements. Her study provides important insight into deficiencies in the UN treaty monitoring system, but does not in any way consider the domestic implementation of human rights treaties by States.

<sup>86</sup> Keohane, Robert O. 'International Relations and International Law: Two Optics' (Sherrill Lecture, Yale Law School) as quoted by Koh, above n 3, 2629.

<sup>87</sup> The empirical studies that demonstrate this were discussed in section 1.3 in the previous chapter.

take ‘justice’ into account. It has been argued that it is a model ‘that sacrifices morality and the primacy of respect for individual autonomy in favour of procedural integrity’,<sup>88</sup> and that it ‘runs the danger of equating legitimacy with effectiveness.’<sup>89</sup> Similar criticism of Franck’s model comes from Phillip Trimble who asserts that fairness should be assessed at the level of individuals rather than at the governmental level as Franck proposes.<sup>90</sup> Ignoring individuals and non-State actors when assessing fairness considerably weakens the value of the fairness model.

Philip Trimble also finds the four criteria for legitimacy problematic because they appear to be based on western imperialist ideals.<sup>91</sup> According to Trimble, the four criteria that purportedly evidence a fair process, do not necessarily ‘accord with how ... non-western people think law should be made’ and ‘if international law and the work of international institutions are to be perceived as legitimate, and thereby worthy of respect by peoples around the world, their process will have to fit the expectations of the governed people about how law should be made’.<sup>92</sup> As both countries chosen for this case study are western States, this research cannot provide any additional evidence to support Trimble’s assertions. However, the concerns raised by Trimble cast further doubt on the efficacy of this theory.

While the fairness model could be strengthened by including substantive fairness as an indicator of legitimacy, in addition to procedural fairness, exactly how substantive fairness might be measured is problematic. Overall this model sheds some light on the behaviour of States vis-à-vis human rights treaties; according to Franck, human rights treaties are largely legitimate and fair, and therefore should have a strong compliance pull; yet human rights treaties are

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<sup>88</sup> Tesón, Fernando ‘The Kantian Theory of International Law’ (1992) 92 *Columbia Law Review* 53, 95.

<sup>89</sup> Georgiev, Dencho ‘Letter’ (1989) 83 *American Journal of International Law* 554, 555.

<sup>90</sup> Trimble, Phillip R. ‘Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy Fairness in International Law and Institutions’ (1997) 95(6) *Michigan Law Review* 1944, 1950.

<sup>91</sup> Ibid, 1959.

<sup>92</sup> Ibid, 1959.

violated on a regular basis all around the world.<sup>93</sup> Therefore, there is more to explaining States' behaviour than whether the international law norm is procedurally fair. Franck's model does not provide a complete explanation of why States obey, or fail to obey, international human rights treaties.

### 2.3.3 *Transnational Legal Process Model*

The transnational legal process theory was developed by Harold Koh in the late 1990s and like the other normative theories considered above, argues that socialisation of the norm generates voluntary compliance by States with their treaty obligations.<sup>94</sup> Like the other normative theories, this theory also focuses solely on States' practices regarding compliance and does not seek to explain why States commit or fail to commit to international treaties. However, the transnational legal process model takes a broader approach than either Franck or the Chayes. While acknowledging the contribution that both these normative models make to the compliance debate, Koh is critical of their narrow focus, saying:

Each chooses to view the compliance question through a single analytic filter: management and fairness, respectively. Yet like all lenses, these filters clarify at the same time as they distort, simplifying at the cost of oversimplification. What do they see and what do they miss?<sup>95</sup>

To overcome these perceived deficiencies, Koh developed a framework, consisting of three phases that he says explain the process of norm-internalisation.<sup>96</sup> His three phases are interaction, interpretation, and internalisation, and he asserts that the result is a theory that is 'normative, dynamic and constitutive.'<sup>97</sup>

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<sup>93</sup> Breaches of human rights treaties can be of a technical nature, for example the numerous overdue State reports to treaty committees, as well as a more substantive nature such as ethnic cleansing in Darfur and genocide in Rwanda.

<sup>94</sup> Koh, above n 3.

<sup>95</sup> Ibid, 2635.

<sup>96</sup> Ibid, 2646.

<sup>97</sup> Ibid.

The first phase involves one or more transnational actors, provoking an interaction or series of interactions with another. Significantly, Koh uses the term ‘transnational actor’, so as to recognise that actors other than States may be the ones to initiate interaction, for example NGOs and multinational corporations.<sup>98</sup> Thus the first phase of Koh’s model recognises that the behaviour of States regarding compliance with international law cannot be explained by looking at States alone. This is particularly true in an area such as human rights, where non-State actors abound.<sup>99</sup>

The second phase of the transnational legal process model is ‘interpretation’. This entails transnational actors enunciating a norm that addresses the situation that provoked the first-phase interaction. An example of a second-phase interpretation would be the negotiation of a human rights treaty, containing the norms agreed upon during the series of interactions that occurred through the drafting process. The third phase of Koh’s model is ‘internalisation’, that is States’ participation in the first two phases, and ongoing interactions through follow up meetings, results in the norm, over time, becoming internalised in the domestic arena. Through these processes States gradually become persuaded of the validity of the norms, and come to accept and obey them.

According to the transnational legal process model, the way to increase States’ acceptance of, and compliance with, international human rights law is not to increase enforcement mechanisms, but rather to increase the interaction between members of the international community regarding the norm. This increased interaction will lead to increased internalisation of the norm, which will result in increased compliance with the norm. Koh’s model appears to come closest to providing a complete explanation of why States do, or do not, comply with international human rights law, because it factors in the broadest range of variables. Unlike the other theoretical models considered thus far, it recognises

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<sup>98</sup> An example of an NGO initiating an interaction that led to the adoption of an international treaty would be the International Campaign to Ban Landmines which in 1991 began a campaign to get States to enter into a treaty to ban landmines. The result was the negotiation of the *1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* that has now been ratified by 149 States.

<sup>99</sup> Koh, above n 94, 2649.

the influence of the entire international community, including NGOs, thus taking a more holistic approach. It also recognises the relevance of continued interaction with the international community and places a high value on the process of interaction in norm internalisation.

However, like the other theories considered in this chapter, the transnational legal process model has its critics. Hathaway, for example, asserts that Koh's model is useful in *explaining* States' behaviour after the event, but is not helpful in *predicting* States' behaviour about which norms are likely to be complied with by which countries.<sup>100</sup> Hathaway does, however, think that this model is generally useful in explaining why human rights norms are obeyed, even when it is not in a State's self-interest.<sup>101</sup>

The focus of this theory, like most of the other theories discussed so far in this chapter, is predominantly on the impact and influence of international factors, while placing little emphasis on the role that domestic factors may play in shaping the behaviour of States. This omission is one of the reasons that the normative theories considered thus far appear to provide an incomplete explanation for States' compliance levels. The disregard of domestic considerations when explaining compliance levels is addressed by proponents of the theory of domestic salience analysed in the following section.

### 2.3.4 Domestic Salience

Scholars, such as Madelaine Chiam,<sup>102</sup> Darren Hawkins,<sup>103</sup> and Andrew Cortell and James Davis<sup>104</sup> have undertaken research that has led them to theorise that States' compliance with international law depends very much on what they

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<sup>100</sup> Hathaway, above n 6, 1962.

<sup>101</sup> Ibid, 1961.

<sup>102</sup> Chiam, Madelaine 'Government Decision-Making and International Law: Australia and the Framework Convention on Tobacco Control' (2003) 24 *Adelaide Law Review* 217.

<sup>103</sup> Hawkins, Darren 'The Domestic Impact of International Human Rights Norms' Paper presented at the 42<sup>nd</sup> Annual Convention of the International Studies Association, Chicago, Illinois, 20-24 February 2001. Accessed at [www.isanet.org/archive/hawkins.html](http://www.isanet.org/archive/hawkins.html) on 7 May 2007.

<sup>104</sup> Cortell, Andrew P. and Davis, James W. 'Understanding the Domestic Impact of International Norms: A Research Agenda' [2000] 2 *International Studies Review* 65.

variously describe as the ‘domestic salience’<sup>105</sup> or ‘normative fit’<sup>106</sup> of an international law. While Hawkins and Cortell and Davis considered domestic salience only in terms of compliance, Chiam also applied the theory to a State’s decision-making concerning the negotiation of a treaty. Thus it appears that this theory may be used to explain States’ behaviours around both ratification and compliance.

Several researchers have argued that domestic salience is relevant to States’ compliance with international norms,<sup>107</sup> but Cortell and Davis were the first to explore what domestic salience actually means, and how it might be measured. They identified three factors that are indicative of domestic salience, namely: the norm’s appearance in domestic political discourse, either by way of the State or non-state actors, whereby it begins to be relied upon to justify or support a position; changes in domestic institutions, for example laws are enacted, or procedures established, to sanction violations or monitor compliance; and changes in policy.<sup>108</sup> Using these three measures, they argue that norm salience can be rated as high, moderate, low or not salient.<sup>109</sup> Norms which achieve all three measures have a high degree of salience, while norms which are part of the national discourse, but produce only limited change in institutions and policies, have moderate salience. Norms that are part of the national discourse but do not produce changes in institutions or policies are rated as having a low degree of domestic salience, while norms that lack domestic advocates are not salient at all.<sup>110</sup>

While rating a norm’s domestic salience in this way may be useful, it does not help with understanding *why* some norms are more domestically salient than others; why do some international norms lead to changes in institutions and

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<sup>105</sup> Hawkins, above n 103.

<sup>106</sup> Cortell, above n 104, and Chiam, above n 102.

<sup>107</sup> See for example Gourevitch, Peter ‘The Second Image Reversed: The International Sources of Domestic Politics’ (1978) 32(4) *International Organizations* 881, and Checkel Jeffrey T. ‘Norms, Institutions and National Identity in Contemporary Europe’ (1999) 43 *International Studies Quarterly* 83.

<sup>108</sup> Cortell, above n 104, 70.

<sup>109</sup> Ibid, page 72.

<sup>110</sup> Ibid.

policy, while others have no impact. Cortell and Davis assert that this is largely dependent on the cultural match of the norm, that is, how much the international norm resonates with ‘widely held domestic understandings, beliefs, and obligations.’<sup>111</sup> Of course, as society’s attitudes change over time, so too will the degree to which particular norms have domestic resonance.

Chiam analysed Cortell and Davis’ theory of domestic salience in the context of Australia’s negotiation and speedy ratification of a treaty regulating tobacco (Tobacco Convention),<sup>112</sup> and concludes that the fact that the treaty largely reflected existing laws in Australia was extremely relevant to Australia’s practices surrounding this treaty. Australia actively participated in the negotiation of the treaty, and ensured that the final draft contained no obligations that were not already part of Australian domestic law.<sup>113</sup> In effect, Australia ‘exported’ its tobacco control regulation to the international community rather than ‘importing’ internationally agreed standards into Australia, as is more commonly the case with international treaties.<sup>114</sup> The result was that Australia ratified a convention that had a high degree of domestic legitimacy, because it was in complete harmony with its national laws and policies. Furthermore, the kind of strict tobacco control set out in the convention fitted well with the strong anti-smoking culture prevalent in Australia at the time.<sup>115</sup> This high degree of domestic salience may account for the treaty’s smooth path through the domestic treaty making process; as Chiam noted, the Joint Standing Committee on Treaties (JSCOT) received only one submission on this treaty (which expressed strong support for the convention).<sup>116</sup>

Chiam found that while domestic salience explains Australia’s behaviour around the Tobacco Convention, there are other factors that also influenced Australia’s

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<sup>111</sup> Ibid, 73.

<sup>112</sup> World Health Organisation Framework Convention on Tobacco Control 2003. Ratified by Australia 27 October 2004, entered into force 27 February 2005.

<sup>113</sup> Chiam, above n 102, 224.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid page 228.

<sup>116</sup> Submission of the Cancer Council of Australia and the National Heart Foundation. Accessed at: [www.aph.gov.au/house/committee/jscot/30march04/subs/sub1.pdf](http://www.aph.gov.au/house/committee/jscot/30march04/subs/sub1.pdf) on 14 May 2007.

practices. In particular, she speculates that the provenance of the international obligation and the policy priorities of the Government were relevant. Chiam notes the Australian Government's tense relationship with the human rights treaty bodies at that time, and pondered whether the Tobacco Convention would have received such strong support from Australia if, instead of being framed as a health initiative and emanating out of the World Health Organisation, it had been classified as a human rights issue and sponsored by a UN human rights body.<sup>117</sup> Thus, Chiam asserts that the domestic salience theory is not only affected by the source of the international obligation, but also by how the obligation fits with the government's policy priorities. To illustrate this, Chiam analysed the Australia-US Free Trade Agreement (FTA)<sup>118</sup> which, she argued, is not domestically salient, as evidenced by the vocal public opposition. Notwithstanding significant community anxiety about the FTA, the Government proceeded with finalising the agreement because it was consistent with its policy aim of increasing free trade with the United States.

The final scholar to examine the theory of domestic salience is Hawkins, who studied efforts to comply with international human rights laws in Chile, South Africa, Israel and Cuba. These States are significantly different from the two chosen for this research, in that the four States selected by Hawkins all had recent histories of high profile human rights abuses.<sup>119</sup> In addition, none of the countries selected by Hawkins are western States or federations like Australia and the United States.<sup>120</sup> Given the dearth of scholarship regarding the theory of domestic salience, it is worthwhile examining Hawkin's study, even if it is distinctly different from the case study undertaken for this thesis. Unlike Chiam, Hawkins did not consider the significance of domestic salience to decisions surrounding ratification, limiting his analysis to compliance with treaty obligations.

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<sup>117</sup> For example as a protocol to ICESCR, implementing the right to the highest attainable standard of health, or the right to an adequate standard of living: Chiam, above n 102, 239.

<sup>118</sup> A bilateral agreement between Australia and the United States designed to liberalise trade in goods, services and investment between the two countries. Signed 18 May 2004. Entered into force 1 January 2005.

<sup>119</sup> Pinochet in Chile; Apartheid in South Africa; the Palestinian conflict in Israel; and political persecution and suppression of human rights by the non-democratic communist government in Cuba.

<sup>120</sup> Hawkins, above n 103.

Hawkins measured domestic salience by examining ‘the degree to which social groups publicly articulate and endorse those norms in their discourse.’<sup>121</sup> The term ‘social groups’, as used by Hawkins includes not only formal NGOs, but also groups such as churches and political parties. Using this measure, Hawkins determined that domestic salience is low if ‘only a few brave individuals endorse human rights norms’;<sup>122</sup> medium if some prominent groups voice their support for human rights, but other social groups still support repression and authoritarian rule; and highly domestically salient if a broad array of social groups endorse human rights norms.<sup>123</sup> Thus Hawkins’ measure of domestic salience is different to that used by Cortell, Davis and Chiam, because he ignores changes in government practices, like enacting new laws or changing policies or procedures related to the international norm. If the key to compliance with an international norm is how salient it is with the general domestic population then Hawkin’s measure is appropriate. If however, the key is that the norm is not only salient with the general population, but also salient with the government, then the method of measurement used by Cortell, Davis and Chiam is more suitable.

Using his measure of the extent of discourse by social groups, Hawkins found domestic salience to be a very important influence on States’ compliance. He suggested that in South American countries, like Chile, where human rights are now well developed, international human rights laws are a good normative fit, and contrasts this with Asian countries where he asserts domestic human rights norms are weak, and governments can readily justify non-compliance by appealing to other cultural norms such as community responsibility.<sup>124</sup> However, Hawkins did not include any Asian countries in his study, and does not cite any authority in support of his bald assessment of the domestic salience of human rights norms in Asian States.

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<sup>121</sup> Ibid, 9-10.

<sup>122</sup> Ibid, 10.

<sup>123</sup> Ibid 10.

<sup>124</sup> Ibid 9.

Hawkins also considered the impact of domestic structures on State compliance, which he defined as the political institutions of the State, the nature of civil society, and the ways in which State and society are linked by intermediary organisations.<sup>125</sup> He concluded that ‘in contrast to strong theoretical expectations ... domestic structure has relatively little influence on state compliance’,<sup>126</sup> and that open political institutions and parties do not have a significant impact on States’ compliance.

Overall, Hawkins reached two conclusions. The first is that domestic variables matter more than international factors in determining State compliance, and the second is that not all domestic factors matter equally.<sup>127</sup> In particular, a high degree of normative congruence is more important to treaty compliance than domestic structures, such as human rights institutions.

As discussed above, some theories’ usefulness is limited by their exclusive focus on international factors. With the domestic salience theories, the reverse may be true, in that, the omission of international influences may inhibit the ability of these theorists to explain States’ commitment to, and compliance with, international human rights treaties. It may be that the behaviour of States can only be explained by taking into account a combination of both international and domestic considerations.

## 2.4 Hybrid Model

Hafner-Burton and Tsutsui, whose empirical study of compliance with civil and political rights in developing States was critiqued in the previous chapter, developed a theoretical model to explain States’ behaviour vis-à-vis human rights treaties, which merges aspects of rational actor models, in particular institutionalism, and a normative sociological model, known as the world society

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<sup>125</sup> Ibid 8.

<sup>126</sup> Ibid 31.

<sup>127</sup> Ibid 3.

approach.<sup>128</sup> This approach asserts that ‘models and norms that are institutionalized at the world level acquire assumed status over time and influence policy makers at the national level.’<sup>129</sup> In applying the world society approach to human rights treaties, Hafner-Burton and Tsutsui contend that when a particular treaty gains international legitimacy, a government will ratify it simply to avoid being an outcast in the international arena. That is, ratification is appropriate for, and therefore in the self-interest of, any actor identifying as a State.<sup>130</sup> Hafner-Burton and Tsutsui argue that there should be no expectation that ratification of a human rights treaty will lead to improved human rights practices within a State. Indeed, they propound a theory that there should be an expectation that treaty ratification will have a negative impact on the domestic human rights situation.<sup>131</sup> This is because ratification is ‘often a symbolic gesture to signal that the government is not a deviant actor’.<sup>132</sup> In other words, Hafner-Burton and Tsutsui contend that there should be a decoupling of the international process of ratification of human rights treaties and the domestic process of human rights compliance. States are aware of the weak enforcement mechanisms within human right treaties, and so can, and do, ratify such treaties when they have neither the intention, nor capacity, to comply with them.<sup>133</sup> It is therefore wrong to expect there to be an improvement in human rights behaviour merely because a State has ratified a human rights treaty.<sup>134</sup>

If this rationale is taken to its natural conclusion, one would expect to see near universal ratification of the major human rights treaties, which has not happened with any treaty except CROC. For example, the two international covenants have 156 State Parties in the case of ICESCR<sup>135</sup> and 160 in the case of the

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<sup>128</sup> Hafner-Burton, above n 10, 1386.

<sup>129</sup> Ibid 1382.

<sup>130</sup> Hawkins, Darren and Goodliffe, Jay ‘Explaining Commitment: States and the Convention Against Torture’ (2006) 68(2) *Journal of Politics* 8.

<sup>131</sup> Hafner-Burton, above n 10, 1386.

<sup>132</sup> Ibid 1383.

<sup>133</sup> Ibid 1380.

<sup>134</sup> The empirical studies of scholars such as Keith and Hathaway, analysed in section 1.3.in the previous chapter, support this contention.

<sup>135</sup> Office of the High Commissioner for Human Rights accessed at: [www.ohchr.org/english/countries/ratification/3.htm](http://www.ohchr.org/english/countries/ratification/3.htm) on 19 July 2007.

ICCPR,<sup>136</sup> indicating that there are many States, including the United States, that are willing to risk being labelled deviant actors, rather than undertake the symbolic gesture of ratification. This suggests that there are other factors that influence whether a State will ratify a treaty.

According to Hafner-Burton and Tsutsui, what leads to increased compliance with human rights treaties are strong NGOs with links to international civil society, who can place pressure on governments to improve human rights practices.<sup>137</sup> They contend that a strong civil society is a key factor in predicting levels of compliance with international human rights treaties by a State. Thus, they assert that the international human rights framework created by international institutions, such as the UN, assist civil society to enforce human rights. This is very much in line with the spiral model proposed by Risse, Ropp and Sikkink that was analysed in Chapter 1, where it was criticised for its anglo-centrism. The Hafner-Burton and Tsutsui framework appears to be a theory that is most applicable to developing nations. It is implicit in these scholars' analysis that civil society is stronger in developed, democratic States, and therefore these States are expected to have better human rights practices. In this regard the hybrid model is similar to liberalism in asserting that liberal democratic States are more likely to comply with international human rights treaties, albeit for different reasons.

## 2.5 Conclusion

The theories analysed in this chapter are very diverse, not only because some seek to explain States' practices by reference to self-interest, while others assert that it is the persuasive power of binding norms that controls the behaviour of States, but also because some of the theories look to international factors to explain States' actions, while others assert that it is domestic considerations that most influence the behaviour of States. The multiplicity of explanations for the behaviour of States suggests that there is a need for further exploration and

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<sup>136</sup> Office of the High Commissioner for Human Rights accessed at: [www.ohchr.org/english/countries/ratification/4.htm](http://www.ohchr.org/english/countries/ratification/4.htm) on 19 July 2007.

<sup>137</sup> Hafner-Burton, above n 10, 1386.

development of these theories, and conducting empirical research is one way of doing this. Indeed, it has been noted that ‘systematic empirical evidence to support either side [rational actor and normative theories] is rare.’<sup>138</sup> This thesis aims to play a small part in overcoming this problem by analysing the actions of two States in relation to a single human rights norm, and using the findings to further develop the theories analysed in this chapter. Thus, Part II of this thesis investigates the behaviour of the United States and Australia vis-à-vis Article 29(1) of CROC, and the theories examined in this chapter are then reconsidered in Chapter 8 in light of these findings. The purpose of using this approach, is to increase understanding of why the journey of HRE from convention to classroom appears to be so problematic. However, before moving on to these substantive issues, it is necessary to address definitional issues surrounding the norm relating to HRE, and this is purpose of the next chapter.

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<sup>138</sup> Ibid, 1377.

## **CHAPTER 3 – HUMAN RIGHTS EDUCATION: A SLOGAN IN SEARCH OF A DEFINITION?<sup>1</sup>**

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#### **3.5 Conclusion**

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<sup>1</sup> This is a play on Hillary Clinton's infamous statement that 'Children's rights' is a slogan in search of definition' in Rodham, H 'Children Under the Law' (1973) 43 *Harvard Educational Review* 1.

*The term ‘human rights education’ is too often used in a way that greatly oversimplifies its connotations<sup>2</sup>*

### 3.1 Introduction

This thesis explores, *inter alia*, the extent to which Australia and the United States are providing HRE in government secondary schools in Melbourne and Boston in accordance with Article 29(1) of CROC. In order to do this it is necessary to understand not only what Article 29(1) means, but also how human rights education is understood by key stakeholders instrumental in the promotion and implementation of HRE in schools. Section 3.2 therefore uses General Comment No. 1 on the Aims of Education<sup>3</sup> prepared by the Committee on the Rights of the Child as a tool to ‘unpack’ Article 29(1) of CROC and expose what this norm actually requires. It then compares this to other UN definitions of HRE propounded as part of the Decade for HRE and the World Programme for HRE. This analysis enables a determination to be made as to whether there is general consensus within the international community of States as to the meaning and content of HRE.

In order to understand Australia and the United States’ domestic practices relating the norm in Article 29(1) of CROC, it is helpful to have some insight into how these governments, and the governments of Victoria and Massachusetts, understand and interpret HRE. Section 3.3 therefore examines whether these governments understand HRE in a manner that is consistent with Article 29(1) of CROC. This is particularly important because two of the theories being evaluated in this thesis assert that the clarity of the language used in an international norm is critical to whether or not it is complied; the managerial model suggests that ambiguity in what is required of States is one of the reasons for non-compliance,<sup>4</sup> while the

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<sup>2</sup> General Comment 1: The Aims of Education, Committee on the Rights of the Child, 17 April 2001, CRC/GC/2001/1, paragraph 19.

<sup>3</sup> Ibid.

<sup>4</sup> Chayes, Abram and Chayes, Antonia Handler, *The New Sovereignty: Compliance with International Regulatory Agreements*, (1995) Harvard University Press, Cambridge, 15.

fairness model stresses that the clarity of the rule influences whether or not a State will comply.<sup>5</sup>

The data collected from teachers as part of this study, suggests that they rely heavily on human rights NGOs for resources and guidance on HRE, and it is therefore relevant to examine how these organisations understand HRE as this is likely to influence the provision of HRE in schools. Section 3.4 analyses how three of the most influential NGOs in the field of HRE understand this concept, for the purpose of ascertaining whether these key stakeholders interpret HRE in a manner congruent with the internationally accepted definition of this term.<sup>6</sup>

### **3.2 How the Committee on the Rights of the Child and General Assembly Define HRE**

Although States, acting through the UN and its agencies, have seized many opportunities to declare the existence of a right to HRE,<sup>7</sup> the focus of this thesis is Article 29(1) of CROC, and so it is how the norm has been articulated in this provision that is relevant. The purpose of this section is to analyse what this Article requires, including how General Comment No. 1 contributes to a clearer understanding of this norm. Subsequent efforts to define HRE are also considered in order to establish whether more recent attempts to explain HRE are consistent with Article 29(1) of CROC.

#### *3.2.1 Article 29(1) and General Comment No. 1*

Many of the articles in CROC impose specific obligations on State Parties using unequivocal language that clearly indicates the nature of the commitment that a State Party has undertaken. Examples of mandatory language in CROC include the use of words such as ‘respect’; ‘ensure’; and ‘undertake’. In contrast, Article

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<sup>5</sup> Franck, Thomas *Fairness in International Law and Institutions* (1995) Clarendon Press, Oxford, 41-207.

<sup>6</sup> How teachers understand HRE is considered in Chapter 7, where their survey responses and interviews are analysed.

<sup>7</sup> See for example: the Universal Declaration of Human Rights (UDHR) – Article 26; UNESCO Convention Against Discrimination in Education – Article 5; Convention on Elimination of Racial Discrimination – Article 7; Convention on the Elimination of All Forms of Discrimination against Women – Article 10; International Covenant on Economic Social and Cultural Rights (ICESCR) – Article 13; CROC – Article 29(1); and Vienna Declaration and Programme of Action, paragraphs 78-82.

29(1) merely declares that States Parties ‘agree’ that the education of the child shall be directed to the five areas set out in that article. This is the only article in the entire convention to express States Parties’ commitment in terms of an agreement. While it is to be expected that articles relating to economic, social and cultural rights (ESC rights) will use terminology that is less immediately obligatory than the language used in the articles relating to civil and political rights,<sup>8</sup> the language used in Article 29(1) is weak even by the standards applicable to ESC rights. Thus, the article relating to health provides that ‘States Parties shall pursue full implementation of this right’, and ‘shall take appropriate measures’,<sup>9</sup> while Article 31 mandates that States Parties ‘shall respect and promote’ the right of a child to participate in cultural and artistic life. Several other provisions relating to ESC rights require States Parties to ‘recognize’ a right.<sup>10</sup> It therefore seems that when it comes to describing a State’s obligations, Article 29(1) has the weakest language in CROC.<sup>11</sup> On its face, this language appears to indicate no more than that States Parties concur that they have a common understanding of the broad parameters of HRE. However, when read in conjunction with Article 28 and General Comment No. 1, it is apparent that much more is required of States Parties than just their agreement about what constitutes HRE. Article 28 requires States Parties to ‘recognize the right of the child to education’, and Article 29 builds on this by providing that the right to education referred to in Article 28 shall be directed to the substance it outlines. Thus, although Article 29(1) does not specifically refer to a child having a *right* to be educated about human rights, it does require that the right to education in Article 28 *shall* be directed to the matters set out in Article 29(1). The end result is that Article 29(1) does require States Parties to take steps to ensure that children’s education includes HRE. It does however achieve this outcome in an indirect way, and it would perhaps have been

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<sup>8</sup> This is because ESC rights are only required to be implemented progressively to the maximum extent of available resources (Article 4), while civil and political rights are to be effected immediately.

<sup>9</sup> Article 24(2).

<sup>10</sup> For example, Article 26 (social security); Article 27 (right to an adequate standard of living); and Article 28 (right to education).

<sup>11</sup> The use of the word ‘agree’ in Article 29(1) is identical to Article 13 of ICESCR which is the provision in that covenant relating to HRE. Just like CROC, none of the other substantive provisions of ICESCR use such insubstantial language when describing State Parties’ obligations.

preferable for the drafters of Article 29(1) to use similar language to that utilised in other articles pertaining to ESC rights, that is, that States Parties recognise the *right* of a child to be educated about the matters set forth in article 29(1).

Article 29 breaks down the content of education that children are to receive into five parts, namely:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

No guidance is given as to relative importance of each aim, and it has been suggested, that in light of this, each of these aims should be considered to be of equal value and importance.<sup>12</sup> Thus, for the purpose of this study, the provisions of paragraphs (b), (c) and (d) which are collectively referred to as HRE, are considered to be of equal significance. Paragraphs (a) and (e) have been excluded from the definition of HRE for this research because the former relates to a general aim of education, rather than human rights specifically, and the latter relates to the environment. While both of these are tangentially related to human rights<sup>13</sup> they are not a core part of educating children about human rights, whereas paragraphs

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<sup>12</sup> Hodgson, Douglas *The Human Right to Education* (1998) Ashgate Publishing, Aldershot, 74.

<sup>13</sup> For example paragraph (a) is of particular significant for ensuring that disabled children receive an education that allows them to reach their full potential. See for example Lloyd, Chris 'Excellence for all Children False Promises! The Failure of Current Policy for Inclusive Education and Implications for Schooling in the 21st Century' (2000) 4(2) *International Journal of Inclusive Education* 133, and there is an increasing amount of research being undertaken into the links between protecting the environment and the realisation of human rights see Sachs, Wolfgang 'Environment and Human Rights' (2004) 47(1) *Development* 42 and Boyle, Alan E. and Anderson Michael R. (eds) *Human Rights Approaches to Environmental Protection* (1998) Clarendon Press, Oxford. However, these issues are beyond the scope of this research and therefore for the purpose of this study, HRE has been limited to Article 29(1)(b), (c) and (d).

(b), (c) and (d) all directly relate to children being educated about human rights and are therefore the focus of this research.

As mentioned in Chapter 1, the Committee on the Rights of the Child (CRC) developed General Comment No. 1 on the Aims of Education<sup>14</sup> to assist State Parties in implementing and complying with this norm. It is appropriate to use General Comment No.1 when analysing the normative content of Article 29(1) because, as Dianne Otto has noted, although not legally binding, General Comments ‘carry enormous political and moral weight’<sup>15</sup> and ‘at the very least, they provide persuasive interpretations of the treaty provisions.’<sup>16</sup> Indeed, Judge Thomas Buergenthal of the International Court of Justice has referred to General Comments as having become ‘distinct juridical instruments’<sup>17</sup> and likened them to ‘advisory opinions’ of international tribunals.<sup>18</sup> However, it should be remembered that General Comments are adopted by the treaty committee and therefore are consensus documents agreed to after negotiations and compromises by committee members.<sup>19</sup>

General Comment No. 1 stresses that the paragraphs in Article 29(1) are interrelated and that they reinforce, integrate and complement the other provisions in CROC, and cannot be properly understood in isolation from them.<sup>20</sup> Thus, HRE should be interpreted in a holistic manner that incorporates principles such as non-discrimination (Article 2), the best interest of the child (Article 3), and the right to express views and have them taken into account (Article 12).<sup>21</sup>

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<sup>14</sup> General Comment No. 1, above n 2.

<sup>15</sup> Otto, Dianne “Gender Comment”: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women? (2002) *Canadian Journal of Women and the Law* 1, 11.

<sup>16</sup> Ibid, 13.

<sup>17</sup> Buergenthal, Thomas quoted in Steiner, Henry J. and Alston, Philip *International Human Rights in Context: Law, Politics, Morals* (2<sup>nd</sup> ed, 2000) Oxford University Press, Oxford, 732.

<sup>18</sup> Ibid.

<sup>19</sup> Otto, above n 15.

<sup>20</sup> General Comment No. 1, above n 2, paragraph 6.

<sup>21</sup> Ibid.

Paragraph (b) in Article 29(1) refers to education being directed at ‘the development of respect for human rights’. As is seen later in this chapter, there is a tendency for some governments to equate human rights with civil and political rights. General Comment No.1 makes it clear that this is not what is intended by this provision. It specifically states that ‘the education to which every child has a right is one designed to provide the child with life skills, to strengthen the child’s capacity to enjoy the *full range* of human rights’<sup>22</sup> [emphasis added]. The absence of any discussion in General Comment No.1 about civil and political rights and ESC rights indicates that the reference to human rights in Article 29(1)(b) is to *all* human rights. Thus, Article 29(1)(b) requires that children learn about human rights as universal and indivisible, in conjunction with the principles in United Nations Charter which promote the maintenance of international peace and security by, *inter alia*, observing faith in fundamental human rights and in the dignity and worth of the human person and the equal rights of men and women.<sup>23</sup>

Paragraph (c) in Article 29(1) provides that HRE includes the development of respect for a child’s parents. This is not something that might immediately come to mind when thinking about the content of HRE. General Comment No.1 reveals the motivation for the inclusions of this provision in Article 29(1), namely to address concerns that CROC is ‘anti-parent’.<sup>24</sup> This sentiment is evident in the following statement of United States Senator Jesse Helms: ‘the United Nations Conventions on the Rights of the Child is incompatible with the God given rights and responsibility of parents to raise their children.’<sup>25</sup> Thus, Article 29(1)(c) and General Comment No. 1 seek to counter the assertion that CROC prioritises children’s

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<sup>22</sup> Ibid, paragraph 2.

<sup>23</sup> Preamble of the Charter of the United Nations, signed at San Francisco on 26 June 1945, entered into force 24 October 1945.

<sup>24</sup> General Comment No. 1, above n 2, paragraph 7.

<sup>25</sup> 141 Congressional Record S 8400 (daily ed. 1995).

rights over parent's rights by expressly requiring that children's education include learning to respect their parents<sup>26</sup>

Paragraph (c) also incorporates education about national values and respecting different civilizations. General Comment No. 1 sees this as fundamental to creating a culture which is infused by human rights values.<sup>27</sup> In many ways the elements in paragraph (c) have a prophylactic role, that is, they are aimed at sowing the seeds of harmonious relationships among all people and helping to prevent the outbreak of violent conflicts and related human rights violations.<sup>28</sup>

Paragraph (c) is inextricably linked with paragraph (d) in that respecting difference is a precursor to understanding, peace, tolerance and friendship among all people. Thus, General Comment No.1 emphasises that HRE must combat prejudice, racism, discrimination and xenophobia,<sup>29</sup> in order to promote the ethical values which facilitate peace and harmonious relations among all people. Although much of General Comment No.1 is devoted to *how* to implement Article 29(1) of CROC, rather than elaborating on the *content* of the norm, it is nevertheless helpful in elucidating the meaning of Article 29(1), and provides substance to the general mandate for human rights education.

### 3.2.2 UN Decade for Human Rights Education (1995-2004)

Article 29(1) was augmented by the UN Decade for HRE, and it is important to consider how HRE has been defined in this initiative, and in particular, whether the definition of HRE developed by the Office of the High Commissioner for Human Rights (OHCHR) and endorsed by the General Assembly supports the articulation of HRE in CROC. As part of the Decade for HRE the OHCHR prepared 'Guidelines for National Plans of Action for HRE' (Guidelines) and the first section is headed

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<sup>26</sup> For a full discussion of this debate see Renteln, Allison Dundes 'United States Ratification of Human Rights Treaties: Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child' (1997) 3 *International Law Students Association Journal of International and Comparative Law* 629.

<sup>27</sup> General Comment No. 1, above n 2, paragraph 7.

<sup>28</sup> Baxi, Upendra, 'Human Rights Education: The Promise of the Third Millennium?' Chapter in Andreopoulos, George J. and Claude, Richard Pierre (eds) *Human Rights Education for the Twenty-First Century* (1997) University of Pennsylvania Press, Philadelphia, 146.

<sup>29</sup> See for example General Comment No. 1, above n 2, paragraph 11.

'Definition of Human Rights Education'.<sup>30</sup> It begins by highlighting references to HRE in international human rights instruments including CROC, before stating that:

Human rights education may be defined as training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes, which are directed towards:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free society;
- (e) The furtherance of the activities of the United Nations for the maintenance of peace (see A/51/506/Add.1, appendix, para. 2).<sup>31</sup>

There are many similarities between this definition of HRE and Article 29(1) of CROC, as well as a few difference that are of less significance. Paragraph (a) corresponds with paragraph (b) in Article 29(1) except that it omits the reference to the Charter of the UN. Paragraph (b) is similar to paragraph (a) in Article 29(1) of CROC except that it is not specific to children. Paragraph (d) in Article 29(1) has been broken down into three separate provisions in the above definition, namely paragraphs (c), (d) and (e). The only aspect of HRE in Article 29(1) of CROC which is not included in the above definition of HRE is paragraph (c) which provides that HRE includes:

The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

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<sup>30</sup> Guidelines for National Plans of Action for Human Rights Education, General Assembly A/52/469/Add.1, 20 October 1997, 5.

<sup>31</sup> Ibid.

The first part of this paragraph is specific to children and therefore understandably not part of a general definition of HRE. This leaves the only substantive difference between Article 29(1) and the definition of HRE developed for the Decade as the references to cultural identity, national values and different civilizations.<sup>32</sup> It is unclear why this provision does not form part of the later definition of HRE. It may be that values education, while relevant to HRE was not considered to be as important as the other aspects of HRE set out paragraphs (a) – (e) of the definition developed for the Decade. Furthermore, values are referred to in the Guidelines in the section immediately following the definition. In particular it refers to HRE as having three dimensions, including ‘the development of values, beliefs and attitudes which uphold human rights’.<sup>33</sup> It is suggested that this broadly encompasses the concept contained in Article 29(1)(c), and thus the definition of HRE in the Guidelines generally reinforces the articulation of HRE in Article 29(1) of CROC.

There is however, one significant difference between the HRE set out in the Guidelines and the HRE set out in Article 29(1) as elaborated in General Comment No. 1. As stated above the Guidelines refer to HRE as having three dimensions. The third dimension is identified as being ‘encouragement to take action to defend human rights and prevent human rights abuses’.<sup>34</sup> General Comment No. 1 recommends that HRE be empowering, which is clearly not as strong a directive as taking action. There are two possible explanations for this difference. The first is that the CRC, when developing General Comment No. 1, was mindful of children’s different developmental stages and evolving capacities<sup>35</sup> and did not consider it appropriate to encourage young persons to take action to defend and prevent human rights abuses at too early an age. The second is the different provenance of these statements; General Comment No.1 is essentially a consensus document agreed to by members of the CRC, who are State

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<sup>32</sup> As discussed in Chapter 5, Article 29(1)(c) was the result of a proposal by the Australian delegation to the drafting of CROC.

<sup>33</sup> Guidelines, above n 30, paragraph 12(b).

<sup>34</sup> Ibid, paragraph 12(c).

<sup>35</sup> General Comment No. 1, above n 2, paragraphs 1, 9 and 12.

representatives, whereas the Guidelines were drafted by the OHCHR. It could be expected that the OHCHR would use stronger language than States, albeit the Guidelines were ultimately adopted by the General Assembly.

Overall, the definition of HRE in the Guidelines bears a strong similarity to the articulation of HRE set out in Article 29(1) of CROC. The only significant difference is not in the definition of HRE, but rather in the guidance of how such HRE should be promoted, that is, by encouraging recipients of HRE to take action, which is not something that General Comment No.1 endorses.

### *3.2.3 UN World Programme for HRE (2005 - ongoing)*

When the UN Decade for HRE came to an end in late 2004, the General Assembly decided that the efforts to promote HRE needed to continue and therefore adopted the World Programme for HRE as the vehicle through which to continue the focus on human rights education. The World Programme operates in phases, with each phase concentrating on a different aspect of HRE. The first phase is from 2005 - 2007 and is directed at HRE in primary and secondary schools. The Plan of Action for the First Phase (Plan of Action) was prepared by the OHCHR and transmitted by the Secretary-General to the General Assembly.<sup>36</sup> It includes the following definition of HRE:

Human rights education can be defined as education, training and information aiming at building a universal culture of human rights through the sharing of knowledge, imparting of skills and moulding of attitudes directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free and democratic society governed by the rule of law;
- (e) The building and maintenance of peace;

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<sup>36</sup> Plan of Action for the First Phase (2005-2007) of the World Programme for Human Rights Education, A/59/525/Rev.1, 2 March 2005.

- (f) The promotion of people-centred sustainable development and social justice.<sup>37</sup>

The first three paragraphs are in every respect identical to the first three paragraphs in the definition of HRE used for the UN Decade for HRE. However, the next three paragraphs reveal a further refinement of the definition of HRE. Some of the changes are stylistic rather than substantive including, for example, the deletion of the reference to the UN in the paragraph addressing the maintenance of peace. However, two changes are significant, namely the addition of a reference to a ‘democratic society governed by the rule of law’ in paragraph (d) and the inclusion of a new provision addressing sustainable development and social justice. The mention of ‘rule of law’ is a reflection of the new importance placed on this concept. As Thomas Carothers, Director of Research at the Carnegie Endowment for International Peace, noted ‘The concept [the rule of law] is suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization.’<sup>38</sup> It was in the late 1990s that the ‘rule of law’ started to emerge as an important part of democratic society.<sup>39</sup> Since CROC was drafted during the 1980s when the ‘rule of law’ did not enjoy such a high profile in human rights discourse, it is understandable that it did not feature in Article 29(1). Similarly, sustainable development did not become part of the human rights discourse until the 1990s,<sup>40</sup> that is, subsequent to the drafting of Article 29(1). While the idea of ‘social justice’ has been around for a long time there is no definitive definition of it.<sup>41</sup> However, it is generally understood to be

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<sup>37</sup> Ibid, paragraph 3.

<sup>38</sup> Carothers, Thomas ‘The Rule of Law Revival’ (1998) 77(2) *Foreign Affairs* 95.

<sup>39</sup> See for example McAdams, A. James (ed) *Transitional Justice and the Rule of Law in New Democracies* (1997) University of Notre Dame Press, Notre Dame, Indiana; Raz, Joseph ‘The Rule of Law and Its Virtue’ (1997) 93 *Law Quarterly Review* 195; Widner, Jennifer A. *Building the Rule of Law* (2001) W.W. Norton, New York; and O’Donnell, Guillermo A. ‘Why the Rule of Law Matters’ (2004) 15(4) *Journal of Democracy* 32.

<sup>40</sup> See for example Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Section I, paragraphs 20 and 27 and Section II, paragraphs 17 and 36; Donnelly, Jack; ‘Human Rights, Democracy, and Development’ (1999) 21 *Human Rights Quarterly* 608; and Moser, Caroline, and Norton, Andy. ‘To Claim our Rights: Livelihood Security, Human Rights and Sustainable Development.’ (2001) Paper presented at the Workshop on Human Rights, Assets and Livelihood Security, and Sustainable Development, Overseas Development Institute, London, 19-20 June 2001.

<sup>41</sup> Reisch, Michael ‘Defining Social Justice in a Socially Unjust World’ (2002) 83(4) *Families in Society* 343.

closely linked to human rights,<sup>42</sup> and the addition of these words in this definition of HRE does not significantly alter the content of the proposed HRE. It is suggested that the changes in the description of HRE between the Decade and the World Programme amount to a refinement of the definition rather than substantive modifications.

Like the Guidelines for the Decade for HRE, the Plan of Action follows its definition of HRE with a statement that HRE should include encouraging people to take action to defend and promote HRE.<sup>43</sup> As noted above, this is not something that General Comment No.1 recommends for children's HRE.

### 3.2.4 Conclusion

Article 29(1) of CROC read in conjunction with General Comment No. 1 provides a clear definition of HRE, the core elements of which are that HRE must promote respect for all human rights as universal and indivisible standards belonging to all people. It must promote respect for others, and it must actively encourage the development of values relating to peace, tolerance, and equality in an integrated and holistic manner.

The international HRE initiatives subsequent to CROC essentially affirm the articulation of HRE in Article 29(1) and General Comment No. 1. The few differences are minor and stem from a broadening of the definition to suit an audience that comprises more than just children, and an evolution in the understanding of HRE that has occurred since Article 29(1) was drafted in the late 1980s. In particular, the inclusion of concepts such as the 'rule of law' and 'sustainable development' in the more recent articulations of HRE represent an effort to incorporate more modern ideas about what is necessary in order to achieve a culture of human rights.<sup>44</sup> The main area of divergence between CROC

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<sup>42</sup> See for example Held, Virginia *Rights and Goods: Justifying Social Action*. (1984) The Free Press, New York and Ferguson, Clare 'Global Social Policy Principles: Human Rights and Social Justice' (1999) DFID Social Development Division, accessed at: [www.dfid.gov.uk/pubs/files/sdd-gsp.pdf](http://www.dfid.gov.uk/pubs/files/sdd-gsp.pdf) on 21 September 2007.

<sup>43</sup> Plan of Action, above n 36, paragraph 4.

<sup>44</sup> Promoting a culture of human rights is the first objective of the World Programme for HRE, Plan of Action, above n 36, paragraph 7.

and the two subsequent initiatives is the express acknowledgement that HRE should promote action to defend and promote human rights.<sup>45</sup> Overall, there appears to be general consensus at the international level as to the content of HRE, with a small amount of disparity between Article 29(1) and the more recent statements regarding HRE.

### **3.3 How Governments Understand HRE**

The purpose of this section is to ascertain how the governments involved in this case study understand HRE, and in particular, whether they interpret HRE in a manner consistent with the definition of HRE developed at the international level and analysed in section 3.2 above. Unfortunately, the governments of Australia, the United States, Victoria and Massachusetts have not explicitly stated what their understanding of HRE is, so their interpretation of HRE can only be gleaned through interviews with staff from the relevant Departments of Education (DOEs) and from an analysis of government publications, which give some insight into how these four administrations understand HRE.

#### *3.3.1 Australian Federal Government*

Under the federal system of government in Australia, education is the responsibility of the states<sup>46</sup> and *prima facie* the Federal Government has no power to make laws regarding what students in secondary school learn. However, the High Court has held that the Australian Government may use its external affairs power<sup>47</sup> to enact legislation giving effect to treaties that Australia has ratified. Thus, this head of power has been broadly interpreted to give the Federal Government authority to legislate in areas that would otherwise be beyond its jurisdiction.<sup>48</sup> As a result the Federal Government could, if it were so inclined, enact legislation giving effect to Article 29(1) of CROC pursuant to its external affairs power.<sup>49</sup> The Australian

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<sup>45</sup> Guidelines, above n 30, paragraph 13(c), and Plan of Action, above n 36, paragraph 4(c).

<sup>46</sup> *Commonwealth of Australia Constitution Act 1900*, s 51.

<sup>47</sup> *Ibid*, s 51 (xxix).

<sup>48</sup> *Commonwealth v State of Tasmania* (1983) 158 CLR 1.

<sup>49</sup> The Australian Government has instead chosen to use the approach of cooperative federalism, whereby the Parliament of the Commonwealth works with the parliaments of the states and territories to achieve

government has not taken this step, but it has nevertheless found opportunities to articulate its understanding of HRE in its periodic reports to the CRC<sup>50</sup> that include, *inter alia*, activities it has undertaken pursuant to Article 29(1). By setting out how it thinks it is complying with Article 29(1), the Australian Government reveals its understanding of its obligations under this article. The first report was submitted in December 1995 (1<sup>st</sup> Report).<sup>51</sup> A combined second and third report was submitted in September 2003 (2<sup>nd</sup> Report).<sup>52</sup>

The 1<sup>st</sup> Report was prepared during the time of a Labor Government and indicates that Australia had an understanding of HRE that in many aspects was congruent with Article 29(1), but at the same time differed in some critical areas. In a lengthy section on HRE in Australia,<sup>53</sup> the Government addresses the majority of issues identified in Article 29(1) of CROC. The report refers to the Hobart Declaration on Schooling in Australia<sup>54</sup> that sets out ten agreed national goals of education.<sup>55</sup> The relevant ones for the purpose of this research include, developing respect for others, a capacity to exercise judgement in matters of morality, ethics and social justice, and knowledge, skills, attitudes and values which will enable students to participate as active and informed citizens in a democratic society. The 1<sup>st</sup> Report elaborates on these issues, and specifically identifies that ‘the knowledge, experience and interest of women and Aboriginal and Torres Strait Islander

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outcomes that one party to the federal compact could not achieve on its own. This arrangement is analysed in-depth in Chapter 6, where Australia’s compliance with Article 29(1) of CROC is analysed.

<sup>50</sup> Article 44 of CROC requires that State Parties submit reports to the CRC within two years of the entry into force of CROC for the State Party and thereafter every five years. The reports must set out the measures that have been adopted to give effect to the rights in CROC and the progress made on the enjoyment of those rights, so that the CRC can have a comprehensive understanding of the extent of implementation of CROC.

<sup>51</sup> *Australia’s First Report under Article 44(1)(a) of the Convention on the Rights of the Child* CRC/C/8/Add. December 1995.

<sup>52</sup> *Australia’s Combined Second and Third Reports under the Convention on the Rights of the Child* March 2003, Attorney-General’s Department.

<sup>53</sup> The section of the report relating to Article 29(1) of CROC is in excess of 6,000 words.

<sup>54</sup> The Hobart Declaration on Schooling in Australia is a 1989 report from the Australian Education Council (now the Ministerial Council on Education, Employment, Training and Youth Affairs), a body that is made up of all state, territory and federal Ministers of Education.

<sup>55</sup> The agreement on uniform education goals demonstrates the operation of cooperative federalism in the field of education.

peoples are included by the provision of cross-curricula perspectives.<sup>56</sup> It also recognises that groups with special needs must be addressed, and singles out immigrant groups, children who do not yet speak English, and students with learning disabilities as being in need of additional programs.

The HRE referred to in Australia's 1<sup>st</sup> Report includes bullying, school violence based on gender, racism and ethnic violence<sup>57</sup> and the cumulative social and cultural effects of colonisation.<sup>58</sup> With the exception of colonisation, these are all expressly identified as crucial aspects of HRE in General Comment No. 1.

The 1<sup>st</sup> Report not only addresses HRE nationally, but also reports on HRE within each state and territory. Regrettably, while the overall report on HRE is comprehensive, the section on Victoria is woefully inadequate. The single paragraph merely states that Victoria is committed to providing quality programs in the legislated areas of learning, which are: Arts, English, Health and Physical Education (including sport), Languages other than English, Mathematics, Science, Studies of Society and Environment, and Technology.<sup>59</sup> There is no reference to human rights forming part of this education. It therefore appears that in 1995 the Victorian Government was either not providing any school based HRE, or alternatively did not consider that it needed to report on such matters to the Federal Government so that it could, in turn, include these in its report to the CRC. This may be due to the fact that at the time of the 1<sup>st</sup> Report the Government of Victoria was a Liberal-National Coalition.<sup>60</sup> As will be discussed in Chapter 8, there has been research conducted that suggests that Labor governments tends to be more supportive of international human rights laws than Liberal-National coalitions. Thus, the lack of depth in the Victorian component of the Report may be a reflection on the political persuasion of the Victorian Government at that time, rather than the actual level of HRE occurring in Victorian schools. Overall, while the

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<sup>56</sup> 1<sup>st</sup> Report, above n 51, paragraph 1237.

<sup>57</sup> 1<sup>st</sup> Report, above n 51, paragraph 1241.

<sup>58</sup> Ibid, paragraph 1245.

<sup>59</sup> Ibid, paragraph 1301.

<sup>60</sup> Jeff Kennett was the Liberal Premier from 1992 to 1999.

1<sup>st</sup> Report sheds some light on the Australian Government's understanding of HRE at that time, it does not provide any insight into how the Victorian Government understands HRE.

The 1<sup>st</sup> Report provides a comprehensive insight into how the Australian Government at that time understood the HRE required by Article 29(1). The information provided to the CRC demonstrates a thorough and wide-ranging understanding of HRE that includes most of the issues contained in Article 29(1) of CROC. However, it fails to include any reference to ESC rights, and makes no mention of international human rights laws, the United Nations, or the principles enshrined in its charter. Interestingly, the report also manages to largely avoid using the words 'human rights'. The only place they appear is in the section provided by the Australian Capital Territory that relates specifically to HRE activities taking place within the ACT.<sup>61</sup> The only mention of rights in other sections is in the context of the rights and responsibilities of citizens.<sup>62</sup> This suggests that the Federal Government in 1995 was uncomfortable with the term 'human rights'. The language which the Federal Government seemed to prefer was 'anti-discrimination', 'social justice', 'equality', and 'civics and citizenship', all of which are used liberally throughout the 1<sup>st</sup> Report. While all of these terms are encompassed within the concept of human rights,<sup>63</sup> they do not have the same force and international recognition as the term 'human rights'. The Federal Government's reluctance to expressly include the term human rights, in the section dealing with Article 29(1), in its 1<sup>st</sup> Report to the CRC, suggests that the Government either lacked an understanding of what HRE was, or was deliberately attempting to obfuscate the issue.

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<sup>61</sup> 1<sup>st</sup> Report, above n 51, paragraphs 1279-80.

<sup>62</sup> Ibid, 1238.

<sup>63</sup> For example, 'equality' is referred to in Article 29(1)(d) , 'discrimination' is the subject matter of Article 2 of CROC, and General Comment No. 1 identifies it as a core part of HRE pursuant to Article 29. Social justice is about analysing and addressing oppression based on a variety of grounds including racism, sexism, heterosexism, and ableism. See Adams, Maurianne, Griffin, Pat and Bell, Lee Anne (eds) *Teaching for Diversity and Social Justice* (1997) Routledge, Oxford.

In contrast to the 1<sup>st</sup> Report, the 2<sup>nd</sup> Report is extremely brief when it comes to detailing activities pursuant to Article 29(1). It identifies only three issues – anti-racism, child sexual abuse, and school discipline.<sup>64</sup> While anti-racism initiatives clearly fall within the definition of HRE as set out in Article 29(1) and elaborated on in General Comment No. 1,<sup>65</sup> the other two issues are more likely to fall outside of the education contemplated by Article 29(1). While preventing the sexual abuse of children is clearly an aim of CROC,<sup>66</sup> neither Article 29(1) nor General Comment No. 1 contemplate it forming part of the HRE that children receive. School discipline practices could well form part of HRE, particularly when it comes to the use of corporal punishment. However, the discipline practices referred to in the 2<sup>nd</sup> Report relate to procedural fairness issues when dealing with student suspension and exclusion, and reducing class sizes as a means of managing student behavioral problems.<sup>67</sup> These issues may be tangentially related to the HRE mandated in Article 29(1), but they are by no means a core part of the norm.

The 2<sup>nd</sup> Report fails to comply with the recommendation of the CRC regarding reporting on Article 29(1). In General Comment No. 1, the CRC requests that State Parties in their periodic reports provide details of what they consider to be the most important priorities concerning HRE, and to outline the activities that they propose to take over the next five years to address the problems identified.<sup>68</sup> This has not been done in the 2<sup>nd</sup> Report.

The 2<sup>nd</sup> Report contains even less information about the nature and extent of HRE in Victorian schools than the 1<sup>st</sup> Report. Indeed, Victoria is not mentioned at all, so once again this document is unhelpful when it comes to understanding the Victorian Government perception of HRE.

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<sup>64</sup> 2<sup>nd</sup> Report, above n 52, paragraph 373.

<sup>65</sup> General Comment No. 1, above n 2, paragraph 11.

<sup>66</sup> See Articles 19 and 34.

<sup>67</sup> 2<sup>nd</sup> Report, above n 52, paragraph 383.

<sup>68</sup> General Comment No. 1, above n 2, paragraph 26.

The extremely brief narrative about HRE activities in Australian schools set out in the 2<sup>nd</sup> Report is open to a number of interpretations. One is that reports to the CRC are about activities not interpretations, and so the Liberal-National coalition may recognise that HRE is broader than what it is reporting on, but has only included in the report what it believes it is doing in the field of HRE. Another explanation is that this Government has a very narrow understanding of HRE, namely anti-racism, protecting children from sexual abuse, and school discipline. A third possible explanation for the brevity of reporting on HRE may be that the Government is not willing to commit resources to preparing a comprehensive report to this UN treaty committee. There have, for several years, been tensions between Australia and the UN treaty committees that may account for the apparent lack of effort in reporting,<sup>69</sup> and which are explored further in Chapter 8. Unfortunately, there is insufficient publicly available information to determine why the most recent report by the Australian Government to the CRC is so brief when it comes to Article 29(1).

What explanation is there for this significant difference in reporting style and substance between the 1<sup>st</sup> and 2<sup>nd</sup> Reports? The answer appears to lie in the change of government that took place between the two reports. In March 1996 a conservative Liberal-National Government replaced the Labour Government that was responsible for the preparation of the 1<sup>st</sup> Report, and that Liberal-National Administration prepared the 2<sup>nd</sup> Report. The content of the 2<sup>nd</sup> Report suggests that the conservative government does not share the previous government's understanding of HRE. Governments change, and it is likely that educational policies and priorities will change from one administration to the next. Thus, any government's interpretation of HRE must be understood as representing only the policy or understanding of the current political party holding office. The difference between the Australian Government's 1<sup>st</sup> and 2<sup>nd</sup> Reports therefore appears to be

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<sup>69</sup> Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423.

due to a change of government, and commensurate change in priorities, including, in particular a reduced commitment to international human rights laws.<sup>70</sup>

Based on Australia's two Reports to the CRC, it appears that the Federal Government has an understanding of HRE that is narrower than the definition propounded in Article 29(1), and elaborated on in General Comment No. 1. Interviews with employees of the Federal Department of Education (DOE) confirmed this conclusion. One senior staff member stated in an interview that 'Human rights is a very small part of your education. It's in one sense a very small part of CCE [civics and citizenship education].'<sup>71</sup> This perception that HRE is part of civics and citizenship education is the reverse of the approach adopted in Article 29(1) of CROC. Civic and citizenship education involves teaching students about the democratic system of government and civic life. This is merely one aspect of HRE, which encompasses much more than these limited democratic values.

In conclusion, the Australian Government's 1<sup>st</sup> and 2<sup>nd</sup> Reports to the CRC on implementation of CROC in Australia, and the interviews with DOE employees point to the Australian Government having a narrow understanding of HRE that encompasses only limited aspects of Article 29(1) of CROC. As the next section demonstrates this restricted view of HRE does not appear to be shared by the Victorian Government, at least at the time of this empirical research, which took place between 2003 and 2005.

### 3.3.2 Victorian State Government

To ascertain how the Victorian State Government understands HRE, two staff members from the Victorian DOE were interviewed along with a staff member from the Victorian Curriculum and Assessment Authority (VCAA), the statutory body responsible for developing curriculum for Victorian schools. In addition relevant publications of the Victorian DOE were analysed.

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<sup>70</sup> For a full discussion on the differences in human rights commitments of Labor and Liberal governments in Australia see Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George *No Country is an Island: Australia and International Law* (2006) UNSW Press, Sydney. This issue is discussed in more depth in Chapters 6 and 8.

<sup>71</sup> Interview with C1 on 18 June 2004.

The Victorian DOE employees selected for interviews were the Department's representatives on the Victorian Human Rights Education Committee (VHREC), an organisation comprising representatives from many NGOs and education organisations. It was formed in 2001 with the aim of encouraging the Government to give greater emphasis to HRE in the Victorian Curriculum and Standards Framework.<sup>72</sup> The chair of the VHREC advised that one of the motivations for deciding to approach the DOE about HRE was that 'there had just been a change of government around that time so it seemed a bit of an opportunity'.<sup>73</sup> He did not elaborate on why a change of government prompted this initiative, but one possible explanation is that it was thought that the new Labor Government might be more receptive to the idea of increasing HRE in schools than the previous Liberal-National Government.

It could be expected that DOE employees who had been involved with the VHREC for several years would have a reasonably comprehensive understanding of HRE, as a result of their involvement with this body. One of the interviewees described HRE as:

Enabling kids to understand more about the basis of our freedoms and our rights and responsibilities as they're established through international agreements, through the United Nations, through covenants and through the laws that we have here and how they reflect that, through our just general ethical sense of how people ought to be allowed to live, and how we want to live ourselves, and how we see that reflected in how we interact with other people and the environment.<sup>74</sup>

This interviewee was the only DOE employee from any jurisdiction to make a connection between HRE and international human rights treaties. Unlike the DOE staff from other jurisdictions who were interviewed, this staff member did not limit HRE to civics and citizenship, nor to purely domestic matters. This interviewee's

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<sup>72</sup> Interview conducted with the Chair of the VHREC on 5 May, 2004.

<sup>73</sup> Ibid.

<sup>74</sup> Interview with Victorian DOE employee on 2 April 2004.

understanding of HRE is grounded in the UN international human rights framework, and is congruent with the HRE set out in Article 29(1).

Further insight into what the Victorian Government understands the term HRE to mean can be gleaned from its publication of the *Ideas for Human Rights Education* booklet.<sup>75</sup> This resource contains 107 suggestions for human rights lessons, including a diverse range of activities relating to CROC and other human rights treaties; ESC rights; local and global issues; domestic bills of rights; and indigenous land rights.<sup>76</sup> The breadth of human rights issues included in this resource, and the interviews with DOE and VCAA staff suggest that the Victorian Government in power at the time of this publication has an understanding of HRE that generally accords with Article 29(1) of CROC, as expanded upon by General Comment No. 1. The Victorian DOE's understanding of HRE appears to have been informed by its close association with the VHREC, and it cannot be ascertained from this, that the whole of the Victorian Government shares this understanding of HRE. Nevertheless, there is evidence that at least the Victorian DOE has an understanding of HRE that is congruent with the internationally accepted definition of this term analysed in section 3.2 above.

### 3.3.3 United States Government

There are only limited opportunities to gain insight into the way in which the United States Government understands HRE. This is because the United States, not having ratified CROC, is not required to submit periodic reports to the CRC which would reveal how it interprets Article 29(1). Furthermore, because the Federal Government does not have responsibility for education it has not been required to articulate policies or programs relating to HRE. Like Australia, the United States Constitution sets out the specific areas in which the Federal Government has legislative powers, and education is a subject matter which, by virtue of the Tenth Amendment, is reserved to the states.

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<sup>75</sup> Department of Education and Training (Vic) *Ideas for Human Rights Education* (2005) Department of Education and Training, Melbourne. Electronic copy accessed at: [www.eduweb.vic.gov.au/edulibrary/public/teachlearn/student/lem/Human\\_rights\\_final.pdf](http://www.eduweb.vic.gov.au/edulibrary/public/teachlearn/student/lem/Human_rights_final.pdf) on 16 September 2007.

<sup>76</sup> This publication is analysed in-depth in section 6.5.2 in Chapter 6 when the HRE activities of the Victorian Government are analysed.

In 2002, an American HRE expert noted that 'as yet neither the federal government nor any of the state governments have articulated comprehensive public policies on HRE in schools'.<sup>77</sup> The absence of any HRE policy initiatives by the United States Government was confirmed by another researcher in 2004 when she observed that the Federal Government's lack of leadership in this area is one of the obstacles to HRE in United States, and what little HRE is occurring in classrooms is due to the efforts of NGOs.<sup>78</sup> This dearth of HRE policies or activities by the United States Government means that researchers are unable to ascertain what, if any, understanding this Government has of the term 'human rights education'. Fortunately, there has been more activity regarding HRE at the state level, and this facilitates a detailed consideration of how the Massachusetts Government understands the concept of HRE.

### 3.3.4 Massachusetts State Government

How the Massachusetts Government understands HRE was ascertained through interviews with two Department of Education employees, and analysis of the Massachusetts curriculum frameworks, and the legislation governing education, known as the General Laws.

One interview was with a senior Massachusetts DOE employee involved with the drafting of the History and Social Science Curriculum Framework, one of seven curriculum frameworks mandated by the Massachusetts *Education Reform Act 1993*.<sup>79</sup> The curriculum frameworks act as guide for what students need to know and what they will be assessed on. They are standards that are applied in all public schools in Massachusetts, and students are required to show competency in the material covered in the frameworks in order to receive a high school diploma.

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<sup>77</sup> Stone, Adam 'Human Rights Education and Public Policy in the United States: Mapping the Road Ahead' (2002) 24(2) *Human Rights Quarterly* 537, 537-538.

<sup>78</sup> Lapayese Yvette V. 'National Initiatives within the UN Decade for Human Rights Education: The Implementation of Human Rights Education Policy Reforms in Schools' (2004) 3(2) *Educational Research for Policy and Practice* 167, 176-198

<sup>79</sup> The other curriculum frameworks are in the areas of English Language; Mathematics; Science and Technology; World Languages; the Arts; and Health.

Thus they represent what the Massachusetts Government sees to be the key learning areas for students.

Set out below is an extract from this interview which reveals much about how the Massachusetts Government understands HRE. Although it is a lengthy excerpt, it has been reproduced in full in order to present a comprehensive picture of how the Massachusetts Government perceives HRE.

*Interviewer:* What does the Massachusetts DOE understand to be human rights education?

*DOE Employee:* Well I think the place where it's good to start, is our framework ... At the beginning of the framework we kind of lay out what the purpose of this framework is. Firstly, "democracy is the worthiest form of human government ever conceived." Secondly, "we cannot take democracy's survival or its spread or its perfection in practice for granted." The writers of the framework and the Board of Education, who approved this framework, believe that the democracy and basic rights that we all have as Americans in our Bill of Rights, need to be studied; they need to be learned.

Democracy cannot be taken for granted and people need to know and understand the struggles that went into securing those rights. Basic freedoms and how those rights and freedoms were expanded over the past two and a half centuries to include rights for women and rights for African-Americans as well.

And the Board of Education, and all of us, and certainly I believe that education and learning not only the rights, but how they came about, what their meaning is, all the struggles that were involved in securing them – and protecting them – as the world and America goes forward, is absolutely fundamental to an education of our students as citizens of Massachusetts, as citizens of the United States of America, and as citizens of the world as well.

So that idea really underlays this framework, that it's a very American, Jeffersonian notion, that

you've got to learn about democracy, you have to know about all the rights, you have to transmit that education to the young generation so that they can protect and defend those rights.

So that kind of lays out the purpose of the document, and of course human rights are fundamental to that.<sup>80</sup>

This demonstrates a somewhat narrow understanding of human rights education, very focused on the United States. The interviewee indicates that the Massachusetts DOE sees human rights principles as fundamental to the History and Social Science Curriculum Framework, yet the majority of what he referred to as HRE is limited to the principles of democracy and the political institutions that support such a form of government.

However, an analysis of the History and Social Sciences Curriculum Framework reveals that there are broader concepts of human rights embedded within the framework. For example, the introduction specifies that:

Devotion to human dignity and freedom, equal rights, justice, the rule of law, civility and truth, tolerance of diversity, mutual assistance, personal and civic responsibility, self-restraint and self-respect – all these must be taught and learned and practised.<sup>81</sup>

Although this extends the notion of human rights education beyond that identified by the Department of Education staff member, it is still relatively narrow in that it is limited to civil and political rights, and is silent about ESC rights. It is also worth noting that the quoted text appears in the general introduction to the framework, and although the concepts of human dignity, equal rights are mentioned again in the section on themes of the framework, they are not actually replicated in the substantive body of the framework, where what students should learn in each grade is specifically set out.

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<sup>80</sup> Interview with Massachusetts DOE Employee on 4 December 2003.

<sup>81</sup> *Massachusetts History and Social Science Framework*, August 2003, 1.

The interviewee also pointed out what the Massachusetts DOE considers to be HRE in the substance of the framework:

*DOE Employee:* In the elementary levels, kids will be given a basic introduction on basic civic principles. Civic principles are the rights found in our constitution, the Bill of Rights, the Declaration of Independence. They'll start learning about responsibilities and citizenship, and what not in the elementary grades.

In the middle school levels, kids are introduced to more geography and ancient classical civilizations as well. And when they get to ancient classical civilizations, they'll start learning about some of the origins of basic democratic rights, democratic forms of government in places such as Ancient Greece and Rome and Israel.

Then at the high school level, we provide standards for US history and for world history, and they are very in-depth, very solid, and human rights is very important to that. We have a standard here that addresses the reasons for the establishment of the UN in 1945, including the main ideals of the UN Declaration of Human Rights.

And then the last thing I wanted to mention was we also provide standards for a 12th grade civics course, and that course also includes, in addition to learning about the basic principles and rights that we have as citizens of the United States of America, students also have an opportunity to learn about the relationship of the US to other nations and the idea of international citizenship.<sup>82</sup>

While the UN and the Universal Declaration of Human Rights are mentioned once in the curriculum framework, it is very clear that the main thrust of HRE in this document is American constitutional rights rather than international human rights. Furthermore, the reference to the UDHR is in terms of it being a set of ideals,

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<sup>82</sup> Interview with Massachusetts DOE Employee on 4 December 2003.

rather than as a core part of international human rights law, which somewhat downplays its significance.

From the interviews and from an analysis of the curriculum framework, it appears that the Massachusetts Government's understanding of HRE is that it is related to students acquiring knowledge of a set of rules and principles regarding how democracy works, rather than a genuine understanding of, and commitment to, HRE as set out in Article 29(1) of CROC analysed in section 3.2 above.

In order to cast further light on the Massachusetts Government's view of HRE it is necessary to also examine the Massachusetts legislation known as the *General Laws*, in particular Chapter 69, Section 1D which is entitled 'Establishment of Educational Goals and Academic Standards for Public Schools'.<sup>83</sup> The words 'human rights' do not appear anywhere in Chapter 69. However, a broader analysis that looks for human rights concepts rather than specific language reveals some evidence of HRE. For example, it states that 'Academic standards shall be designed to avoid perpetrating gender, cultural, ethnic or racial stereotypes'.<sup>84</sup> The use of negative language – to refrain from perpetrating stereotypes – is in stark contrast with Article 29(1) of CROC that uses positive language to promote 'the development of respect' and "the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples". The Massachusetts Government legislation seems to suggest that it is sufficient if education does not perpetrate the use of stereotypes; it is not necessary to actually promote respect and tolerance.

Section 1D of Chapter 69 sets out mandatory areas of instruction, including the 'major principles of the Declaration of Independence, the United States Constitution, and the Federalist Papers' which must be 'designed to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth [of Massachusetts]'. This is a stronger statement than the provision relating to avoiding stereotypes, but unfortunately is very parochial – a student's respect for

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<sup>83</sup> This is a Massachusetts state law that is binding on, and regulates, all government schools.

<sup>84</sup> Massachusetts *General Laws*, Chapter 69, Section 1D.

diversity is confined to within the borders of Massachusetts. This narrow focus is highlighted by the reference to only United States documents, and the absence of any reference to the UN or its work in the field of human rights. Furthermore, the requirement in section 1D to teach respect for diversity relates only to the population of the state of Massachusetts. There is no mandate that students learn about respecting difference in all people.<sup>85</sup> The Massachusetts *General Laws* are largely silent when it comes to HRE, and the little that has been included is limited, either by scope (to the principles enshrined in American documents, or to learning respect for the diverse population of Massachusetts), or by weak language (avoid perpetrating stereotypes).

### 3.3.5 Conclusion

The above analysis suggests that the governments being considered in this research have a narrow understanding of HRE. The focus is on civil and political rights and, in the case of the United States, this tends to be limited to rights within the United States, or even within just the state of Massachusetts, rather than a consideration of human rights globally. The main aim of the HRE propounded by these governments appears to be the transmission of basic knowledge about democracy and democratic values. Only the Victorian DOE has developed an understanding of HRE that is close to the norm set out in Article 29(1) of CROC. This understanding appears to be strongly influenced by the involvement of DOE staff with the VHREC, a body which includes many NGO representatives. As the next section illustrates, NGOs tend to have a broader understanding of what HRE means, than do government bureaucracies.

## 3.4 How Human Rights NGOs Understand HRE

The role that human rights NGOs play in the promotion and implementation of HRE cannot be ignored, for in the absence of government initiatives, they are the ones developing HRE materials and providing schools with HRE resources, with the result that it is their interpretation of HRE that is being passed on to teachers through the literature and resources they provide. For this reason, the way that

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<sup>85</sup> General Comment No. 1, above n 2, paragraphs 4 and 11.

NGOs understand HRE is of great importance, and in particular, whether their understanding is congruent with the international community's definition of HRE as set out in Article 29(1) of CROC and analysed in section 3.2 above. Three of the major NGOs working in the field of HRE have been selected for consideration below, namely Amnesty International; Human Rights Education Associates (HREA); and People's Movement for Human Rights Education (PDHRE).

### 3.4.1 *Amnesty International*

*Human rights education is both a lens  
through which to observe the  
world, and a methodology  
for teaching and leading others.<sup>86</sup>*

Amnesty International was founded in 1961 by British lawyer, Peter Benenson, as an international movement for the prevention of human rights abuses. Branches were set up in Australia and the United States in 1962, and today it is one of the oldest, largest and most well respected independent international human rights organisations.<sup>87</sup> While Amnesty International is perhaps best known for its campaigns to free prisoners of conscience, it also does a significant amount of work in human rights education. It understands HRE to be:

A process whereby people learn about their rights and the rights of others, within a framework of participatory and interactive learning. HRE is concerned with changing attitudes and behaviours, learning new skills, and promoting the exchange of knowledge and information. HRE is long-term, and aims to provide an understanding of the issues, and equip people with the skills to articulate their rights and communicate this knowledge to others. HRE ...

- Recognises the universality and indivisibility of human rights
- Increases knowledge and understanding of human rights
- Empowers people to claim their rights

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<sup>86</sup> Accessed at: [www.amnestyusa.org/Educate/About/page.do?id=1102103&n1=4&n2=79&n3=1340](http://www.amnestyusa.org/Educate/About/page.do?id=1102103&n1=4&n2=79&n3=1340) on 20 September 2007.

<sup>87</sup> It has over one million members, subscribers and regular donors in over 140 countries. Accessed at: <http://web.amnesty.org/pages/aboutai-facts-eng> on 21 July 2007.

- Assists people to use the legal instruments designed to protect human rights
- Uses interactive and participatory methodology to develop attitudes of respect for human rights
- Develops the skills needed to defend human rights
- Integrates the principles of human rights into everyday life
- Creates a space for dialogue and change
- Encourages respect and tolerance.<sup>88</sup>

In contrast to the governments considered above, Amnesty International has clearly enunciated its understanding of HRE. It has publicly declared how it defines HRE which is not something any of the governments in this case study have done. Its definition of HRE is normative and transformative in that it seeks to educate people to assert and defend their rights and the rights of others, in other words, to become human rights activists. Thus, Amnesty International's activist approach to HRE is very apparent from this pronouncement; it wants students to question, challenge and take action.<sup>89</sup>

The reference to the 'indivisibility of human rights' and the fact that there is no distinction made between ESC rights and civil and political rights suggests that Amnesty International understands HRE to encompass the full range of human rights. This is congruent with Article 29(1) as elaborated on in General Comment No. 1. Amnesty International's definition of HRE seems to be both narrower and broader than Article 29(1) of CROC. Narrower, because it does not appear to cover all the matters addressed in paragraphs (b) – (d) of Article 29(1), for example, there is no express reference to a child developing respect for his or her parents. This may be because Amnesty's definition of HRE is not specifically aimed at children, as Article 29(1) of CROC is. It will be recalled that the HRE definitions in the UN Decade for HRE and the World Programme for HRE are also silent about human rights education including the development of respect for parents. Thus it is

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<sup>88</sup> Amnesty International 'What is Human Rights Education?', accessed at: <http://web.amnesty.org/pages/hre-intro-eng> on 1 May 2006.

<sup>89</sup> Flowers, Nancy 'What is Human Rights Education?' (2003), accessed at: [www.hrea.org/erc/Library](http://www.hrea.org/erc/Library) on 30 March 2004, 4.

clear that the inclusion of a reference to respecting parents is only relevant where the recipients of that education are children.

Amnesty International's definition of HRE is broader than Article 29(1), because the treaty provision merely refers to the 'development of respect' for human rights, whereas Amnesty International aims to empower students to defend and claim their rights, which has more of an activist element to it. Indeed, the Amnesty International staff member interviewed in Boston, who was responsible for student groups, stated that she designed 'trainings that will help them to become better human rights activists'.<sup>90</sup> This goes beyond the purpose and intent of Article 29(1), described in General Comment No. 1 as being to enable children to 'enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values'.<sup>91</sup> The language in Article 29(1) of CROC was drafted by State representatives and the final text had to be agreed to by the majority of States,<sup>92</sup> it is therefore not surprising that it does not encourage human rights activism, as this is not something that is generally favoured by States who support maintaining of the status quo, and who see activism as a challenge to their power and control.<sup>93</sup> However, this activist approach to HRE is consistent with the other international definitions of HRE in the Guidelines for the Decade for HRE and the Plan of Action for the World Programme for HRE, both of which refer to HRE has encouraging the taking of action to defend and promote human rights.

Amnesty International relies on the UDHR for guidance on HRE rather than Article 29(1) of CROC. This is not surprising, given that the UDHR is referred to in Amnesty International's mission statement and CROC is not,<sup>94</sup> and that Amnesty International's HRE work is not limited to children. Overall, Amnesty International's

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<sup>90</sup> Interview with Amnesty International employee in Boston on 4 February 2004.

<sup>91</sup> General Comment No. 1, above n 2, paragraph 2.

<sup>92</sup> The drafting of this norm is analysed in Chapter 5.

<sup>93</sup> Ignatieff, Michael *Human Rights as Politics and Idolatry* (2001) Princeton University Press, Princeton, New Jersey.

<sup>94</sup> *Statute of Amnesty International* as amended by the 27th International Council, meeting in Morelos, Mexico, 14 to 20 August 2005, accessed at: <http://web.amnesty.org/pages/aboutai-statute-eng> on 23 July 2007.

understanding of HRE appears to be generally consistent with paragraphs (b) and (d) of Article 29(1), and the matters set out in Article 29(1)(c) while not explicitly addressed, may be implicit in the Amnesty International's definition of HRE.

### *3.4.2 Human Rights Education Associates (HREA)*

HREA is an international non-governmental organisation that supports human rights learning; the training of activists and professionals; the development of educational materials and programming; and community-building through on-line technologies.<sup>95</sup> It was established in the Netherlands in 1996, and now has offices in Amsterdam and Boston.

The Executive Director of HREA was interviewed, and in response to a question asking how HREA defined HRE, stated:

The way that we define it is that it promotes understanding and the promotion and protection of human rights. So that means that human rights education has to be not only about human rights values, but it has to be done in a way that it creates some sort of a really personal understanding and commitment to human rights.

So it cannot just be purely informational, it has to move people by the ideas, and move them in terms of relating it to their own lives or feeling that they're connecting to human rights, you know, in terms of how they're acting in the world. ...

We look at human rights education in terms of the goals, and not just pure content and we feel that's very important. It's not that everyone that gets human rights education is going to become a human rights lawyer or a human rights advocate, but we think those actually should be the goals, that people feel that at the minimum that the human rights ideas are something that they own and they feel close to, and that they feel the importance of protecting and promoting human rights elsewhere and empowering others. So there's self-empowerment and there's empowering others.<sup>96</sup>

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<sup>95</sup> Accessed at: [www.hrea.org](http://www.hrea.org) on 21 September 2007.

<sup>96</sup> Interview conducted on 2 December 2003.

Thus, HREA is similar to Amnesty International in requiring, as a core part of HRE, that it motivate and empower individuals to effect positive change within society. The tone, if not the specific language, is adversarial or confrontational. This NGO is clearly seeking to create activists who will know and be able to claim and assert their human rights. Its understanding of HRE is expressed in significantly stronger language than that used in Article 29(1), in that, there is a clear distinction between the goal of developing respect for human rights, as Article 29(1) mandates, and the goal of producing human rights lawyers and activists, as HREA advocates.

This interviewee did not seek to define the ‘human rights’ part of the term, that is, she did not feel the need to elaborate on whether human rights means just civil and political rights, or the whole range of human rights. However, from the overall tone of the interview, and from a review of the literature on HREA’s web page,<sup>97</sup> it is clear that HREA has a very inclusive understanding of the term ‘human rights’. However, like Amnesty International, its focus appears to be on the matters addressed in paragraphs (b) and (d) of Article 29(1), and it does not explicitly address the issues set out in 29(1)(c).

### *3.4.3 People’s Movement for Human Rights Education (PDHRE)<sup>98</sup>*

Founded in 1988, PDHRE is a small international NGO based in New York that works to develop and advance pedagogies for HRE relevant to people’s daily lives in the context of their struggles for social and economic justice and democracy.<sup>99</sup> This NGO was one of the prime instigators of the UN Decade for Human Rights Education, and in 2003 the Executive Director, Shulamith Koenig was awarded the prestigious UN Human Rights Award<sup>100</sup> for her work for PDHRE in the field of HRE.

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<sup>97</sup> Accessed at: [www.hrea.org](http://www.hrea.org) on 23 July 2007.

<sup>98</sup> Formerly People’s Decade for Human Rights Education.

<sup>99</sup> Accessed at: [www.pdhre.org/about.html](http://www.pdhre.org/about.html) accessed on 7 October 2003.

<sup>100</sup> The Human Rights awards were instituted by United Nations General Assembly Resolution 2217/XXI, 19 December 1966. They are intended to ‘honour and commend people and organizations which have made an outstanding contribution to the promotion and protection of the human rights embodied in the Universal Declaration of Human Rights and in other United Nations human rights instruments’. They were first awarded in 1968, and have been given out at five-year intervals since then.

The People's Movement for Human Rights Education perceives HRE as:

A process of learning that evokes critical thinking and systemic analysis, with a gender perspective, with the learners... learning to analyse their situations within a holistic framework of human rights about political, civil, economic, social and cultural concern relevant to the learners lives... to result in a sense of ownership of human rights... leading to equal participation in the decisions that determine our lives and taking actions to claim them.<sup>101</sup>

Like the other NGOs considered in this chapter, PDHRE has a broad understanding of HRE that is inclusive of ESC rights. It also adopts an activist approach, asserting that HRE should not just be about disseminating information about human rights, but also about developing skills of analysis and critical thinking that will lead the recipients of HRE to become human rights advocates. This is consistent with the HRE articulated in the Decade and World Programme, but not Article 29(1) of CROC and General Comment No. 1.

#### *3.4.4 Conclusion*

All three NGOs understand that HRE should be about empowerment and encouraging recipients of HRE to become human rights activists. While General Comment No. 1 refers to empowerment twice,<sup>102</sup> it is not its focus. All the NGOs embrace the full range of human rights, as recommended in General Comment No. 1, but they all fail to perceive HRE as including the entirety of matters referenced in Article 29(1). In particular these NGOs did not identify the issues set out in paragraph (c) as being part of their understanding of HRE. This may be due, in part, to the fact that a portion of paragraph (c) is specific to children – development of respect for their parents – and none of these NGOs are specifically child focused. These NGOs understanding of HRE, while generally similar to how HRE has been defined in Article 29(1) of CROC and General Comment No. 1, are much more congruent with the other two international definitions of HRE analysed in section 3.2. This is because of their aim of provoking people to take action to protect human rights.

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<sup>101</sup> Posting by Shulamith Koenig on behalf of PDHRE on the HREA Listserv on 1 January 2002.

<sup>102</sup> General Comment No. 1, above n 2, paragraph 2.

### 3.5 Conclusion

It has been asserted that human rights education ‘lacks a clear definition’.<sup>103</sup> However, the above analysis does not support this proposition. While the term human rights education is more complex than one might initially think, and arguably open to different interpretations, there are a number of key elements, which form part of all the international definitions of HRE analysed in section 3.2 above. First, HRE must promote respect for all human rights as universal and indivisible standards belonging to all people. This involves more than the mere dissemination of information about the content of human rights treaties. It must be empowering, that is it must develop skills that enable people to respond to the challenges that they can expect to face in their lives.<sup>104</sup> Second, HRE must promote respect for others, be they parents or persons from different cultures and civilizations. This requires that HRE displace ignorance which can lead to fear of persons from diverse racial ethnic, religious, cultural and linguistic backgrounds. Thus HRE acts as an antidote to racism, intolerance and discrimination. Third, HRE must actively encourage the development of values relating to peace, tolerance and equality in an integrated and holistic manner.<sup>105</sup> This aspect of HRE helps to prevent violence and conflict, and promotes a free and open society. These matters together make up the normative basis of the HRE in Article 29(1) of CROC.

Notwithstanding the clear explanation of HRE at the international level, this analysis indicates that the domestic governments in this case study understand HRE very differently from this international definition. This seems to be because these governments have chosen to selectively focus on specific aspects of Article 29(1). They have ‘cherry-picked’ the parts of Article 29(1) that they prioritise and defined that as HRE rather than interpreting the entire norm holistically. General

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<sup>103</sup> Flowers, Nancy ‘How to Define Human Rights Education? A Complex Answer to a Simple Question’ in Georgi, Viola B. and Seberich, Michael (eds) *International Perspectives in Human Rights Education* (2004) Bertelsmann Foundation Publishers, Gütersloh, Germany, 106.

<sup>104</sup> General Comment No. 1, above n 2, paragraph 2.

<sup>105</sup> Ibid, paragraph 13.

Comment No. 1 makes it clear that all the paragraphs in Article 29(1) are interrelated and together comprise HRE.

Human rights NGOs specialising in HRE appear to have an understanding of the content of HRE that is congruent with Article 29(1) of CROC. Where differences emerge is in the aims of HRE. The three NGOs analysed in this chapter all perceived the purpose of HRE to be to create human rights activists, that is, to encourage people to take action to promote and defend human rights. They seek to empower individuals to claim their rights and integrate them into their lives. This is consistent with the definition of HRE propounded by the Decade and the World Programme, but not with the articulation of HRE in Article 2(1) of CROC and General Comment No. 1.

Thus, the term HRE has been adequately defined, and Article 29(1) supported by General Comment No. 1 and the definitions of HRE developed as part of the Decade for HRE and the World Programme for HRE, provide States with clear direction as to what is required in order to comply with this provision. Any assertion by a State that it has not complied with Article 29(1) because of ambiguity or lack of clarity would not withstand close scrutiny. With a clear understanding of what Article 29(1) requires, it is appropriate to now explore the extent to which Australia and the United States are implementing this norm. However, before such an analysis can be undertaken it is necessary to outline the methodology used to gather data on the HRE practices of these two States, and that is the subject of the next chapter.

## **CHAPTER 4 – METHODOLOGY**

### **Contents**

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*To make academic research relevant,  
researchers should try out their theories with  
practitioners in real situations and real organisations.<sup>1</sup>*

#### 4.1 Introduction

This chapter outlines the methodological framework used in this research as well the strengths and weaknesses of the methods adopted, and the justification for their selection.<sup>2</sup> As was indicated in the Preface, this thesis was motivated by a desire to discover more about the state of human rights education in schools, and the laws that relate to HRE. Section 4.2 provides an overview of the approach used to further this acquisition of knowledge including in particular the choice of Article 29(1) of CROC as the basis of the study, and the selection of government secondary schools as the lens through which to analyse HRE.<sup>3</sup>

To gain insight into HRE in a variety of different spheres including, international law, domestic law and the education sector, a variety of methods were employed. Thus, while analysing documents is appropriate for a consideration of HRE at the international level,<sup>4</sup> a review of documents within schools would not yield the nuanced knowledge about how teachers perceive and implement HRE in the classroom that this research project was seeking, since this type of information is generally not recorded in formal documents. Similarly, a review of documents within the Victorian and Massachusetts' Departments of Education (DOEs) would shed some light on HRE policies and programs, but interviews with departmental officials were necessary to produce more detailed understanding of the departments' philosophies and future plans concerning HRE. Finally, interviews with NGO staff working in the HRE field were undertaken to provide greater insight into how such organisations understand HRE, and how they see their role in

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<sup>1</sup> Avison, David, Lau, Francis, Myers, Michael and Nielsen, Peter Axel 'Action Research' (1999) 42(1) *Communications of the ACM* 94.

<sup>2</sup> At the outset, it should be noted that all the empirical research conducted for this thesis was carried out in accordance with the ethics approvals of the University of Melbourne Human Research Ethics Committee, the Victorian Department of Education, and the Director of Boston Public Schools.

<sup>3</sup> The choice of Australia and the United States, (in particular Melbourne and Boston) for the case study is considered in section 4.5 on comparative research.

<sup>4</sup> For example official UN documents and the travaux préparatoires for CROC.

providing HRE in schools, than would document analysis alone. These factors influenced the research design and whether to conduct quantitative or qualitative analysis of the data collected, and are analysed in sections 4.3 and 4.4.

By questioning whether ratification of international human rights treaties influences whether a State conforms to a particular human rights norm, this research project necessitated a comparative study. Cross-country comparative research provides opportunities to gain insights into the manner in which different States consider and give effect to international law, something that would not be possible if the study were limited to a single country. However, comparative research is also fraught with potential problems. The benefits and pitfalls of conducting comparative research are analysed below in section 4.5.

The empirical data for this thesis was gathered from two main sources, namely surveys completed by teachers from Melbourne and Boston secondary schools, and responses to questions asked in in-depth interviews with teachers, DOE officials, education academics and NGO staff. These sources of information provide specific insight into both official and unofficial understandings of HRE practices and policies. The methods used to gather the data from each of these sources are analysed in sections 4.6, and 4.7 below.

## **4.2 Research Approach**

For the reasons set out in the Preface, Article 29(1) of CROC was the obvious choice of norm through which to examine the HRE that school students receive. As previously indicated, there are other treaties and international instruments that call for HRE,<sup>5</sup> but Article 29(1) of CROC is the most explicit and, with 191 State Parties, the most widely accepted.

Human rights education is a concept that is broad and diverse, and like all education, is not limited to formal school classroom instruction, but can and does take place in a wide variety of institutions and organisations in both formal and

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<sup>5</sup> Other international treaties with HRE provisions include the International Covenant on Economic, Social and Cultural Rights (Art. 13); the Convention on the Elimination of all Forms of Racial Discrimination (Art. 7); the Convention on the Elimination of all forms of Discrimination Against Women (Art. 10); and the UNESCO Convention on the Elimination of Discrimination in Education (Art. 5).

informal ways.<sup>6</sup> The focus of this research is HRE for children, but for the study to be meaningful, it is necessary to narrow this group further. Students in government schools were selected because they are the students over whom the government has the most direct influence, and this research is focused on government policy and (in)action. The Victorian and Massachusetts Governments set the curriculum for all schools within their territorial jurisdiction; however, private, independent, and religious schools can, and do, add their own programs according to their particular mission.<sup>7</sup> Thus to get a better picture of governments' commitment to, implementation of, and compliance with Article 29(1) of CROC it is preferable to consider only government schools.

Secondary schools have been chosen in preference to primary schools because there is more flexibility and diversity in the curriculum at this level of schooling. In the early years of school the curriculum is focused on the development of the core skills of literacy and numeracy.<sup>8</sup> By the time students reach secondary school the subject choices become increasingly diverse, and the focus of education is significantly broadened. Furthermore, by the time students reach secondary school, they are teenagers and at a stage where they are developing political consciousness, awareness of world issues, and their thinking and analysis is becoming more refined. Thus although, HRE would be beneficial at all levels of schooling, it has been found that it is in secondary school that HRE can be of significant benefit.<sup>9</sup>

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<sup>6</sup> See for example Mann, Jonathan, Lazzarini, Zita, Gostin, Lawerence and Gruskin, Sofia 'Teaching Human Rights to Public Health Practitioners' in Andreopoulos, George J. and Claude, Richard Pierre (eds) *Human Rights Education for the Twenty-First Century* (1997) University of Pennsylvania Press, Philadelphia 334; Hinkley, D. Michael 'Military Training for Human Rights and Democratization' in Andreopoulos, George J. and Claude, Richard Pierre (eds) *Human Rights Education for the Twenty-First Century* (1997) University of Pennsylvania Press, Philadelphia 296; and Chapman, Audrey, Spire, Herbert, Spire, Louise and Whitbeck, Caroline 'Science, Scientists and Human Rights Education' in Andreopoulos, George J. and Claude, Richard Pierre (eds) *Human Rights Education for the Twenty-First Century* (1997) University of Pennsylvania Press, Philadelphia 359.

<sup>7</sup> For example Carey Baptist Grammar School in Melbourne has a strong commitment to social justice, and as part of this, year 9 students can enrol in an elective subject called 'Human Rights Defenders' accessed at: [www.carey.com.au/pathways/default.asp.173.html#](http://www.carey.com.au/pathways/default.asp.173.html#) on 6 September 2007.

<sup>8</sup> The Victorian CSF for primary schools emphasises that 'literacy and numeracy development are of paramount importance in the early years' accessed at [www.vcaa.vic.edu.au/prep10/csf/aboutcsf2.html](http://www.vcaa.vic.edu.au/prep10/csf/aboutcsf2.html) on 6 September 2007. In the United States the *No Child Left Behind Act 2001* requires that children in elementary schools be tested in reading and math every year in grades three through eight.

<sup>9</sup> Howe, Brian R. and Covell, Katherine *Empowering Children: Children's Rights Education as a Pathway to Citizenship* (2005) University of Toronto Press, 4.

### 4.3 Research Design

The dearth of existing data and literature on the implementation of Article 29(1) of CROC and HRE in schools meant that the data could not be obtained from library-based research alone. The most feasible method of obtaining the information needed to answer the research question was to collect raw data by surveys and interviews from the ‘coal face’, that is from the people involved in, or responsible for, implementing Article 29(1) of CROC, namely teachers, DOE officials, education academics and NGO staff.

This research examines whether commitment to an international human rights norm regarding HRE influences the nature and extent of HRE occurring in secondary schools. The research design therefore needed to be multifaceted and analyse multi-data; that is, it had to be able to evaluate HRE activities at a multitude of levels – international, national, state and local. No single research method would have been able to achieve this, and it is for this reason that the research design utilised in this project is a blend of several distinct research methods, including comparative qualitative research, the collection of data through surveys and interviews, and the analysis of primary and secondary documents.

The use of multiple sources of materials has the benefit of increasing construct validity. Thus the extent of HRE in schools in Melbourne and Boston is not measured solely by answers to questions in the survey. Rather, the survey responses were analysed in conjunction with data gathered through interviews with teachers, DOE officials, education academics and NGO staff. This approach, which allows for different perspectives on the research question, and enables comparability of data, is known as ‘triangulation’ and increased the overall validity of the data.<sup>10</sup>

### 4.4 Qualitative Research

This study is not about quantifying the extent to which Article 29(1) of CROC has been implemented around the globe. Nor is it about testing hypotheses or making

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<sup>10</sup> Burgess, Robert ‘Multiple Strategies in Field Research’ in Burgess, R. (ed) *Field Research: A Sourcebook and Field Manual* (1991) Routledge, London, 165-6.

predictions or generalisations about widespread compliance with this treaty provision, all of which would have required precise, statistical, quantitative research. Rather, this research is about developing a deeper understanding of the theory and reality of two States' compliance with an international human rights norm and this required qualitative research.

While qualitative research can avoid the problems of quantitative research that were highlighted in Chapter 1, such as an inability in large-scale studies to conduct in-depth micro analysis of the data, it is not without its own shortcomings. In particular, it is an inherent danger of qualitative research that the data is analysed subjectively rather than objectively.<sup>11</sup> Researchers doing qualitative research therefore need to be aware of their own biases and ensure that they are acknowledged in the analysis. However, the researcher's background and biases should be viewed as a positive rather than negative attribute, for they facilitate a unique interpretation of the data.<sup>12</sup> Thus, in this thesis, the original contribution to the body of knowledge comes not only from the collection and analysis of new data about efforts to give effect to the norm in Article 29(1) of CROC, but also from the researcher's particular perception and interpretation of that data.

#### 4.5 Comparative Research

The basic assumption of this study is that the issue under consideration can best be examined by comparing the status of HRE in a country that has ratified CROC with one that has not. The first step was therefore to identify suitable subjects for comparison. In the case of countries that have not ratified CROC, the list was conveniently short – United States and Somalia. The latter was ruled out because of its instability and political turmoil,<sup>13</sup> leaving the United States as an obvious

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<sup>11</sup> Drapeau, Martin 'Subjectivity in Research: Why Not ? But...' (2002) 7(3) *The Qualitative Report* accessed at: [www.nova.edu/ssss/QR/QR7-3/drapeau.html](http://www.nova.edu/ssss/QR/QR7-3/drapeau.html) on 23 April 2006.

<sup>12</sup> Rennie David L. 'Human Science and Counselling Psychology: Closing the Gap between Research and Practice' (1994) 7 *Counselling Psychology Quarterly* 235.

<sup>13</sup> The Siad Barre regime was ousted from government in January 1991; turmoil, factional fighting, and anarchy have dominated in the years since. For this reason the Australian Department of Foreign Affairs and Trade has issued a travel warning that Australians should avoid all travel to Somalia until further notice ([www.smartraveller.gov.au/zw-cgi/view/Advice/Somalia](http://www.smartraveller.gov.au/zw-cgi/view/Advice/Somalia) accessed on 23 April 2006). All of these factors pointed towards Somalia being a difficult country in which to conduct research and collect data. In addition,

choice for this research. The mix of countries selected in comparative studies affects the quality and comparability of the data.<sup>14</sup> Choosing a country that was totally dissimilar to the United States would not have been constructive, as the number of variables would have made meaningful comparison problematic. Therefore certain criteria were drawn up to identify a State that would make comparative research with the United States meaningful.<sup>15</sup>

Australia was selected as the second country for the case study because a number of key similarities allowed a useful comparison to be made, while at the same time having a key difference, the ratification of CROC, which facilitated the exploration of the research question. Australia and the United States share many common features - both are wealthy, developed, democratic nations operating under a federal system. They have a level of economic development that allows for full, or close to full, implementation of HRE. A developing country was not chosen as a comparative in this case study because the extent of its economic development makes useful comparison difficult. In addition, Article 4 of CROC which allows States to implement Article 29(1) progressively ‘to the maximum extent of their available resources’ means that the level of implementation required may be very different to that which would be expected of a developed State, which again makes a meaningful comparative study problematic. It is the similarities between Australia and the United States that made them useful comparative case studies, including, in particular the factors set out in the following table.

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Somalia has no internationally recognised, legitimate, government and therefore its ability to ratify treaties is problematic.

<sup>14</sup> Hantrais, Linda ‘Comparative Research Methods’ (1996) 13 *Social Research Update*, University of Surrey accessed at <http://sru.soc.surrey.ac.uk/SRU13.html> on 5 July 2007, 3.

<sup>15</sup> It is, of course, acknowledged, that the United States is the world’s only ‘Super Power’ and there are no countries that are really ‘like’ the United States.

Similarities	Differences
Both States are federations. <sup>16</sup>	Australia has ratified CROC while the United States has not. <sup>17</sup>
Both States have a common law system. <sup>18</sup>	The United States is a monist State, while Australia is dualist. <sup>19</sup>
In both States the provision of education is the responsibility of states, not the federal government.	The United States has a constitutional Bill of Rights and Australia does not, although two jurisdictions within Australia do have such legislative Bills of Rights. <sup>20</sup>
Both States provide notionally free government education through to the completion of year 12. <sup>21</sup>	Australia has a well established national human rights institution, <sup>22</sup> while the United States has no such entity.
Both States have English as their official language. <sup>23</sup>	Australia has a relatively small population while the United States has the third highest population. <sup>24</sup>
Both States are wealthy, capitalist democracies.	In Australia there are many more private schools than in the United States. <sup>25</sup>

<sup>16</sup> Because this thesis examines efforts by States to give effect to HRE as expressed in Article 29(1) of CROC, a similar system of government was both relevant and important.

<sup>17</sup> Australia ratified CROC on 17 December 1990. The United States signed CROC on 16 February 1995, but has yet to ratify it.

<sup>18</sup> It is not just the education system that is being analysed but also the legal framework. This determined that both States should have a similar legal system.

<sup>19</sup> That is, when the United States ratifies a treaty it immediately becomes part of its domestic law, while Australia needs enabling legislation before a treaty becomes part of the domestic Law.

<sup>20</sup> *Human Rights Act 2004 (ACT)* and *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

<sup>21</sup> The United States tradition of free public education has been under threat in recent years with increases in private schools and the introduction of the voucher system: Sonstelie, Jon 'The Welfare Cost of Free Public Schools' (1982) 90(4) *Journal of Political Economy* 794. Free public education in Australia, has, like the United States, been eroded in recent years: Margison, Simon *Education and Public Policy in Australia* (1993) Cambridge University Press, New York.

<sup>22</sup> The Human Rights and Equal Opportunity Commission, established pursuant to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

<sup>23</sup> Conducting interviews in a language other than English would not have been possible for the researcher. Further, the translation of documents, surveys and interview transcripts would have placed an undue burden on the resources available for this research project. Country where English was the official language was therefore a selection criterion.

<sup>24</sup> Only China and India have larger populations than the United States, which has over 298 million (U.S. Census Bureau accessed at [www.census.gov/](http://www.census.gov/) on 23 April 2006). Australia's population is just over 21 million (Australian Bureau of Statistics accessed at [www.abs.gov.au/Ausstats](http://www.abs.gov.au/Ausstats) on 10 September 2007).

<sup>25</sup> In the United States 89% of children attend government schools (U.S. Department of Education's National Center for Education Statistics for 2001 accessed at <http://nces.ed.gov/fastfacts/> on 30 September 2003).

The similarities pointed to the United States and Australia being suitable subjects for comparative analysis of the type contemplated by this thesis. However, it should be noted that the choice of countries was also influenced by one other factor, namely that the researcher had easy access to the data and familiarity with the two countries.<sup>26</sup> This is a valid and relevant factor to consider when selecting nations for cross-country comparative research since familiarity with a country provides additional information, increasing the value of insight and analysis.<sup>27</sup> Thus, while the primary bases for selecting the countries for the case study were objective, pragmatic reasons unique to the researcher also played a role.

The differences between the United States and Australia are not so significant as to outweigh the similarities. The differences could be managed by the researcher understanding and being sensitive to areas of variation.<sup>28</sup> Furthermore, some of the differences, such as the presence or absence of Bills of Rights and national human rights institutions, could be incorporated into the study as variables to assess whether they impact on the nature and extent of HRE being provided in schools. Thus while there will always be differences between States selected for comparative research, these can be overcome by acknowledging them up front, and incorporating them into the analysis of the data collected.

Choosing countries for the comparison was not the end of the selection process, for it was not feasible, in a single study, to attempt to collect data from all secondary schools in Australia and the United States. In order for the research to be manageable, a micro rather than macro comparison was designed. The cities used in this case study were chosen in an effort to minimise difference so that to

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In Australia the percentage is much smaller with only 63.1% of children attending government schools and the balance going to Catholic schools (21.2%) and independent schools (15.5%) (Australian Bureau of Statistics in 2002 Catalogue No. 4221.0).

<sup>26</sup> Whilst the researcher is Australian, she has a 'Green Card', is a licensed attorney in the State of California and lived in the United States for five years from 1990 – 1995. This experience gave her an increased understanding of American culture and language that was useful in communicating with interview subjects, and analysing survey and interview responses.

<sup>27</sup> Etzioni-Halevy, Eva 'Comparing Semi-corruption among Parliamentarians in Britain and Australia', Chapter 7 in Øyen, Else (Ed) *Comparative Methodology: Theory and Practice in International Social Research* (1990) Sage Publications, London, 117.

<sup>28</sup> Ibid, 118.

the extent possible, one compares like with like.<sup>29</sup> Melbourne, in the Australian state of Victoria and Boston in the United States state of Massachusetts were chosen because of their similar characteristics. Boston and Melbourne are both state capitals with multicultural societies<sup>30</sup> and broadly similar population sizes.<sup>31</sup> They are both considered university towns – Melbourne has eight universities<sup>32</sup> in addition to numerous TAFEs (Colleges for Technical and Further Education), while Boston has eight research universities<sup>33</sup> and a significant number of smaller colleges and specialist universities and institutions. This suggests that education is valued in these communities. Finally, the researcher resides in Melbourne which made it convenient to access schools in that city. For all these reasons Melbourne and Boston were chosen as the two cities for the case study.

#### 4.6 Surveys

Surveys enable exploration of a field by asking questions *around* as well as directly *on* the subject of the study.<sup>34</sup> The development and use of surveys to gather information about HRE in schools required the consideration of many factors, including whether a survey was the most effective mechanism for gathering the required data; the size and selection of a sample; piloting of the survey; the design of the questions; the length and format of the survey; and the means of distribution. Each of these issues is analysed in this section.

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<sup>29</sup> Sekaran, Uma 'Methodological and Theoretical Issues and Advancements in Cross-Cultural Research' (1983) 14(2) *Journal of International Business Studies* 61.

<sup>30</sup> The Irish are the largest ethnic group in the city of Boston, while Italians also form a very large segment of the city's population. Approximately half the city population is white, with the other half made up of African American, Hispanic or Latino, Native American, Asian American, Pacific Islanders, and mixed races. *U.S. Bureau of the Census - Population Division*.

Melbourne has a large Italian community as well as one of the world's largest Greek populations outside of Greece and Cyprus. It also has a large Jewish community (more than half the total number of Jews in Australia live in Melbourne). Finally, there is a significant population of South East Asian people, made up of refugees and immigrants from that region. *Australian Bureau of Statistics*.

<sup>31</sup> Greater Boston has a population of approximately 5.4 million people while Melbourne has 3.7 million.

<sup>32</sup> The University of Melbourne, Monash University, La Trobe University, Deakin University, Royal Melbourne Institute of Technology, Swinburne University of Technology, Victorian University of Technology and the Australian Catholic University.

<sup>33</sup> Boston College; Boston University; Brandeis University; Harvard University; Massachusetts Institute of Technology; Northeastern University; Tufts University; and University of Massachusetts.

<sup>34</sup> Moser, C.A. and Kalton, G. *Survey Methods in Social Investigation* (2<sup>nd</sup> ed, 1993) Dartmouth Publishing, Aldershot, England, 5.

#### 4.6.1 Use of Surveys

To answer the thesis question, the study needed to examine what teachers understand human rights education to mean, the extent to which human rights is being taught, the content of such education, and the perceived obstacles to HRE. Thus a research method was required that could measure teachers' activities and experiences, as well as their opinions and attitudes. A short easy-to-use survey was therefore developed as the most appropriate way to gather this data.

A survey had the advantage of reaching a larger sample size than could be achieved with interviews alone. As Sellitz and others famously said 'Questionnaires can be sent through the mail; interviewers cannot.'<sup>35</sup> Mailed-out surveys are also preferable when the questions asked seek a considered rather than immediate response. The survey for this research project required respondents to reflect on a number of issues, and respondents may have to consult documents, like the school charter or mission statement in order to answer some of the questions. This indicated that a self-administered survey was appropriate. It was unlikely that any one teacher held all the knowledge regarding HRE within the school, which was another factor suggesting that a mailed-out survey was appropriate as it provided an opportunity for respondents to consult with other teachers before completing the survey, possibly resulting in more accurate answers to the questions relating to the extent of HRE within the school.

The main disadvantage of using mailed, self-administered surveys is that response rates are notoriously low. Response rates can be increased by providing monetary incentive for completing and returning the survey;<sup>36</sup> however, that was not viable option given the limited resources available for this research. Motivated respondents are needed in order to ensure a sufficient number of completed surveys are returned. A pre-paid return envelope was provided to encourage a response, and follow up letters and phone calls were made to non-respondents.

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<sup>35</sup> Sellitz, C., Wrightsman, L.S. and Cook, S.W. *Research Methods in Social Relations* (3<sup>rd</sup> ed, 1976) Holt, Rinehart and Winston, New York.

<sup>36</sup> Yammarino, Francis J., Skinner, Steven J. and Childers Terry L. 'Understanding Mail Survey Response Behavior: A Meta-Analysis' (1991) 55(4) *Public Opinion Quarterly* 613.

Difficulty in ensuring that the most appropriate teacher completed the survey is another disadvantage with a mailed-out survey. There were no available lists of individuals who teach in subject areas where human rights might be included. It was therefore necessary to send the survey to the school principal with a request that they pass the survey on to the most appropriate person. There can be no guarantee that the most appropriate person was in fact given the survey.

A further disadvantage of surveys is that the results can be skewed. This is because surveys are most likely to be completed and returned by teachers who have knowledge, experience and interest in teaching human rights.<sup>37</sup> In the result, this research cannot claim to be representative of all Melbourne and Boston teachers' understanding and practices surrounding HRE. However, the data collected is nevertheless instructive and useful in increasing understanding of the knowledge and activities of those teachers committed enough to HRE to take the time to complete and return the survey.

On balance, there were more factors in favour of using surveys to collect data from teachers, than against. Furthermore, some of the disadvantages of using a survey could be overcome by combining it with an in-depth interview.

#### 4.6.2 *Sample Selection*

While quantitative research generally requires that the sample being surveyed has been randomly selected, the same is not true for qualitative research, where samples are more often non-random, purposeful and small.<sup>38</sup> This held true for the selection of the sample for this study which was all government secondary schools in the two chosen cities. This resulted in 107 schools in Melbourne and 127 schools in Boston being included in the sample. This was a manageable sample size and the survey was therefore sent to all 234 schools.

Within each school there are a variety of different sampling units, including principals, teachers, administrators and students. This study is concerned with

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<sup>37</sup> Moser, above n 34, 262.

<sup>38</sup> Merriam, Sharon B. *Qualitative Research and Case Study Applications in Education* (1998) Josey-Bass Publishers, San Francisco, 8.

identifying the extent of HRE in government secondary schools, and teachers are the group within the school who are most knowledgeable about whether they are teaching human rights and the current status of HRE in their school. For this reason cluster sampling was utilised, that is, within each school a defined group or cluster was selected, namely teachers, albeit the survey had to go to the principal of the school with a request to pass it on to the appropriate teacher.

#### *4.6.3 Piloting of Survey*

In accordance with standard social research practices,<sup>39</sup> a draft of the survey was piloted on three teachers; two in Melbourne and one in Boston.<sup>40</sup> The feedback from the pilot study resulted in the overall number of questions being reduced from 26 to 20 in response to comments regarding the length of time needed to complete the survey. Also as a consequence of the pilot study, the survey was restructured so that the questions fell into three distinct categories. Finally, some responses from the pilot study suggested that a few questions lacked clear wording or were ambiguous, and these problems were remedied before the final survey was distributed. Piloting of the survey helped produce a survey that was user-friendly yet still contained all the questions which needed to be addressed in order to answer the thesis question.

#### *4.6.4 Design of Questions*

The survey was designed to discover how teachers understand and teach HRE in order to ascertain the extent to which Article 29(1) of CROC is being implemented in secondary schools. This purpose informed the design of the questions, and a copy of the survey is attached as Appendix 1. There were three separate types of questions, namely: five closed questions in which the respondent was given a limited number of answers from which to chose; five open-ended questions where the respondent decided the content, length and detail of the answers; and ten filter

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<sup>39</sup> Moser, above n 34, 47.

<sup>40</sup> The teachers who participated in the piloting of the survey were persons already known to the researcher through her involvement with organisations such as the Victorian Human Rights Education Committee in Victoria, and through preliminary inquiries into HRE in Boston.

questions which invited the respondent to select a nominated alternative and then, depending on the answer chosen, to elaborate or explain the answer.

Closed questions were used because they can be scored quickly and objectively, and are the least threatening of the question types.<sup>41</sup> Open-ended questions were used to elicit the respondent's own thoughts and ideas on a particular issue, for example what they understand the term 'human rights education' to mean. In addition allowing a teacher to write their own comments has some appeal to respondents because it allows them to say what they want rather than always be simply answering the researcher's questions.<sup>42</sup>

After an initial question asking teachers to describe their understanding of the term HRE, the survey was divided into three parts. The five questions in the first section asked about the teacher's own experience of HRE; the 12 questions in the second section asked about HRE in the school where the teacher currently works; and the final section had just two questions, one asking whether the teacher was willing to be interviewed, and the other inviting any other comments about HRE. This design was adopted so as to ensure that all relevant topics were covered, and also to clearly indicate to the respondents the nature of the questions being asked.

#### 4.6.5 *Distribution of Surveys*

As already noted, the survey was initially sent to the principal of each school with a request that they pass it on to the most appropriate teacher. This resulted in a very poor rate of return. Follow up contact with schools revealed that principals were acting as gatekeepers and not passing the survey on to any teachers, in an apparent effort to protect them from the burden of completing the survey. For example an email from one principal stated 'I have spoken to a number of relevant staff regarding your request for participation in your study. Nobody is willing to participate.'<sup>43</sup> The researcher replied that she had recently met a teacher from that school at a seminar, and that that teacher had indicated a willingness to participate

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<sup>41</sup> Fink, Arlene and Kosecoff, Jacqueline *How to Conduct Surveys: A Step-By-Step Guide* (2<sup>nd</sup> ed, 1998) Sage Publications, Thousand Oaks, California, 4.

<sup>42</sup> Moser, above n 34, 264.

in the research. Only then did the principal agree to pass the survey on to that teacher. As this example demonstrates, principals as a first point of contact can hinder the collection of data by ‘protecting’ teachers from requests that they consider the teachers will not be interested in, or alternatively will not have time to participate.<sup>44</sup>

As a result, it was necessary to devise a further strategy for getting the surveys to the desired respondents. The researcher approached the Australian Education Union (AEU) with a request that they assist with this research. The Secretary of the Victorian Branch of the AEU considered that HRE was an issue that would be of interest to the AEU’s members, and therefore agreed to mail the survey to its members working in government secondary schools in Melbourne. This avoided the problem of principals not passing on the survey to teachers and resulted in considerably more completed surveys being returned.

Surveys were sent to Boston high schools via air mail from Australia. Again, there was an initially low response rate and this was increased only marginally through follow up phone calls and emails to schools. However, a higher response rate was achieved when the survey was sent to teachers who were referred to the researcher by other teachers who had already agreed to participate in the research. Known as ‘snowballing’,<sup>45</sup> this technique allowed access to teachers who were willing to participate because the researcher had been referred to them by a person they knew.

#### **4.7 Interviews**

Conducting interviews, while labour-intensive and time-consuming, was necessary in order to gain further insight into teachers’ opinions, knowledge and experience of HRE, and to ascertain the extent to the norm in Article 29(1) of CROC is being implemented and complied with in schools. Interviews with staff within Victorian and Massachusetts’ DOEs were also appropriate so as to give them an opportunity

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<sup>43</sup> Email from the Principal of a Melbourne secondary school dated 1 August 2003. Copy on file with author.

<sup>44</sup> This issue is discussed more fully in section 7.2 in Chapter 7, where the survey results are analysed.

to elaborate on the current data regarding the extent to which DOEs are implementing or complying with the norm in Article 29(1) of CROC. The following table summarises the number of interviews conducted as well as the nature of the interviewees.

<b>Interviewee</b>	<b>Australia</b>	<b>United States</b>	<b>Total</b>
Teachers	20	21	41
DOE staff	4 (2 from Victorian DOE and 2 from Commonwealth DOE)	2	6
NGO staff	3	6	9
University education faculty staff	2	3	5
<b>Total Interviews</b>	<b>29</b>	<b>32</b>	<b>61</b>

#### *4.7.1 Interviewing Teachers*

Interviews were conducted to probe beyond the answers given by teachers in their completed surveys, to clarify ambiguous answers, and to obtain answers to questions that may not have been answered, or not answered fully on the survey. Thus as previously discussed, interviews helped to overcome the inflexibility of the survey.<sup>45</sup> While the survey was a practical means of obtaining facts about HRE in schools it was not so useful for finding out about the knowledge, values and attitudes that informed or influenced a teacher's practices relating to HRE. To uncover these more complex issues, an informal interview was undertaken. Teachers nominated themselves to be interviewed by responding positively to the

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<sup>45</sup> Kalton, Graham and Anderson, Dallas W. 'Sampling Rare Populations' (1986) 149(1) *Journal of the Royal Statistical Society. Series A (General)* 65.

<sup>46</sup> Moser, above n 34, 260.

penultimate question on the survey asking whether they: ‘Would you be willing to participate in a follow up interview about human rights education?’

A semi-structured interview format was selected, as it allowed the interviewee to answer questions on his/her own terms, more so than in a highly structured interview. Yet, at the same time, this format allowed the interviewer to ensure that the interview remained focused and that all relevant questions were asked. Furthermore, the semi-structured interview provided the greatest scope for probing beyond the initial answers and gave interviewees the opportunity to elaborate on their answers.<sup>47</sup> Thus the semi-structured format allows for latitude in exploring the subject matter of the interview, while still maintaining enough focus to permit meaningful comparison between different interviews. A copy of the interview guide is attached as Appendix 2. A limitation of using a semi-structured format is that the interviews are not standardised, and thus comparability between different interviewees’ responses is more difficult. However, since the interviews were conducted for qualitative rather than statistical analysis, this drawback is of less significance.

Since the researcher is not a school teacher, there could have been a perception by interviewees that the researcher was an ‘outsider’. However, this was balanced by the interviewer’s detailed knowledge of HRE, and the interviewees’ expectations of the interviewer; that is the interviewees were all made aware, before the interview began, that the data was being collected for use in legal research regarding international human rights laws. Establishing a rapport with interviewees increases the likelihood of obtaining detailed quality data. In order to develop rapport, the interview commenced with questions which required descriptive rather than evaluative answers.<sup>48</sup> For example teachers were first asked how long they had been teachers, and how long they had been at the school where they currently work. These non-threatening questions allowed interviewees to overcome any initial apprehension they may have about the interview.

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<sup>47</sup> Burgess, R. ‘The Unstructured Interview as a Conversation’ in Burgess, R. (ed) *Field Research: A Sourcebook and Field Manual* (1991) Allen and Unwin, London, 107.

<sup>48</sup> Whyte, W. *Learning From the Field: A Guide From Experience* (1984) Sage Publications, London, 104.

The method of recording the interview is important, as it may influence the conduct of the interview. On the one hand, tape recording allows the interviewer to concentrate on the conversation rather than having to constantly look at a note pad and try to write down every word that is said. On the other hand taping can be a deterrent to people freely giving responses, as they may feel inhibited when they know every word is being recorded. In this research, it was important to ensure that all dialogue was accurately recorded, and for this reason the interviews were taped. There was no indication that any of the interviewees felt self-conscious or reticent because of the presence of the tape recorder.

#### *4.7.2 Interviewing DOE, NGO and University Staff*

In addition to interviewing teachers, data was also obtained through 20 interviews with other people associated with HRE programs and practices, namely DOE personnel in Canberra, Melbourne and Boston, NGO representatives in Melbourne and Boston, and academics within education faculties at universities in Melbourne and Boston. The interviews with these individuals all followed the same format that was used with teachers, namely a semi-structured interview. However, as no surveys had been completed by these individuals prior to the interview, all data had to be collected at the one interview.

Interviewees from the DOEs were identified on the basis that they worked within sections of the department that had a connection with HRE. Generally, this connection took the form of the interviewee being involved in developing programs or resources related to HRE. One of the purposes of conducting interviews with DOE officials was to supplement the documentary evidence relating to how the government understands the term HRE, for example, Australia's periodic reports to the CRC,<sup>49</sup> and also to ascertain what the DOEs perceive to be their responsibilities vis-à-vis the provision of HRE in accordance with international and domestic legal obligations.<sup>50</sup>

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<sup>49</sup> This was discussed in section 3.3 in the previous chapter.

<sup>50</sup> This is discussed in Chapter 6.

The views of human rights NGOs were considered important for this research, since, as already explained, it is NGOs that are increasingly developing educational resources on HRE<sup>51</sup> for use in schools. They are likely to have specialist knowledge regarding HRE which provides a different perspective from government officials and teachers. The NGOs' definitions of HRE were considered in section 3.4 in the previous chapter. A number of factors influenced the selection of NGOs for interviews; in some cases NGOs were chosen because one or more teachers indicated in an interview that they had used resources of a particular NGO. In other cases NGOs were chosen by the interviewer because of their experience and expertise in HRE.

As it became apparent from the interviews with teachers, that there was a dearth of HRE in formal teacher training programs at universities<sup>52</sup> it was thought appropriate to carry out interviews with academics in university education faculties. Those interviewed were selected on the basis that they taught courses potentially connected to human rights,<sup>53</sup> or had published articles on topics related to human rights education. The questions posed to education academics include asking them about their understanding of the term 'human rights education', whether they include any training related to HRE within the subjects they teach, and if so the nature of that training, and their familiarity with Article 29(1) of CROC. The interviews with education academics provide insight into the nature and extent of HRE training offered within education degrees.

#### 4.8 Conclusion

This chapter explained the underlying rationale for the research approach and design and described the methods by which data will be collected. It justified the use of qualitative research rather than quantitative and explained the selection of Australia and the United States; Melbourne and Boston; and government

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<sup>51</sup> See for example: Human Security Network *Understanding Human Rights: Manual on Human Rights Education* (2003) Graz, Austria; People's Movement for Human Rights Education *Passport to Dignity* (2001) PDHRE, New York; Facing History and Ourselves *Resource Book: Holocaust and Human Behavior* (1994) Boston; and Amnesty International *First Steps: A Manual for Starting Human Rights Education* (1997) Amnesty International Publications, London.

<sup>52</sup> This issue is discussed in depth in section 7.5 in Chapter 7.

secondary schools for the case study. The aim of the methodological framework adopted for this research was to provide a synoptic view of the Australian and United States Governments' levels of commitment to, implementation of, and compliance with, the norm in Article 29(1) of CROC. Overall the research design achieved this aim, although there were incidences when compromises and adjustments were necessary, for example, in the means employed to ensure surveys reached the appropriate teachers.

As outlined above, the data collected for this study draws on the views of a wide range of individuals involved in HRE in Australia and the United States. The surveys and interviews were supplemented with documentary evidence pertaining to HRE obtained from a diverse range of government entities, human rights NGOs, universities and secondary schools. Obtaining data by these multiple methods facilitated the research process of triangulation, which allowed for comparability of data and enhanced the overall validity and reliability of the data. Furthermore, the use of a variety of methods to collect data helped to overcome the limitations of some methods such as self-administered surveys.

The research methods developed and implemented for this study, were designed to collect valuable empirical data which will not only add to the state of knowledge regarding commitment to, implementation of, and compliance with, the HRE norm in Article 29(1) of CROC, but also facilitates the evaluation of existing theories regarding States compliance with international human rights treaties.<sup>54</sup> The next three chapters record and analyse the data collected in accordance with the methods outlined in this chapter.

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<sup>53</sup> Such courses were identified from university student handbooks and faculty web pages.

<sup>54</sup> The theoretical implications of this research are covered in Chapter 8.

## **CHAPTER 5 – AUSTRALIA AND THE UNITED STATES’ COMMITMENT TO ARTICLE 29(1) OF CROC AND HRE AT THE INTERNATIONAL LEVEL**

### **Contents**

#### **5.1 Introduction**

#### **5.2 The Emergence of HRE as a Norm in International Law**

#### **5.3 Australia’s Involvement in International HRE Initiatives**

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- 5.3.2 Participation in other International HRE Initiatives
- 5.3.3 Conclusion

#### **5.4 United States’ Involvement in International HRE Initiatives**

- 5.4.1 Drafting of Article 29(1) of CROC
- 5.4.2 Participation in other International HRE Initiatives
- 5.4.3 Conclusion

#### **5.5 Conclusion**

*Perhaps states promote HRE simply hypocritically,  
expecting to reap the international benefits of doing so.<sup>1</sup>*

### 5.1. Introduction

By establishing the theoretical framework, setting out the methodological approach, and addressing definitional issues, Part I of this thesis laid the foundations for answering the research question: ‘What factors determine whether a State will commit to, implement and comply with Article 29(1) of CROC?’. Part II builds on this foundation by analysing whether there is any correlation between the conduct of Australia and the United States in the international arena relating to the norm in Article 29(1) of CROC and other international HRE initiatives, and their HRE practices within their domestic jurisdictions.

This chapter is the first of three that investigate Australia and the United States’ practices relating to Article 29(1) of CROC in three distinct areas, namely international law, domestic law, and the education sector. It identifies the nature and extent of Australia and the United States’ involvement in the drafting of CROC, in particular Article 29(1), and in the development of the international framework relating to HRE which complements and supports Article 29(1). However, first it is important to consider the historical development of HRE as a norm in international law so as to provide depth and context to the discussions later in this chapter about the involvement of Australia and the United States. This chapter therefore begins with an overview of the drafting of the HRE provisions in the Universal Declaration of Human Rights (UDHR), and their subsequent incorporation into the International Covenant on Economic, Social and Cultural Rights (ICESCR). This background analysis is followed by an examination of Australia and the United States’ involvement in the ensuing HRE related initiatives, namely the drafting of Article 29(1) of CROC; the development of, and participation in, the UN Decade for Human Rights Education<sup>2</sup> (the Decade), and the UN World Programme for Human

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<sup>1</sup> Cardenas, Sonia ‘Constructing Rights? Human Rights Education and the State’ (2005) 26(4) *International Political Science Review* 363, 364.

<sup>2</sup> From 1995-2004. Proclaimed by the United Nations General Assembly in Resolution 49/184 on 23 December 1994.

Rights Education<sup>3</sup> (World Programme) that succeeded the Decade. Analysing the involvement of Australia and the United States in each of these initiatives provides a comprehensive picture of the extent to which these two States have demonstrated a commitment in the international arena to Article 29(1) of CROC and to the international framework that supplements HRE.

## **5.2 The Emergence of HRE as a Norm in International Law**

Prior to 1948, HRE had been exclusively a concern of domestic legal systems, as human rights had not generally been considered to be a matter for international law. However, the UN Charter followed by the adoption of the UDHR saw this change, and for the first time HRE was included in an international instrument. In the UDHR, HRE was referred to in the Preamble, as well as in Article 26(2), the latter providing that:

Education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Although the first phrase does not directly relate to HRE, the balance of this provision encompasses the first articulation of HRE in international law. The drafting of the UDHR was undertaken by a committee established by the now defunct Commission on Human Rights, and took place over two years from 1947-48. The drafting committee was initially made up of representatives from three states, but quickly expanded to eight, including delegates from Australia (Colonel William Roy Hodgson) and the United States (Eleanor Roosevelt, who was appointed Chairperson).<sup>4</sup>

The drafting committee delegated responsibility for preparing the first draft to John Humphrey, a Canadian lawyer and newly appointed Director of the UN

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<sup>3</sup> From 2005 on an ongoing basis. Proclaimed by the United Nations General Assembly in Resolution 59/113 on 10 December 2004.

<sup>4</sup> The other members of the drafting committee were Chile (Hernán Santa Cruz), China (Peng-chun Chang), France (René Cassin), Lebanon (Charles Malik), the UK (Charles Dukes), and the USSR (Valentin Tepliakov).

Secretariat's Division on Human Rights. The draft outline prepared by Humphrey became the first official UN draft of the UDHR and the base document from which all additions and deletions were debated and negotiated.<sup>5</sup>

HRE appears in two parts of the UDHR, namely the Preamble and Article 26(2). The final paragraph of the Preamble provides that:

Every individual and every organ of society, keeping the Declaration constantly in mind, shall strive by *teaching and education* to promote respect for these rights and freedoms.  
[emphasis added]

This is markedly different from the Preamble in the Humphrey draft, which consisted only of the enunciation of the “four freedoms”,<sup>6</sup> and made no mention of the promotion of human rights through teaching and education. This language came from proposals made by the UK and Lebanon who expressed the view that the ‘Declaration’s main importance would be as an educational instrument’<sup>7</sup> The UDHR, being a non-binding declaration, could not effectively compel States to enact legislation or otherwise require States to domestically realise the rights espoused in the document, and the Preamble makes it clear it is not States, but rather ‘every individual and every organ of society’ that has responsibility for using HRE to promote respect for human rights. As one scholar has noted, this effectively means that ‘education on human rights should no longer be an issue left to governments to attend to when they can finally manage to get around to it.’<sup>8</sup> Clearly, teachers and NGOs fall within the definition of ‘every individual and every organ of society’ set out in the Preamble, and as is seen in Chapter 7, there are individual teachers and human rights NGOs who are endeavouring to give effect to this plea.

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<sup>5</sup> E/CN.4/AC.1/3 dated 4 June 1947. Officially this document was known as the ‘Secretariat Outline’; however, this is somewhat of a misnomer, since what Humphrey produced was far more substantial than a mere outline.

<sup>6</sup> Freedom of speech, freedom of religious belief, freedom from fear and freedom from want – as proclaimed by President Franklin Roosevelt in his 1941 address to Congress.

<sup>7</sup> SR.49/P.8.

<sup>8</sup> Aka, Philip C. ‘Education, Human Rights, and the Post-Cold War Era’ (1999) 15 1999 *New York Law School Journal of Human Rights* 421, 446.

The Humphrey draft consisted of 48 Articles, none of them containing any reference to HRE.<sup>9</sup> Article 36 provided that everyone has the right to education, but made no reference to the content of such education.<sup>10</sup> The French representative on the Drafting Committee, René Cassin, used Humphrey's document as the basis for two further drafts of the declaration, and these also failed to include any reference to the content or purpose of education.<sup>11</sup> When Cassin's drafts were first discussed by the committee, Malik, the delegate from Lebanon, 'objected that this article made no reference to the content of education [which] he felt should be stressed by stating the principles of the Charter; otherwise there was [a] possibility of abuse.'<sup>12</sup> For reasons that are not apparent, Cassin did not act on this objection when preparing a revised draft. The issue of the content of education was only taken up after Alex Easterman, a British journalist representing the World Jewish Congress, stated that:

The Article on education provided a technical framework but contained nothing about the spirit governing education which was an essential element. Neglect of this principle in Germany had been the main cause of two catastrophic wars.<sup>13</sup>

This view was endorsed by the UNESCO delegate, Pierre Lebar, who added that:

[In] Germany, under the Hitler regime, education had been admirably organized but had, nevertheless, produced disastrous results. It was absolutely necessary to make clear that education to which everyone was entitled should strengthen respect of the rights set forth in the Declaration and combat the spirit of intolerance.<sup>14</sup>

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<sup>9</sup> E/CN.4/AC.1/3 dated 4 June 1947.

<sup>10</sup> *United Nations Yearbook on Human Rights for 1947*, Lake Success, 1949, 484.

<sup>11</sup> E/CN.4/AC.1/W.1 and E/CN.4/AC.1/W.2

<sup>12</sup> E/CN.4/AC./SR.14.

<sup>13</sup> SR.8/p.4.

<sup>14</sup> SR.67/p.12.

Thus, it was obvious that the Holocaust was the catalyst that led to a norm on HRE being included in the UDHR. Easterman proposed the following provision, which the representative of Panama sponsored:<sup>15</sup>

This education shall be directed to the full development of the human personality, to strengthen respect for human rights and fundamental freedoms and shall combat the spirit of intolerance and hatred against other nations or racial or religious groups everywhere.<sup>16</sup>

However, the inclusion of a provision about HRE was not without debate and dialogue, in particular, the UK and India<sup>17</sup> wanted only civil and political rights included in the UDHR, and resisted all attempts to include ESC rights, including Article 26.<sup>18</sup> To the extent that there was to be an article about education, they wanted it kept to a minimum, and proposed that it simply provide that ‘everyone has a right to education’.<sup>19</sup> Not surprisingly, UNESCO vehemently opposed this suggestion. The Preamble to the UNESCO Constitution declares that ‘Since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed’,<sup>20</sup> and UNESCO saw Article 26(2) as playing an important part in achieving this mission.<sup>21</sup> Because of the UK and Indian opposition, a special subcommittee was formed to consider the issue and it initially proposed that Article 26(2) read as follows:

Education shall be directed to the full development of the human personality, to the strengthening of respect for human

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<sup>15</sup> The Commission sought to obtain input from a diverse range of sources and so allowed many NGOs to attend the sessions. However, any suggested amendments to the drafts had to be sponsored by a State representative.

<sup>16</sup> E/CN.4/AC.2/SR.8/p.4 – December 1947.

<sup>17</sup> It is perhaps not surprising that these two States were in agreement since British rule in India only ended in August 1947.

<sup>18</sup> 99/p.8.

<sup>19</sup> Ibid.

<sup>20</sup> *Constitution of the United Nations Educational, Scientific and Cultural Organization*, Adopted in London on 16 November 1945.

<sup>21</sup> As discussed in Chapter 3, education about peace is an integral part of HRE. Peace is specifically referred to in Article 29(1)(d) of CROC, and education about peace is mentioned several times in General Comment No. 1.

rights and fundamental freedoms and to the promotion of international goodwill.<sup>22</sup>

However, the subcommittee ultimately adopted a Chinese version which was essentially the proposal above, with the addition of the words ‘and to the combating of the spirit of intolerance and hatred against other nations or religious groups.’<sup>23</sup>

The draft UDHR was next considered by the Third (Social and Humanitarian) Committee of the General Assembly (Third Committee). The Third Committee meetings provided an opportunity for States not represented on the Commission to have input. It was at this time that the Mexican and United States’ delegations jointly proposed the following alternative language for Article 26(2):

Education shall be directed to the full development of the human personality, to the strengthening of respect for human rights and fundamental freedoms and to the promotion of understanding, tolerance, and friendship among peoples, as well as the activities of the United Nations for the maintenance of peace.<sup>24</sup>

This represented a shift from using the negative language of the Chinese draft – ‘combating intolerance and hatred’ – to positive language – ‘promoting tolerance and friendship’. This was a significant shift in the focus of the Article, turning it from a provision that was about fighting the causes of conflict and wars, to one that was about upholding and encouraging attitudes and practices that are essential for a peaceful society that respects human rights. This use of positive language was carried over into Article 29(1) of CROC.

When the norm on HRE was incorporated into the International Covenant on Economic, Social and Cultural Rights (ICESCR), there were three additions made to the text used in Article 26(2) of the UDHR, and the first paragraph of Article 13 provides that State Parties agree that:

Education shall be directed to the full development of the human personality and the sense of its dignity, and shall

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<sup>22</sup> SR.69/p.2.

<sup>23</sup> Ibid, 9.

<sup>24</sup> A/C.3/356.

strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

The three changes are a reference to the development of a sense of dignity; the call that individuals should have an education that enables them to participate effectively in a free society; and the addition of a reference to ethnic groups. The UDHR refers to the inherent dignity of humans on five occasions, but not in Article 26(2).<sup>25</sup> There do not appear to have many attempts to define the concept of 'human dignity', although one author suggests that it is something equivalent to: 'respect for the intrinsic worth of every person [and] should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others'.<sup>26</sup> Thus, the addition of a reference to dignity in Article 13(1) of ICESCR appears to be recognition that 'education must make the individual aware of his [sic] own inherent worth and of the human rights which accrue to him on this basis'.<sup>27</sup> As is seen below, this reference to human dignity is not carried through to Article 29(1) of CROC, although the concept of dignity features prominently in General Comment No. 1 on the Aims of Education.<sup>28</sup>

It has been suggested that the addition of a requirement that education enable a person to participate effectively in a free society, requires that education not only be theoretical, but also practical, that is, the education should teach students how to satisfy their practical needs in life.<sup>29</sup> The Commission on Human Rights identified the rights to freedom of expression and to hold opinions, as set out in Article 19 of the ICCPR as the rights which give 'meaning to the right to participate

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<sup>25</sup> 'Human dignity' is referred to twice in the Preamble and once in Articles 1, 22 and 23.

<sup>26</sup> Schachter, Oscar 'Human Dignity as a Normative Concept' (1983) 77 *American Journal of International Law* 848, 849.

<sup>27</sup> Beiter, Klaus Dieter The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights (2006) Martinus Nijhoff Publishers, Leiden, 95.

<sup>28</sup> It is mentioned eight times in General Comment No. 1: The Aims of Education, Committee on the Rights of the Child, 17 April 2001, CRC/GC/2001/1.

<sup>29</sup> Beiter, above n 27, 95.

effectively in a free society.<sup>30</sup> Thus the addition of this language appears to be recognition that it is difficult for people to effectively participate in a free society if they have not been educated about their right to free speech.

Finally, the addition of the word ‘ethnic’ reflects the fact that discrimination occurs on more grounds than just race and religion and thus ethnicity needed to be added.<sup>31</sup> Overall the differences between Article 26(2) of the UDHR and Article 13(1) of ICESCR amount to little more than a ‘fleshing out’ of the norm relating to HRE.

Having examined the process by which HRE became a part of the International Bill of Rights, it is now appropriate to analyse how this history led to HRE being included in CROC, and in particular what part Australia and the United States played in the drafting of Article 29(1).

### **5.3 Australia’s Involvement in the Drafting of Article 29(1) of CROC and other International HRE Initiatives**

An important aim of this research is to ascertain whether Australia and the United States’ conduct relating to HRE in the international arena is predictive of whether they will ratify CROC and how they will conduct themselves when it comes to implementing HRE in the domestic arena. This section analyses Australia’s involvement in three separate international HRE measures, namely the drafting of Article 29(1) of CROC, the Decade for HRE, and the World Programme for HRE with a view to ascertaining the extent of Australia’s involvement in each of these initiatives.

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<sup>30</sup> Preamble to the Commission on Human Rights Resolution 2002/48, 51st meeting, 23 April 2002.

<sup>31</sup> There is little detailed information available about what occurred during the drafting of Article 13 of ICESCR, in particular, who proposed these changes, and why. The leading texts on the drafting of ICESCR and Article 13 are silent when it comes to these changes, see Craven, Matthew C.R. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) Clarendon Press, Oxford and Beiter, above n 27.

### 5.3.1 Drafting of Article 29(1) of CROC

The 1979 International Year of the Child was the impetus for the creating CROC.<sup>32</sup> The actual drafting was undertaken by the Open-ended Working Group on the Question of a Convention on the Rights of the Child (Working Group), established by the Commission on Human Rights in 1979.<sup>33</sup> While it took only two years to draft the UDHR, it took ten years to finalise CROC.<sup>34</sup> This reflects the fact that CROC was drafted during the height of the Cold War, when there were significant tensions between the East and West. The Working Group operated on the basis of consensus and the inability of States to reach agreement significantly delayed the finalisation of this treaty.<sup>35</sup> Being an open-ended working group meant that all 53 members of the Commission could participate and States that were not members of the Commission could send observers, who still had the right to take the floor.<sup>36</sup> Australia had a representative on the Working Group for seven of the ten years of its operation, and in 1984, 1988 and 1989, when it was not a member of the Commission, it sent observers. Indeed Australia and the United States were two of only 12 States that were represented at every one of the nine sessions for which there are records.<sup>37</sup> Furthermore, Australia provided the fourth most active delegation in terms of making proposals and textual suggestions for articles.<sup>38</sup> These facts suggest either a strong level of commitment to the development of CROC, or a strong level of concern about this new treaty and a desire to control the content. The analysis below indicates that the latter explanation seems more likely.

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<sup>32</sup> Detrick, Sharon *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (1992) Martinus Nijhoff Publishers, Norwell, MA, 19.

<sup>33</sup> Report of the Commission on Human Rights on its 35<sup>th</sup> Session, E/1979/36, paragraph 242.

<sup>34</sup> The drafting of CROC spanned a decade from 1979 to 1989.

<sup>35</sup> Cohen, Cynthia Price 'Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children' (1998) 4 *Loyola Poverty Law Journal* 9, 39.

<sup>36</sup> Detrick, above n 32, 22.

<sup>37</sup> No records were kept of the Working Groups sessions in 1979 and 1980. The other 10 States that were continuously represented were: Argentina, Brazil, Canada, Denmark, France, The Netherlands, Norway, Poland, USSR and the United Kingdom. Cohen, above n 35, 20-21.

<sup>38</sup> The most active was the United States, followed by Norway, Canada and Australia. Cohen, above n 35, 25-26.

The Working Group based its initial efforts on a draft put forward by Poland. It was the Polish Government in 1978 that made a proposal to the UN Commission on Human Rights that a convention on the rights of the child was needed. Indeed, Poland had expressed support for a convention on children's rights two decades earlier,<sup>39</sup> when the 1959 Declaration on the Rights of the Child was promulgated.<sup>40</sup> Poland was a vocal supporter of children's rights, often evoking the memory of Janusz Korczak, a renowned Polish advocate of children's rights who had himself been working on a declaration on children's rights at the time of his death in a Nazi concentration camp in 1942.<sup>41</sup>

Poland's initial draft was modelled closely on the 1959 UN Declaration on the Rights of the Child, in the hope that the provisions would be uncontroversial, hoping for swift approval and adoption in the following year.<sup>42</sup> However, member States and NGOs were less than supportive of the Polish draft; with concerns expressed about the lack of precision and clarity; the emphasis on ESC rights while excluding a number of civil and political rights; and the absence of provisions relating to implementation.<sup>43</sup> In the result, the final text of CROC bears little similarity to the Polish draft.

Article 7 in the Polish draft dealt with education, and was in all respects identical to Principle 7 in the 1959 Declaration on the Rights of the Child providing that the child:

shall be given an education which will promote his [sic] general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.<sup>44</sup>

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<sup>39</sup> Detrick, above n 32, 21.

<sup>40</sup> General Assembly Resolution 1386(XIV) of 20 November 1959.

<sup>41</sup> The substance of Janusz Korczak's declaration of children's rights appears as an appendix in Lifton, Betty Jean *The King of Children: The Life and Death of Janusz Korczak* (2006) American Academy of Pediatrics, New York.

<sup>42</sup> Detrick, above n 32, 20.

<sup>43</sup> Ibid, 21.

<sup>44</sup> Annexed to the Commission on Human Rights Resolution 20 (E/1978/34) 8 March 1978.

While there is no mention of human rights in this Article, it was nevertheless an attempt to regulate in some way the content of education that children receive. The travaux préparatoires show that many States made proposals, comments and suggestions to this draft, including Australia who was an active participant in the negotiations surrounding Article 29(1), and its influence can be seen in the final text.<sup>45</sup> For example, Australia was part of a small group of Western States<sup>46</sup> that successfully opposed a proposal by Algeria to include ‘peoples’ rights’ as well as ‘human rights’ in paragraph (a).<sup>47</sup> Peoples’ rights tend to be favoured by African States<sup>48</sup> and resisted by Western States, which see them as synonymous with collective rights that are asserted by minority groups, such as Indigenous peoples, in contrast with human rights that are held by individuals.<sup>49</sup> The matter was ultimately resolved by the Chairman proposing that the word ‘all’ be inserted in front of the words ‘human rights’ in Article 29(1)(a), and this was accepted by all delegations.<sup>50</sup> One can speculate that Australia’s opposition to the inclusion of more inclusive text suggests that its active participation in the drafting of CROC may have been motivated by a desire to limit the content of this treaty.

The most significant contribution by Australia to the drafting of Article 29(1) was the suggestion that education about national values be included in Article 29(1)(c).<sup>51</sup> It is unclear from the travaux préparatoires what motivated Australia’s suggestion that education about national values form part of Article 29(1); however, during this period Australia was accepting an increasing number of immigrants, particularly Vietnamese refugees,<sup>52</sup> and a policy of multiculturalism was being pursued.<sup>53</sup> With

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<sup>45</sup> Detrick, above n 32, 399-407.

<sup>46</sup> The other States were Canada, France and the United States. Detrick, above n 32, 399.

<sup>47</sup> Detrick, above n 32, 399.

<sup>48</sup> See for example *African Charter on Human and Peoples’ Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>49</sup> See Triggs, Gillian ‘The Rights of Peoples and Individual Rights: Conflict or Harmony?’ in Crawford, James (ed) *The Rights of Peoples* (1992) Oxford University Press, USA, 142.

<sup>50</sup> Detrick, above n 32, 399 -400.

<sup>51</sup> Detrick, above n 32, 403.

<sup>52</sup> Australian Bureau of Statistics accessed at: [www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/EA1FAC740844F848CA2570EC0073CDF5?opendocument](http://www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/EA1FAC740844F848CA2570EC0073CDF5?opendocument) on 7 September 2007.

<sup>53</sup> Jupp, James ‘Immigration and National Identity: Multiculturalism’ in Stokes, Geoffrey (ed). *The Politics of Identity in Australia* (1997) Cambridge University Press, 132-44.

a culturally diverse population, questions were being raised about Australia's national identity, including for example in a 1982 report from the Australian Council on Population and Ethnic Affairs which asked: 'What is the nature of the Australian national identity? Within what framework of ideas and institutions can we build a more cohesive and productive set of relationships between the disparate groups that make up the Australian community?'<sup>54</sup> It therefore appears that domestic concerns about maintaining 'Australian values' during a time when Australian society was becoming increasingly multicultural may have been 'exported into Article 29(1) of CROC in much the same way as Chiam noted that Australia exported its strict tobacco controls into the WHO Tobacco Convention'.<sup>55</sup>

In 1995 in relation to the drafting of a different international human rights instrument, Australia was recorded as saying that 'the eventual implementation of the declaration will depend on governments' full participation in the drafting process'.<sup>56</sup> This suggests that there maybe a direct link between a State's active involvement in the drafting of a norm, and its ultimate compliance with that norm. Therefore to the extent that Australia was an active participant in the drafting of Article 29(1) of CROC, it could be expected that it would fully implement and comply with this norm, at least to the extent of its involvement, that is, to the extent of the language it proposed regarding education about national values.

### 5.3.2 Other International HRE Initiatives

In order to fully measure Australia's commitment to HRE at the international level, it is necessary to look beyond its involvement in the drafting of Article 29(1) of CROC, and to consider its participation in other international HRE initiatives that provide a supportive framework for the implementation of Article 29(1). By 1988,

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<sup>54</sup> Australian Council on Population and Ethnic Affairs, *Multiculturalism for All Australians - Our Developing Nationhood* (1982) Australian Government Publishing Service, Canberra, 1. Accessed at: [www.multiculturalaustralia.edu.au/history/timeline.php?myOption=Multiculturalism+in+Practice](http://www.multiculturalaustralia.edu.au/history/timeline.php?myOption=Multiculturalism+in+Practice) on 7 September 2007.

<sup>55</sup> Chiam, Madelaine 'Government Decision-Making and International Law: Australia and the Framework Convention on Tobacco Control' (2003) 24 *Adelaide Law Review* 217.

<sup>56</sup> Statement by Bill Barker on Behalf of the Australian Delegation on 21 November 1995 in relation to the drafting of the United Nations Declaration on the Rights of Indigenous Peoples. Barsh, Russel 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force' (1996) 18(4) *Human Rights Quarterly* 782, 791.

the concept of HRE had been part of international human rights instruments for 40 years, yet there was concern about the extent to which States were actually taking steps to ensure that people were being educated about human rights.<sup>57</sup> In an effort to overcome this perceived apathy towards HRE, a new NGO was formed – The People's Decade of Human Rights Education (PDHRE), with the express purpose of lobbying the UN to increase its efforts to promote HRE through proclaiming a decade for human rights education.<sup>58</sup> Thus, the initial impetus for the Decade came from an NGO, but was embraced by States and the Declaration and Programme of Action adopted at the end of the 1993 World Conference on Human Rights, contains a large section devoted to HRE, including a recommendation that there be a Decade for HRE.<sup>59</sup> Ultimately, the General Assembly proclaimed such a Decade for HRE, which called on all States to intensify their efforts regarding HRE, and to prepare and implement national plans for human rights education.<sup>60</sup> To assist States with preparing and implementing national plans of action, the Office of the High Commissioner for Human Rights (OHCHR) drafted Guidelines that included a set of principles, together with a step-by-step strategy for developing national plans in HRE.<sup>61</sup> These Guidelines called on States to establish a national committee for HRE, which should draft the national plan of action for HRE, commission a baseline study of HRE, facilitate the implementation of the national plan, conduct periodic evaluation and review, and finally prepare follow-up programs as required.<sup>62</sup>

To the international community, it must have seemed as if Australia had wholeheartedly embraced the Decade and the recommendations in the Guidelines, because its mid-Decade report to OHCHR on the initiatives it had taken pursuant to the Decade, stated that it had established a national committee for HRE and

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<sup>57</sup> See for example Report of the Secretary-General on Human Rights Education, A/49/261-E/1994/110 and Add.1.

<sup>58</sup> Accessed at: [www.pdhre.org/about.html](http://www.pdhre.org/about.html) on 19 March 2007.

<sup>59</sup> The Declaration and Programme of Action was endorsed by the General Assembly in December 1993 by Resolution 48/121.

<sup>60</sup> General Assembly Resolution A/RES/49/184, 6 March 1995, paragraphs 5 and 6.

<sup>61</sup> A/52/469/Add.1 and Add.1 /Corr.1, 20 October 1997.

<sup>62</sup> Ibid, paragraphs 4 and 23.

provided seed funding to it. Furthermore, the committee's work plan included conducting a comprehensive audit of HRE needs in Australia, developing a national plan, providing assistance in developing comprehensive HRE programs, supporting HRE initiatives in the Asia-Pacific region, reviewing implementation of the national plan, and reporting on progress.<sup>63</sup> Thus, on paper Australia appears to be an example of exemplary compliance with the Guidelines and a State committed to increasing HRE efforts. However, as discussed in the next chapter (section 6.4.1), the Australian Government failed to provide the National Committee for Human Rights Education with sufficient funding to carry out even one of these tasks, let alone all of them. Australia's efforts indicate that it wants to be recognised internationally as a strong supporter of HRE, and this seems to be happening with one scholar noting that the Australian Government is one of the few in the Asia Pacific region to be playing a prominent role in HRE.<sup>64</sup> It is therefore evident that Australia cares about its international reputation regarding HRE.

Australia's desire to be recognised internationally as a strong supporter of HRE was again evident when it introduced the draft resolution proposing the World Programme for HRE<sup>65</sup> which the UN General Assembly duly proclaimed.<sup>66</sup> In addressing the General Assembly, Australia was silent about its own endeavours in relation to HRE, in stark contrast with the approaches of many other States that also addressed the General Assembly.<sup>67</sup> The Australian representative limited his comments to the international arena, speaking of 'a common collective framework for action by all the relevant actors', and 'maintaining an appropriate international

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<sup>63</sup> Office of the High Commissioner for Human Rights 'Summary of National Initiatives Undertaken within the Decade for Human Rights Education (1995-2004)' accessed at: [www.unhcr.ch/html/menu6/1/initiatives.htm](http://www.unhcr.ch/html/menu6/1/initiatives.htm) on 17 January 2002.

<sup>64</sup> Cardenas, above n 1, 369.

<sup>65</sup> Official Record of the 59<sup>th</sup> Session of the General Assembly A/59/PV.70, 10 December 2004.

<sup>66</sup> Resolution 59/113 of 10 December 2004.

<sup>67</sup> For example, Kazakhstan spoke of its efforts to instil in its citizens a culture of respect for human rights; China referred to its national five-year plan to raise awareness among Chinese citizens of democracy, the rule of law and human rights; India highlighted the integration of human rights into diverse subjects at different stages of education; and Japan talked about the seriousness of its efforts to promote HRE and how it was the third UN member state to develop a National Action Plan pursuant to the Decade for HRE. Official Record of the 59<sup>th</sup> Session of the General Assembly A/59/PV.70, 10 December 2004.

framework for human rights education.<sup>68</sup> The inference that can be drawn is that Australia supports HRE at the international level for other States, but does not perceive it as something that it needs to embrace domestically.

The first phase of the World Programme operates from 2005-2007 and is focused on HRE in the primary and secondary school systems. States are encouraged to complete four distinct steps, namely: analyse the current situation of HRE in the school systems; set priorities and develop a national implementation strategy; implement and monitor HRE activities; and finally carry out an evaluation of the program.<sup>69</sup> To achieve these steps, the OHCHR recommended that every Ministry of Education assign a relevant unit to be responsible for coordination with all relevant actors, and to serve as national focal point for school-based HRE initiatives. States were invited to advise the OHCHR of their focal point for the national implementation of the first phase, and these national focal points are listed on OHCHR's web page.<sup>70</sup> Australia has not provided the requested information, and it has not provided the OHCHR with a National Plan of Action for Human Rights Education, because it has not drafted one. In lieu of a National Plan of Action on HRE, Australia provided the OHCHR with an excerpt on HRE from its National Plan of Action for Human Rights.<sup>71</sup> The excerpt is from the 1995 National Plan of Action which was superseded by the National Framework for Human Rights launched in 2004. The conclusion to be drawn from this is that Australia has nothing to report to the OHCHR regarding any initiatives it has taken to carry out any of the four steps for increasing HRE recommended in the Secretary-General's Plan of Action for the First Phase.<sup>72</sup> It appears that once again, Australia positively supported the idea of an ongoing international movement for HRE, but that enthusiasm disappears when it is operating outside of the international arena. The submission of an excerpt on HRE from a National Plan of Action for Human

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<sup>68</sup> Official Record of the 59<sup>th</sup> Session of the General Assembly A/59/PV.70, 10 December 2004.

<sup>69</sup> General Assembly Resolution A/59/525/Rev.1, 2 March 2005, paragraph 26.

<sup>70</sup> Accessed at: [www.ohchr.org/english/issues/education/training/national-focal.htm](http://www.ohchr.org/english/issues/education/training/national-focal.htm) on 22 March 2007.

<sup>71</sup> The excerpt consists of five pages from Australia's 1995 National Plan of Action for human rights. It is noted that the photocopy of this excerpt that appears on the OHCHR's web page is of such poor quality as to be almost unreadable. Accessed at: [www.ohchr.org/english/issues/education/training/docs/actions-plans/Australia.pdf](http://www.ohchr.org/english/issues/education/training/docs/actions-plans/Australia.pdf) on 8 September 2007.

<sup>72</sup> A/59/525/Rev.1, 2 March 2005.

Rights that is over a decade old indicates that Australia is only interested in notionally complying with the minimal recommended reporting to the OHCHR. It appears that Australia has done the minimal amount that it thinks will convince the international community that it is committed to HRE.

### *5.3.3 Conclusion Regarding Australia's International Efforts Relating to HRE*

The above examination reveals that Australia has been actively involved in all of the international HRE endeavours examined in this chapter. However, these endeavours appear to be based on ulterior motives, in that Australia's participation in the drafting of Article 29(1) of CROC seems to have been primarily motivated by a desire to limit or control the content of this norm, and its role in sponsoring the General Assembly resolution proclaiming the World Programme for HRE was to shore up its international reputation as a strong supporter of HRE. Overall, there are growing indicators that Australia perceives HRE as being applicable to, and appropriate for, other States who need international direction or guidance on their domestic HRE practices, unlike Australia.

## **5.4 United States' Involvement in International HRE Initiatives**

This section provides an analysis of the practices of the United States relating to HRE in the international arena. Like Australia, the United States was actively involved in the drafting of CROC, although less so when it came to the drafting of Article 29(1). However, unlike Australia, the United States did not participate in the Decade for HRE, or the subsequent World Programme for HRE.

### *5.4.1 Drafting of Article 29(1) of CROC*

The United States' active participation in the drafting of an international human rights treaty, followed by refusal to be bound by that treaty, is nothing new. The same scenario has been observed with ICESCR<sup>73</sup> and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>74</sup>

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<sup>73</sup> Adopted by General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force 3 January 1976.

<sup>74</sup> Adopted by General Assembly Resolution 34/180 of 18 December 1979, entered into force 3 September 1981.

Throughout the period that CROC was drafted, the United States had a conservative President,<sup>75</sup> who adopted a generally negative attitude towards this treaty, largely because it originated from the Eastern Bloc (Poland).<sup>76</sup> Thus, the provenance of this treaty influenced the United States' attitude from the outset, and as early as 1983, a United States' delegate declared that the United States would never ratify the Convention, but was participating in the drafting process primarily so that other countries would have a better treaty.<sup>77</sup> The United States' efforts to make CROC a 'better treaty' revolved around campaigning for less emphasis on ESC rights favoured by communist countries, and greater incorporation of civil and political rights. Thus, the United States proposed articles on several issues that were not in the Polish draft, including Article 13 (freedom of expression), Article 14 (freedom of religion), Article 15 (freedom of association), and Article 16 (right to privacy). One children's rights advocate, who participated as an NGO representative, commented that these Articles appear to have been proposed by the United States not so much out of an interest in children's rights, as a 'desire to irritate the Soviet Union'.<sup>78</sup> This perspective on the United States' motives gives some insight into its practices surrounding this treaty, suggesting that it was the need to maintain the upper hand with its Cold War enemy that motivated the United States to participate in the drafting of CROC. This is supported by the fact that although the United States had a representative at every meeting of the Working Group, it tended to be a different delegate every year, and invariably a junior lawyer with little experience in children's rights.<sup>79</sup> The result was that the United States brought neither consistency nor experience to its representation on the Working Group.

Despite its opposition to ESC rights, the United States did participate in a limited way in the drafting of Article 29(1). The United States joined with Australia to

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<sup>75</sup> Republican, Ronald Reagan was President from 1981-1989.

<sup>76</sup> Cohen, Cynthia Price 'The Role of the United States in the Drafting of the Convention on the Rights of the Child' (2006) 20 *Emory International Law Review* 185, 188.

<sup>77</sup> Thomas Johnson from the U.S. Department of State Office of the Legal Advisor in Cohen, *Ibid.*

<sup>78</sup> Cohen, above n 35, 39.

<sup>79</sup> Cohen, above n 76, 188.

oppose the inclusion of ‘peoples rights’ in paragraph (a)<sup>80</sup> and successfully objected to another Algerian proposal that there be an express reference to the effect that HRE must still be provided in countries subjected to ‘colonial dominations or foreign occupation’.<sup>81</sup> With respect to paragraph (d), the United States unsuccessfully proposed that the words ‘friendship among all members of the human race, without discrimination’ be used instead of ‘friendship among all peoples, ethnic, religious and indigenous groups’.<sup>82</sup> It appears that the United States was once again trying to avoid any reference to ‘peoples rights’. These few interventions appear to have been the extent of the United States’ involvement in the drafting of Article 29(1), which suggests that this norm was not a provision that overly concerned the United States. Thus, the United States, unlike Australia, did not have any significant influence over the final text of Article 29(1), and did not show any particular commitment to HRE during the drafting process.

#### *5.4.2 United States’ Involvement in other International HRE Initiatives*

The United States, while not itself participating in either the Decade for HRE or World Programme for HRE, did not oppose these initiatives. On the contrary, the United States expressed wholehearted support for these programs for other States. This is evident from the comments made by the United States Representative to the General Assembly prior to the adoption of the World Programme for HRE, to the effect that:

support for the protection of fundamental human rights is one of the foundations of United States foreign policy. ... the United States will stand with people who seek freedom... [and] our fight for the promotion and protection of human rights will continue as long as regimes infringe upon the freedom of their citizens.<sup>83</sup>

The United States’ representative stopped short of explicitly referring to Iraq and Afghanistan, but it was clear from his submission that the United States views HRE

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<sup>80</sup> Detrick, above n 32, 399.

<sup>81</sup> Ibid, 403.

<sup>82</sup> Ibid, 399.

<sup>83</sup> The United States Representative, Yousif Ghafari in the Official Record of the 59<sup>th</sup> Session of the General Assembly A/59/PV.70, 10 December 2004.

as a tool to be used by oppressed people against repressive regimes. References were made to ‘authoritarian and corrupt regimes’ and the need for ‘strong cooperation among democratic nations’.<sup>84</sup> This indicates that the United States sees HRE as being important only for non-democratic countries. In the result, the United States supported the World Programme for HRE, but did not see any need for it to participate in such an initiative. The United States clearly expressed its view that HRE within its sovereign jurisdiction was not something of concern to the UN.

#### *5.4.3 Conclusion Regarding United States’ International Efforts Relating to HRE*

While the United States played a leading role in drafting many of the norms in CROC, Article 29(1) was not one of them. Furthermore, its failure to subsequently ratify this treaty has effectively ended any leadership role it thought it had in the area of children’s rights. The United States support of the Decade for HRE and the World Programme for HRE for other States, and its refusal to itself participate, indicate that it does not see these initiatives as important or relevant. Michael Ignatieff refers to this behaviour as ‘American Exceptionalism’ whereby the United States takes a leadership role in developing international laws, but then refuses to itself be bound by those laws.<sup>85</sup> American exceptionalism is based on the belief that United States does not need to subject itself to international scrutiny of its human rights conduct which, as this chapter has demonstrated, includes HRE.<sup>86</sup>

## **5.5 Conclusion**

The table below summarises the involvement of Australia and the United States in international initiatives to promote HRE, and clearly indicates that Australia played a significantly greater role in this field in the global arena.

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<sup>84</sup> Ibid.

<sup>85</sup> Ignatieff, Michael (ed) *American Exceptionalism and Human Rights* (2005) Princeton University Press, New Jersey, 2.

<sup>86</sup> Ibid, 5.

	Drafting of CROC	Ratification of CROC	Participation in UN Decade for HRE	Participation in World Programme for HRE
Australia	✓	✓	✓	✓
United States	✓	X	X	X

Australia directly influenced the drafting of Article 29(1) of CROC, although this appears to have been motivated, at least in part, by a desire to control or limit the content of this norm. Australia also actively involved itself in the two subsequent pushes to promote HRE, namely the Decade for HRE and the World Programme for HRE. The United States has only notionally involved itself in United Nations' HRE activities, and demonstrated a weak commitment to HRE in the international arena. To the extent that it has been involved, it has been with the apparent aim of establishing norms and commitments for *other* States to embrace.

Both normative and rational actor theorists suggest that how a State behaves on the international stage can be used to predict how that State will behave domestically. If this is the case, one would predict that Australia will have taken more steps to domestically implement and comply with Article 29(1) of CROC than the United States. If the practices of a State in the international arena are also predictive of whether a State will ratify an international treaty, then it would be expected that Australia would commit itself to CROC, and in particular Article 29(1), and the United States would not. The next two chapters examine Australia and the United States' ratification decisions relating to CROC, and their domestic endeavours regarding HRE, and lay the foundation for a re-examination of the existing theories in light of these findings regarding State behaviour vis-à-vis international human rights obligations.

# **Chapter 6 – Mapping the Terrain: Australia and the United States’ Commitment to and Compliance with Article 29(1) of CROC and HRE at the Domestic Level**

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## **SECTION 4 – MAPPING THE TERRAIN: EVALUATING AUSTRALIA AND THE UNITED STATES’ DOMESTIC COMMITMENT TO ARTICLE 29(1) OF CROC AND HRE**

### **6.9 Conclusion**

*One of the intractable problems of contemporary international law lies in the implementation of treaties in the domestic laws and practices of ratifying states.<sup>1</sup>*

## 6.1 INTRODUCTION

This thesis seeks to ascertain what factors influence whether a State will ratify, implement and comply with norms in an international human rights treaty, using Article 29(1) of CROC as a case study. An analysis of Australia and the United States' domestic practices in relation to HRE is crucial to addressing this question. Many of the eight theories considered in Chapter 3 looked only to international influences to explain States' commitment to, and compliance with, human rights treaties. However, three theories, namely liberalism, transnational legal process, and domestic salience suggest that domestic factors are important in predicting States' compliance levels. In order to test whether these theories help to explain Australia and the United States' practices surrounding Article 29(1) of CROC, it is necessary to consider what domestic factors impact on these States' HRE behaviour. To this end, this chapter examines specific HRE initiatives undertaken by federal and state governments to determine the extent to which they are in accordance with the HRE required by Article 29(1) of CROC. This review includes scrutinising whether specific domestic structures such as federalism, national human rights institutions (NHRIs), and domestic Bill of Rights influence compliance.

This chapter begins with an analysis of General Comment No. 5 which sets out what steps the Committee on the Rights of the Child (CRC) recommends States should take to implement CROC.<sup>2</sup> This is therefore a useful measuring stick against which to evaluate Australia and the United States' domestic performance regarding the norm in Article 29(1). This is followed by an examination of the ratification processes, and federal and state Government HRE initiatives. This enquiry is undertaken with a view to ascertaining to what extent domestic factors influenced Australia's decision to ratify CROC, the

<sup>1</sup> Triggs, Gillian 'Implementation of the Rome Statute for the International Criminal Court in Australian Law' (2003) 25 *Sydney Law Review* 507.

<sup>2</sup> General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child, Committee on the Rights of the Child, 3 October 2003, CRC/GC/2003/5

United States' decision not to, and each States' levels of compliance with the norm in Article 29(1) of CROC.<sup>3</sup>

## 6.2 General Comment No. 5

The CRC's General Comment on general measures of implementation of CROC sets out a number of useful suggestions about how State Parties can give effect to the rights in CROC. One of the steps which this General Comment encourages is the development of a comprehensive national plan of action for children. Further, the 1993 Vienna Declaration and Programme of Action called on States to integrate CROC into their national human rights action plans.<sup>4</sup> The United States does not have a human rights action plan, or an action plan for children. While Australia does have a National Plan of Action for Human Rights,<sup>5</sup> it has no action plan for children, and has not integrated CROC into its human rights action plan as recommended in the Vienna Declaration. While Australia's National Plan of Action for Human Rights has one page dealing with HRE,<sup>6</sup> it is brief and self-congratulatory. It merely refers to the funding the Federal Government has given to the Human Rights and Equal Opportunity Commission (HREOC) and to the National Human Rights Education Committee (National Committee), and praises the educative programs developed by HREOC (discussed in section 6.4.2 below) and the relationships built between the Government and NGOs via the National Committee (discussed in section 6.4.1 below). There is no definition of HRE in the Plan of Action nor is there any reference to Article 29(1) of CROC. The Plan is also silent as to how the Government intends to increase or improve HRE, and there are no strategies or plans for the future, no goals or priorities set, and no time frames or measurable targets articulated.<sup>7</sup> The Plan of Action is not so much a forward looking

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<sup>3</sup> The term 'compliance' is used for convenience when discussing Australia and the United States' practices related to HRE as set out in Article 29(1) of CROC, although of course the United States, not having ratified CROC, is under no obligation to comply with this norm. However, since one of the aims of this research is to ascertain whether ratification of a human rights treaty impacts on States' domestic practices, it is necessary to compare Australia's level of compliance with Article 29(1) with the United States' 'compliance' levels.

<sup>4</sup> A/CONF.157/23, 12 July 1993, para 47.

<sup>5</sup> Launched by the Federal Government in December 2004. Accessed at: [www.dfat.gov.au/hr/nap/nap\\_2004.pdf](http://www.dfat.gov.au/hr/nap/nap_2004.pdf) on 10 December 2006.

<sup>6</sup> Ibid, 9.

<sup>7</sup> General Comment No. 5, above n 2, paragraph 32 provides that the plan of action 'must not be simply a list of good intentions; it must include a description of a sustainable process for realizing the rights of

document to guide the Government's future initiatives regarding HRE, but rather a partisan assessment of the Government's record to date in funding HREOC and the National Committee.

The General Comment outlines four measures that are relevant to the implementation of Article 29(1), namely data collection,<sup>8</sup> training,<sup>9</sup> embedding of HRE in school curricula,<sup>10</sup> and cooperative engagement by States with civil society.<sup>11</sup> With respect to data collection, no large-scale studies have been undertaken in Australia or the United States<sup>12</sup> to measure the extent to which HRE is being implemented in schools, which would obviously be useful in identifying problems and informing policy in relation to HRE. Teachers are mentioned in the General Comment as part of a long list of those who should receive systematic and on-going training around CROC. As is demonstrated in the next chapter, the lack of teacher training around CROC and HRE is one of the main obstacles to greater HRE identified by teachers who participated in this research.

The CRC recommends that effective implementation of CROC requires that the convention be reflected in the curriculum of all schools. Section 6.5.1 below contains an analysis of the Victorian school curriculum frameworks and reveals that there is an absence of CROC and HRE in the curriculum. Non-government organisations played an important part in the drafting of CROC, and the CRC notes that they should be similarly involved in the process of domestic implementation.<sup>13</sup> This is yet another area where the Australian Federal Government is failing to fulfil the implementation measures set out in General Comment No. 5. Many of the members of both the National and Victorian HRE committees are NGO representatives, however, the lack of adequate funding

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children throughout the State; it must go beyond statements of policy and principle, to set real and achievable targets'.

<sup>8</sup> General Comment No. 5, above n 2, paragraph 48.

<sup>9</sup> Ibid, paragraph 53.

<sup>10</sup> Ibid, paragraph 68.

<sup>11</sup> Ibid, paragraph 58.

<sup>12</sup> Of course, General Comment No. 5 is not particularly relevant to the United States since it is not a party to CROC. However, the recommendations contained in the General Comment could nevertheless be embraced by the United States if it wished to take further steps to implement the norms in CROC without formally ratifying the treaty.

<sup>13</sup> General Comment No. 5, above n 2, paragraph 58.

from the Federal Government severely limits the capacity of these committees to be actively involved in the domestic implementation of Article 29(1) of CROC. Furthermore, NGOs are playing a part in providing HRE resources to schools, however, this is because teachers are turning to NGOs for assistance and direction in the absence of any directive from the Government on HRE. Thus NGOs are filling a void, rather than engaging cooperatively with Government to implement Article 29(1) of CROC.

The final recommendation for implementation of CROC that the CRC makes concerns NHRIs. However, this issue is dealt with only briefly in General Comment No. 5<sup>14</sup> because it was the subject of an earlier General Comment.<sup>15</sup> How HREOC in Australia is measuring up against this yardstick is considered in section 6.4.2 below, while the United States has no NHRI to evaluate.

While General Comment No. 5 provides guidance for States on how to implement the rights in CROC, it does have some shortcomings, including that it reveals a lack of *practical* understanding of how States can implement CROC. One example of this is seen in the section on legislative measures, which asserts that ‘Where a State delegates powers to federated regional or territorial governments, it *must* also require these subsidiary governments to legislate within the framework of the Convention’<sup>16</sup> (emphasis added). This shows a fundamental misunderstanding of the way in which many federations work. Australia and the United States both operate on a system of co-operative federalism, where state and territory governments are seen as complementary to the federal government, rather than subsidiary to it. Furthermore, constitutional arrangements mean that these federal governments are essentially powerless to *require* states to legislate in areas that are within the states’ jurisdiction, including, for example, education.<sup>17</sup> Thus the CRC’s suggestion that federal governments should, somehow, compel state and

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<sup>14</sup> Ibid, paragraph 65.

<sup>15</sup> General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, Committee on the Rights of the Child, 15 November 2002, CRC/GC/2002/2.

<sup>16</sup> General Comment No. 5, above n 2, paragraph 20

<sup>17</sup> The Federal Governments in Australia and the United States could force states to implement Article 29(1) of CROC by using the external affairs or treaty powers in their respective constitutions (if the United States ratified CROC). However, this is likely to upset the cooperative relationship that state and federal governments strive to maintain.

territory governments to enact legislation implementing CROC is ill-conceived. While national governments remain ultimately responsible for the domestic implementation of treaties, a more nuanced consideration by the CRC of how this might be achieved in federated States would have been helpful.

## SECTION 2 – AUSTRALIA

### 6.3 Ratification Process

Leading Australian human rights scholars have described Australia's relationship with international law as one based on 'deep anxieties'.<sup>18</sup> They suggest that this anxiety stems from a fear that ratifying international treaties will encroach on Australia's sovereignty, and that it allows 'outsiders' to govern what Australia does.<sup>19</sup> This chapter argues that such anxiety is unfounded because the dualist system under which Australia operates means that international law is not binding in domestic law, unless and until enabling legislation is enacted. However, this anxiety, even if unfounded, may impact on the domestic salience of an international norm, and therefore influence whether Australia complies with that norm. Thus, the discussion in this section provides the foundation for the analysis of the various theories on commitment to, and compliance with, international human rights laws undertaken in Chapter 8.

While Australia was quick to ratify CROC (within three and a half months of the treaty entering into force)<sup>20</sup> it has not been so quick to fully comply with Article 29(1). By ratifying CROC, Australia has assumed an obligation under international law to give effect to that treaty,<sup>21</sup> but CROC itself does not have the force of law domestically.<sup>22</sup> There are only a limited number of examples of Australia giving force to international human rights treaties by enacting enabling legislation; the clearest examples being the *Racial Discrimination Act 1975* (Cth) which gives effect to some of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination and the Sex

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<sup>18</sup> Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423.

<sup>19</sup> Ibid.

<sup>20</sup> CROC entered into force on 2 September 1990 and Australia ratified it on 17 December 1990 with effect from 16 January 1991.

<sup>21</sup> Vienna Convention on the Law of Treaties, Article 26.

<sup>22</sup> See *Dietrich v The Queen* (1992) 177 CLR 292 and *Nulyarimma v Thompson* [1999] FCA 1192.

*Discrimination Act 1984* (Cth) which gives effect to parts of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention on the Rights of the Child has not been specifically incorporated into Australian domestic law other than to be declared a relevant instrument under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).<sup>23</sup> This has the effect of including the rights in CROC within the definition of ‘human rights’ in this Act, thereby empowering HREOC to include CROC rights in all its functions relating to human rights, including, for example, in examining legislation to determine whether it is inconsistent with human rights, conciliating complaints of human rights violations, and promoting respect for human rights.<sup>24</sup> Thus, the effect of a dualist system is that Australia can ratify human rights treaties without them having impact domestically until such time as Parliament enacts legislation giving effect to the rights in the treaty.<sup>25</sup> This can be contrasted with the monist system, discussed in section 6.6 below, which the United States operates under, and which results in treaties becoming part of domestic law upon ratification.

In Australia, the executive branch of the Federal Government is responsible for the ratification of international treaties.<sup>26</sup> Concern about the absence of a role for Parliament in this process led to a 1995 Senate Inquiry into Australia’s treaty-making power.<sup>27</sup> The Report that emanated from that Inquiry questioned Australia’s conduct surrounding ratification of CROC, which conduct was one of the reasons for establishing the Inquiry.<sup>28</sup> This is evident from the submission from the Victorian Department of Premier and Cabinet which stated that:

<sup>23</sup> Pursuant to s 47.

<sup>24</sup> The functions of HREOC are set out in Section 11.

<sup>25</sup> The High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 held that administrative decision-makers in government were required to take into account obligations in treaties Australia had ratified, even if those treaties had not been incorporated into domestic law. However, the impact of this decision appears to have diminished since the High Court’s more recent judgement in *Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1. A detailed analysis of these cases is beyond the scope of this thesis.

<sup>26</sup> S.61 of the *Constitution of Australia*.

<sup>27</sup> The Senate Legal and Constitutional Affairs Committee was directed by the Senate on 8 December 1994 to inquire into the Commonwealth’s treaty making power and the external affairs power. Accessed at [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/pre1996/treaty/report/c01.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/c01.htm) on 1 August 2007.

<sup>28</sup> The Committee used CROC as one of its case studies (paragraphs 9.3 – 9.18) *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*. Accessed at: [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/pre1996/treaty/report/](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/), on 4 February 2007.

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The Commonwealth failed to notify Victoria of its intention to go ahead to ratify the UN Convention on the Rights of the Child. The Commonwealth ratified that Convention despite the objections of several State Governments that the Convention took a different policy stance to existing State legislative regimes. Although State and Territory executives were aware of the development of the International Convention on the Rights of the Child, their parliaments were not informed.<sup>29</sup>

Not only was the Commonwealth Government criticised for not consulting with the State and Territory Governments prior to ratifying CROC, it was also condemned for representing that Australia was in compliance at the time of ratification, when this was not the case.<sup>30</sup> Furthermore, Professor Hilary Charlesworth verbally represented to the Inquiry that:

We have been a party to the Convention on the Rights of the Child for a number of years now and I have not seen any sign at all that the Federal Government is moving or trying to get support for legislation. ... We have HREOC and there seems to be absolutely no sign of a more serious implementation of those rights. So I do think there is some room to question the good faith. I think the Australian Government is having its cake and eating it too. It is getting the international applause for signing the treaties and incurring no domestic wrath for doing so.<sup>31</sup>

Ultimately, the Senate Inquiry concluded that a more open and transparent system of scrutiny of treaties was required, and that a process was needed that would identify inconsistencies with state, territory or commonwealth laws prior to ratification.<sup>32</sup> As a result of the Inquiry, several reforms were implemented, including that treaties be tabled in Parliament at least 15 sitting days prior to any binding action being taken, and that a Parliamentary Joint Standing Committee on Treaties (JSCOT) be established to scrutinise all treaties.

Notwithstanding that the Australian Government had already ratified CROC, JSCOT decided in 1997 to inquire into the domestic ramification of CROC and federal and state progress with compliance. The result was the publication of its

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<sup>29</sup> Ibid, paragraph 9.8.

<sup>30</sup> See submissions of the Public Interest Advocacy Centre, Professor Don Greig, and the National Children's Bureau of Australia, at *Trick or Treaty*, above n 28, paragraphs 9.10 to 9.12.

<sup>31</sup> *Trick or Treaty*, above n 28, paragraph 9.16.

<sup>32</sup> Ibid, paragraph 9.18.

report in August 1998 which recommended in relation to the issue of education, that the Government encourage the inclusion of the Convention on the Rights of the Child in school curricula and in training programs for teachers, with an emphasis on the mutuality of rights and responsibilities, including the rights of parents.<sup>33</sup> The inclusion of recommendations relating to the rights of parents, and the attempt to link rights with responsibilities, is not in accordance with Article 29(1) of CROC, which refers to children developing respect for their parents, but is silent on the issue of parents' rights. It appears to have been included in response to concerns from some parents that CROC could be used to encourage children to challenge parental authority.<sup>34</sup> The recommendations by JSCOT that children be educated about parents' rights potentially legitimises the Government taking steps to implement Article 29(1) in a manner not justified by the language of CROC. As discussed in Chapter 3, the manner in which Article 29(1) should be complied with is clearly set out in General Comment No. 1.

The Federal Government responded to these recommendations by asserting that education is the responsibility of state governments, and that it will alert State Education Ministers to JSCOT's recommendations.<sup>35</sup> In addition the Government referred to the work of HREOC in developing HRE resources and the Discovering Democracy kit (both of which are analysed in detail below) and, most interestingly, to a resource called Making Choices.<sup>36</sup> This is a package of 15 booklets designed to develop economic literacy. Students are asked to consider the part they and others play in the economy as producers and consumers of goods and services.<sup>37</sup> It is difficult to see any link between this resource and HRE or why the Government included it as an example of HRE.

While the Australian Government now has a comprehensive system in place for reviewing and ratifying international treaties, the dualist system means that this

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<sup>33</sup> JSCOT *United Nations Convention on the Rights of the Child*, 17<sup>th</sup> Report, August 1998, Recommendations 41 and 42

<sup>34</sup> Ibid, paragraph 7.307.

<sup>35</sup> *Government Response to the Joint Standing Committee on Treaties' Inquiry into the Convention on the Rights of the Child*, March 2003, page 49, accessed at [www.aph.gov.au/house/committee/jscot/governmentresponses/17th.pdf](http://www.aph.gov.au/house/committee/jscot/governmentresponses/17th.pdf) on 15 September 2007, 49.

<sup>36</sup> Ibid, 50.

<sup>37</sup> Accessed at [www.curriculum.edu.au/catalogue/product.php?cat\\_id=332](http://www.curriculum.edu.au/catalogue/product.php?cat_id=332) on 4 August 2007.

has little impact on domestic compliance. Several Australian human rights experts have commented that:

On paper, Australia has long been a champion of the international human rights framework, ratifying almost every human rights treaty negotiated by the international community. Yet, in practice, it has failed to implement the majority of these treaties into domestic law.<sup>38</sup>

These scholars analysed three examples of Australia's domestic human rights practices being inconsistent with their international practices,<sup>39</sup> and concluded that Australia's relationship with the international human rights system 'is based more on pragmatism than on principle', and that other policy concerns, for example, national security and economic interests, regularly trump human rights considerations.<sup>40</sup> The next section considers Australia's domestic initiatives relating to HRE, in order to lay the foundation for later analysis of whether Australia's domestic practices surrounding Article 29(1) of CROC are consistent with its international practices regarding this norm.

#### **6.4 Australian Federal Government's Initiatives Regarding HRE**

As indicated above, when considering the Australian Government's domestic initiatives regarding HRE, the first question that needs to be considered is: what, if any, power does the Federal Government have to enact laws relating to HRE? The starting point is the Australian Constitution, and in particular s 51, that specifies the subject matter jurisdiction of the Federal Government. Any area not included under the s 51 heads of power is the responsibility of the States. However, this does not mean that the States exercise exclusive jurisdiction over education. Rather, if the Commonwealth can find another power under which it can make laws relating to education, for example the external affairs power in s 51(xxix), then it is able to legislate in this area.<sup>41</sup>

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<sup>38</sup> Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George *No Country is an Island: Australia and International Law* (2006) UNSW Press, Sydney, 64.

<sup>39</sup> Ratification of the Rome Statute establishing the International Criminal Court, engagement with the UN Treaty bodies and response to human rights violations of an Australian citizen, David Hicks. *Ibid*, 65 – 98.

<sup>40</sup> Charlesworth, above n 38, 99.

<sup>41</sup> The external Affairs power has previously been used to give the Federal Government jurisdiction to enact legislation it would otherwise be powerless to make. Two well known examples of the use of this power are the enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth) in reliance on Australia's ratification of the International Covenant on Civil and Political Rights, and the enactment of

Because the Australian Constitution does not provide that education is the *exclusive* domain of the States, the Federal Government can, and does, seek to exert influence over the education being provided in state schools. It does this by relying on a number of Constitutional provisions. One of these is s 51(xxiiiA), the provision relating to social security which empowers the Federal Government to make laws with respect to the provision of ‘benefits to students’. The breadth of s 51(xxiiiA) was considered in the case of *Alexandra Private Geriatric Hospital Pty. Ltd. v Commonwealth*<sup>42</sup> in which the High Court held that the term ‘benefit’ has a wide meaning and in particular that it ‘is not confined to a grant of money or some other commodity. It may encompass the provision of a service or services.’<sup>43</sup> Furthermore, by providing a benefit pursuant to this section of the Constitution, the Federal Government is empowered to regulate in the field so as to ensure that the provision of the benefit is effective. The High Court also held that the benefit did not have to be provided directly to the intended beneficiary, but could instead be provided to the entity supplying services to the beneficiary. Applying the rationale from this case to HRE for children, it is clear that the Federal Government could provide funding to schools for HRE, and then regulate the content and provision of that HRE in any school that accepted the funding.

Another way in which the Federal Government can exert a degree of control over education is via s 96 of the Constitution, which provides that the Commonwealth ‘may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.’ The High Court has held that the conditions attached to financial aid given to states can be very broad and do not have to be pursuant to any other Commonwealth power.<sup>44</sup> An example of legislation enacted pursuant to this constitutional power is the *Schools Assistance (Learning Together through Choice and Opportunity) Act 2004* (Cth), which the Federal Government has used to impose a number of conditions on school funding. It has, for example, required at least two hours a week of physical activities for children; insisted on report cards ranking students against

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the *World Heritage Properties Conservation Act 1983* (Cth) to prevent the State of Tasmania from damming the Franklin River which had been included on the World Heritage List.

<sup>42</sup> (1987) 162 CLR 271.

<sup>43</sup> Ibid.

<sup>44</sup> *State of Victoria and Others v The Commonwealth* (Federal Aids Roads Case) (1926) 38 CLR 399.

national benchmarks; required prominent display of the National Values Framework developed by the Federal Government (discussed in section 6.4.3(ii) below); mandated the use of a nationally consistent curriculum; called for common testing in several key learning areas, including civics and democracy; and demanded a functioning flag pole and compulsory flying of the Australian flag.<sup>45</sup> This makes it clear that the Federal Government is willing and able to exert significant influence and control over secondary school education. Yet, despite having this power, the Federal Government appears to have made no effort to provide funding to the states for the inclusion of HRE in school curricula in accordance with Article 29(1) of CROC.<sup>46</sup>

Instead of using funding incentives or cooperative measures to encourage state governments to implement HRE, the Federal Government has adopted a third way of ‘promoting’ HRE in schools, which could be described as ‘informal persuasion’. Four examples of these efforts are discussed below: namely, the establishment of the National Committee, the creation of resources by HREOC, and the development of the Discovering Democracy kit and the National Values Framework by the Department of Education. In addition, the Government’s Inquiry into Good Governance and Human Rights Education in the Asia Pacific Region is also analysed to see what it reveals about the Federal Government’s thinking about HRE within Australia and the region.

#### *6.4.1 National Human Rights Education Committee*

The National Committee was established in 1998 with \$10,000 seed funding from the Federal Government, and has since received two further grants of \$20,000.<sup>47</sup> The funding has never been sufficient to employ staff so the National Committee’s work is done entirely by volunteers, which severely limits its

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<sup>45</sup> Schools Assistance (*Learning Together -- Achievement Through Choice and Opportunity*) Regulations 2005 (Cth).

<sup>46</sup> It should be noted that pursuant to Article 4 of CROC, the Government must implement the rights in CROC by undertaking ‘all appropriate legislative, administrative, and other measures’. Thus, it is not necessary that the Federal Government enact legislation to give effect to Article 29(1) of CROC, it may use non-legislative measures to achieve implementation, such as funding initiatives and administrative policies.

<sup>47</sup> Official Committee Hansard Senate Legal and Constitutional Legislation Committee Reference: Australian Human Rights Commission Legislation Bill 2003, 29 April 2003, Sydney, 38.

capacity to undertake major initiatives.<sup>48</sup> The impetus for establishing the National Committee was not Article 29(1) of CROC, but rather the UN Decade for Human Rights Education (1995–2004). It is made up of 23 members representing a variety of different NGOs and other organisations, as well as individuals with recognised expertise in HRE.<sup>49</sup> The National Committee does not describe itself as an NGO, but rather as ‘a cooperative venture drawing together representatives of Government, business and community sector for the development and promotion of a systematic and comprehensive approach to the delivery of human rights education to the Australian community’.<sup>50</sup>

Thus far the National Committee has organised two national conferences on HRE, at which speakers addressed issues relating to the provision of HRE to diverse sectors, including the media, judiciary, schools, and the broader community.<sup>51</sup> It has also made submissions to Government advocating for greater HRE in Australian schools,<sup>52</sup> but has done little to actively promote HRE in secondary schools.<sup>53</sup> This may be due, in part, to the fact that education is a state, not Federal responsibility. As such, when it comes to promoting HRE in schools, it is the state-based Human Rights Education Committees that have been most active. The work of the Victorian Human Rights Education Committee is discussed in section 6.5.2. below.

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<sup>48</sup> See posting from Michael Curlotti (a member of the National Committee) to the HREA list serve on 20 November 2002 stating ‘Where we have faced considerable challenges is in the attraction of sufficient funding to enable us to undertake the kinds of key initiatives that are implicit in the Guidelines for the Decade’. Copy on file with author.

<sup>49</sup> Members of the National Committee have included distinguished human rights experts such as Professor Hilary Charlesworth, Dr Sev Ozdeowski, Professor Chris Sidoti, and the late Professor Alice Tay.

<sup>50</sup> Accessed at: [www.nchre-australia.org/index.html](http://www.nchre-australia.org/index.html) on 9 October 2003.

<sup>51</sup> *Dignity, Democracy, Equality: The National Strategic Conference on Human Rights Education*, University House, Australian National University, Canberra, 23 August 2002 and *Human Rights: New Paradigms and New Responsibilities* University of Technology, Sydney, 5 - 6 December 2003.

<sup>52</sup> See for example the National Committee’s submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Human Rights and Good Governance Education in the Asia Pacific, 15 January 2003 and its supplementary submission dated 11 May 2003.

<sup>53</sup> The National Committee has developed a human rights program for primary schools called the ‘Citizenship for Humanity’. As it is exclusively designed for primary schools, it is not relevant to this research. However, it should be noted that the National Committee has been disappointed at the extremely slow take-up of this initiative. See Report of the Inquiry into Human Rights and Good Governance Education in the Asia Pacific Region, paragraph 3.23. Accessed at: [www.aph.gov.au/House/committee/jfadt/HRGGoodGov/report/chapter3.pdf](http://www.aph.gov.au/House/committee/jfadt/HRGGoodGov/report/chapter3.pdf) on 25 February 2007. This may be because the Citizenship for Humanity is not directly linked to the curriculum frameworks. As discussed in Chapter 7, some teachers perceive the lack of government mandate regarding HRE as an obstacle to widespread HRE in schools.

The National Committee has, for a number of years, discussed establishing a university based National Centre for Human Rights Education to act as a focus for ‘scholarship, research and consultation for human rights education in Australia with a significant outreach to the Asia Pacific.’<sup>54</sup> The Australian Centre for Human Rights Education has now been established at RMIT University in Melbourne, although it will not be formally launched until December 2007.<sup>55</sup> There is no information available at this time about its aims or proposed activities. Although establishing a national centre for human rights education is not included in the CRC’s recommendations, in either General Comments 1 or 5, as being a necessary measure for implementing Article 29(1) of CROC, it would appear to have the potential to increase HRE endeavours within Australia. However, it is unclear to what extent the Centre’s focus will be on HRE in the Asia Pacific Region rather than within Australia.

Although the National Committee appears not to have focused on advancing HRE in secondary schools, it was cited by the Federal Government in its report to the CRC as one of its key initiatives in promoting awareness of CROC.<sup>56</sup> The CRC obviously did not enquire too deeply into the success or otherwise of the National Committee’s ‘efforts’ before stating in its Concluding Observations that: ‘The Committee notes with appreciation the efforts made by the State to promote awareness of the Convention, including through … the establishment of the National Committee on Human Rights Education.’<sup>57</sup> The National Committee has, in fact, done little to promote awareness of CROC in secondary schools, or increase Australia’s compliance with Article 29(1) of CROC. Thus while the establishment of the National Committee is a positive step towards increasing HRE, without sufficient funding it is unable to make a substantive contribution towards increasing compliance with Article 29(1) of CROC. Furthermore, the fact that Australia has set up such a committee could lead to less HRE efforts since as a result of this initiative, Australia might be subjected to less international scrutiny from bodies such as the CRC who may be satisfied

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<sup>54</sup> Australian House of Representatives newsletter *About the House*, May – June 2003, 31.

<sup>55</sup> Accessed at: [www.rmit.edu.au/dsc/achre](http://www.rmit.edu.au/dsc/achre) on 15 September 2007.

<sup>56</sup> Australia’s *Combined Second and Third Reports Under the Convention on the Rights of the Child*, March 2003, paragraph 54.

<sup>57</sup> *Concluding Observations: Australia CRC/C/15/Add.268*, 20 October 2005, paragraph 21.

that Australia, by establishing the National Committee, is making a genuine effort to promote HRE.

#### *6.4.2 Human Rights and Equal Opportunity Commission*

A variety of guidelines have been developed to give States direction on how NHRIs should operate. For example, the Paris Principles,<sup>58</sup> set out normative standards for NHRIs, and recommend that it is a responsibility of such institutions ‘to assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles’.<sup>59</sup> The Paris Principles are now more than a decade old, and there have been more recent articulations on the role of NHRIs, most notably General Comment No. 2 from the CRC in 2002.<sup>60</sup> This General Comment sets out activities that an independent NHRI should carry out in order to implement CROC, and specifically includes ‘assist in formulation of programmes for the teaching of, research into, and integration of children’s rights, in the curricula of schools’.<sup>61</sup> Unfortunately, this provision does not explicitly refer to the obligation in Article 29(1), missing the opportunity to make the point that NHRIs should focus on education about the broader concept of human rights, and not just on children’s rights.

With the Paris Principles and General Comment No. 2 in mind, it is appropriate to consider how Australia’s NHRI rates in its activities relating to HRE. The Human Rights and Equal Opportunity Commission is an independent statutory body established by the Federal Government pursuant to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the Act). The functions of HREOC are set out in s 11 of the Act and include ‘to promote an understanding and acceptance, and the public discussion, of human rights in Australia’ and ‘to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights’. The Human Rights and Equal Opportunity Commission appears to take this responsibility

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<sup>58</sup> Adopted by General Assembly Resolution 48/134 of 20 December 1993, accessed at [www.ohchr.org/english/law/parisprinciples.htm](http://www.ohchr.org/english/law/parisprinciples.htm) on 15 January 2007.

<sup>59</sup> Ibid, paragraph 3(f).

<sup>60</sup> General Comment No. 2, above n 15.

<sup>61</sup> Ibid, paragraph 19(n).

seriously, noting on its web page that ‘human rights education is one of the core responsibilities of the Commission’.<sup>62</sup>

The Human Rights and Equal Opportunity Commission was established before CROC was ratified by Australia, or had even been drafted. However, as indicated above, in 1993 the Federal Government increased HREOC’s jurisdiction to include CROC. Since then, HREOC has developed significant resources on human rights for use by teachers and students. As part of its Youth Challenge Program,<sup>63</sup> it created eight separate modules on human rights for teachers. They include a general module on human rights; ‘Bringing them Home’, that examines the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families; a module that addresses the myths about refugees, migrants and Indigenous peoples; ‘A last resort?’, which relates to the National Inquiry into children in immigration detention; Paid Maternity Leave which has classroom activities for students on gender and the workplace, and most recently ‘Voices of Australia’ which is aimed at teaching secondary students about diversity, respecting difference, and challenging discrimination and prejudice.<sup>64</sup> These modules have been praised by the Australian Education Union,<sup>65</sup> and are a comprehensive and accessible resource. By addressing issues relating to indigenous peoples, refugees, racism and gender, the modules give effect to the HRE articulated in Article 29(1)(d) of CROC and are congruent with the recommendations in General Comment No. 1.<sup>66</sup> However, all the modules concentrate on civil and political rights, with few, if any, references to economic social and cultural rights (ESC rights). This is partly explicable by the fact that the International Covenant on Economic Social and Cultural Rights has not been listed in the Schedule to the Act as a human rights treaty for which HREOC has responsibility. However, CROC includes economic, social and cultural rights (ESC rights)<sup>67</sup> and hence could be used by

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<sup>62</sup> Accessed at: [www.hreoc.gov.au/about\\_the\\_commission/index.html](http://www.hreoc.gov.au/about_the_commission/index.html) 26 October 2006.

<sup>63</sup> A collection of resources and activities developed for Australian secondary school teachers, accessed at: [www.humanrights.gov.au/education/youthchallenge/](http://www.humanrights.gov.au/education/youthchallenge/) on 1 August 2007.

<sup>64</sup> All eight modules can be downloaded at: [www.humanrights.gov.au/education/youthchallenge/](http://www.humanrights.gov.au/education/youthchallenge/) accessed on 1 September 2007.

<sup>65</sup> Accessed at: [www.aeufederal.org.au/Women/HREOC.html](http://www.aeufederal.org.au/Women/HREOC.html) on 1 August 2007.

<sup>66</sup> General Comment No. 1: The Aims of Education, Committee on the Rights of the Child, 17 April 2001, CRC/GC/2001/1, paragraph 11.

<sup>67</sup> Including for example the right to health (Article 24), the right to social security (Article 26) and the right to education (Article 28).

HREOC as a basis for developing HRE modules relating to children's ESC rights. This would be in keeping with General Comment No. 1 which emphasises the need for HRE pursuant to Article 29(1) to encompass *ALL* human rights, not merely civil and political rights.<sup>68</sup>

In addition to developing these eight modules, HREOC also identified curriculum links for teachers in each state and territory that enable them to readily see how they can use these HRE resources within the state-mandated curriculum frameworks. One would expect that pointing out to teachers how human rights fit within the curriculum frameworks would make this resource more attractive to teachers. However, this does not appear to be the case, as HREOC President John von Doussa has noted:

The challenge facing HREOC is to get as many teachers and schools as possible to use these materials, and to promote an understanding of human rights in the classroom. But realistically, this is a challenge we can not meet unless governments, at a state and federal level, provide the resources to train human rights educators and make human rights education a mandatory part of the curriculum.<sup>69</sup>

Thus, it is not sufficient to show teachers how HRE resources can fit within the curriculum if the teachers have not been trained in how to teach human rights, and the curriculum does not compel them to incorporate HRE into their work. This perception by von Doussa is supported by this research which found that HREOC resources are not being widely used in Melbourne Secondary schools. Melbourne teachers who participated in this research were asked to identify the resources they used in their HRE work.<sup>70</sup> The most common response to this question was that teachers relied on NGOs, such as Amnesty International, as the source of their materials.<sup>71</sup> This appears to be in part because Amnesty International is well known for its work in human rights, has an established

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<sup>68</sup> General Comment No. 1, above n 66, paragraph 2.

<sup>69</sup> von Doussa, John 'Human Rights Education – Education for Life' ABC News Online, 16 February 2007, accessed at: [www.abc.net.au/news/opinion/items/200702/s1849190.htm](http://www.abc.net.au/news/opinion/items/200702/s1849190.htm) on 1 August 2007.

<sup>70</sup> Survey Question 4, attached as Appendix 1.

<sup>71</sup> See for example Survey M30 'We have had speakers from Amnesty'; Survey M29 'Amnesty video'; Survey M28 'Human Rights Watch and Amnesty case studies and kits'; Survey M27 'Amnesty International, Save the Children Foundation, UNICEF and Rugmark'; and M24 'Amnesty International Schools Pack'.

schools program,<sup>72</sup> and a number of teachers or students have had previous association with this NGO.<sup>73</sup> It seems that because HREOC is not a high profile global human rights organisation, it is not at the forefront of teachers' minds when they search for sources of HRE materials. No doubt there are teachers who use HREOC's modules on human rights, but 100% of the sample used for this research did not identify this resource as one they had used.

This finding suggests that HREOC is not widely known outside of legal circles, or at least not its work in the field of HRE. The low profile of HREOC in education circles is evident from a review of leading Australian education journals which revealed a complete absence of any scholarly evaluation of HREOC's work in human rights education generally, and the Youth Challenge modules in particular.<sup>74</sup> Another possibility is that HREOC, although an independent statutory body, may not be seen as entirely separate from the Federal Government in the same way that NGOs, such as Amnesty International, are seen as completely independent of government. As discussed in section 6.4.3 below, some teachers who participated in this research were reluctant to use the Federal Government's Discovering Democracy kit because they perceived it as being government propaganda, rather than a balanced resource. This same perception may apply to HREOC's materials, although empirical research would need to be conducted to test this.

The lack of impact that HREOC is having on HRE within Melbourne schools may also be due to the federal distribution of power, for as discussed above, it is state governments that have primary jurisdiction over education. This may lead Melbourne teachers to look to state-based bodies, such as the Victorian Department of Education, for direction on the resources they should be using. The research findings suggest that HREOC's work is unlikely to penetrate into schools unless and until it develops links with state Departments of Education which are in a position to positively direct teachers to incorporate HRE into the

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<sup>72</sup> Amnesty International Australia has an established schools network that includes over 200 Amnesty groups within Victorian schools. Accessed at: [http://action.amnesty.org.au/hre/comments/youth\\_resources/](http://action.amnesty.org.au/hre/comments/youth_resources/) on 15 September 2007.

<sup>73</sup> For example Survey M30 noted that her 'youngest child used to work for them [Amnesty International]' and Survey M26 who wrote that her 'students chose an organisation such as Amnesty International or the UN' to research and report back on their findings.

<sup>74</sup> For example *Australian Journal of Education*, *Australian Educational Researcher* and *Australia and New Zealand Journal of Law and Education*.

curriculum and recommend HREOC's resources. However, this seems unlikely in the near future, if the publication of the *Ideas for Human Rights* booklet by the Victorian Department of Education<sup>75</sup> is any guide. This booklet, discussed in depth at section 6.5.2 below, suggests a variety of activities and materials that teachers can use to generate HRE in their classrooms, but makes no reference to any HREOC resources.

The Human Rights and Equal Opportunity Commission has undertaken the tasks recommended by the CRC in General Comment No.2, in that it has formulated resources for teaching human rights in schools.<sup>76</sup> These endeavours would be more consistent with Article 29(1) of CROC if they incorporated ESC rights, but nevertheless represent an excellent attempt to provide HRE in accordance with Article 29(1). Although HREOC's efforts do not appear to have been embraced by Melbourne secondary schools, this is not due to any failings on the part of HREOC, but rather the absence of any power to compel use of the HRE resources it has developed. As the President of HREOC has acknowledged, 'producing human rights education resources is the easy part. The hard part is getting these resources into the classrooms.'<sup>77</sup>

#### 6.4.3 *Department of Education Science and Training*

The Federal Department of Education, Science and Training (DEST) has undertaken two HRE initiatives, namely the Discovering Democracy kit<sup>78</sup> and the National Values Framework,<sup>79</sup> both of which are analysed in this section to determine the degree to which they amount to implementation of, or compliance with, Article 29(1) of CROC.

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<sup>75</sup> Department of Education and Training (Vic) *Ideas for Human Rights Education* (2005) Department of Education and Training, Melbourne.

<sup>76</sup> General Comment No. 2, above n 15, paragraph 19(n) and (o).

<sup>77</sup> von Doussa, above n 69.

<sup>78</sup> The Discovering Democracy kit accessed at: <http://www1.curriculum.edu.au/ddunits/about/about.htm> on 15 September 2007.

<sup>79</sup> The National Values Framework accessed at: [www.valueseducation.edu.au/values/default.asp?id=8757](http://www.valueseducation.edu.au/values/default.asp?id=8757) on 15 September 2007.

(i) *Discovering Democracy Kit*

The Discovering Democracy kit is a project that the Attorney-General has described as a ‘flagship’ of its HRE initiatives.<sup>80</sup> It was developed by DEST, and distributed to all Australian primary and secondary schools in 1998. The materials form part of DEST’s efforts to improve understanding about civics and citizenship, and aim to give students knowledge of the history and operation of Australia’s political and legal systems and institutions, and of the principles that underpin Australian democracy.<sup>81</sup> Discovering Democracy was launched by DEST in two stages; the first stage (1997-2001) involved the production and distribution of materials to all Australian schools, and the second stage (2001-2004) focused on enhancing professional development for teachers.<sup>82</sup>

Many of the Melbourne teachers who were interviewed as part of this study were generally aware of the Discovering Democracy kit but tended to be critical of it. One of the common complaints was that the material is very pro-government and self-congratulatory, and could almost be perceived as ‘propaganda’. This is illustrated in the following excerpt from an interview with a Melbourne secondary school teacher:

<i>Interviewer:</i>	Are you familiar with the Discovering Democracy kit?
<i>Teacher:</i>	Yes.
<i>Interviewer:</i>	Have you got an opinion on it?
<i>Teacher:</i>	I think it’s politically motivated, especially in regards to citizenship. I don’t use it. We [the school] don’t use it. <sup>83</sup>

An example of this ‘political motivation’ is the section dealing with the debate about whether Australia needs a Bill of Rights. It states:

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<sup>80</sup> See the former Attorney General Daryl Williams’ opening address at the National Committee’s Human Rights Education conference in August 2002. ‘The Role of Human Rights Education in Australia’ accessed at [www.ema.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches\\_2002\\_Speeches\\_The\\_Role\\_of\\_Human\\_Rights\\_Education\\_in\\_Australia\\_\(23\\_August\\_2002\)](http://www.ema.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2002_Speeches_The_Role_of_Human_Rights_Education_in_Australia_(23_August_2002)) on 15 September 2007.

<sup>81</sup> Discovering Democracy, above n 78.

<sup>82</sup> Ibid.

<sup>83</sup> Interviewee M5.

The demand for a bill of rights in the constitution continues. People are shocked to find that so few rights are protected in the constitution. They should not be too alarmed. Australian society believes in human rights and has many institutions, old and new, which protect them. The best protection for human rights is not a bill of rights but a long tradition of respecting them.<sup>84</sup>

This research indicates that a statement such as this, which promotes the Government's position on a bill of rights in a very partisan and uncritical manner, diminishes the utility of the kit as a teaching resource.

The kit has units for four different levels of schooling, namely middle primary, upper primary, lower secondary and middle secondary.<sup>85</sup> The units address such topics as how laws are made, how the federal system of government works, the role of political parties in government and the importance of symbols such as the Australian flag. These topics do not fall within the ambit of HRE as set out in Article 29(1) of CROC and elaborated on in General Comment No. 1. Only the unit for middle secondary<sup>86</sup> includes any HRE, and the way human rights are addressed in this unit does not conform to the HRE articulated in Article 29(1) of CROC. One area of non-compliance is the significant bias towards discussion of civil and political rights, with ESC rights largely ignored. Thus the class activities and case studies relate to issues such as freedom of speech<sup>87</sup> and the right to peaceful demonstration.<sup>88</sup> Furthermore, there is no mention of 'the principles enshrined in the Charter of the United Nations' as articulated in Article 29(1)(b) of CROC. General Comment No. 1 recommends that HRE be balanced and address both global and local issues,<sup>89</sup> and these two suggestions are not picked up on in the unit on human rights. For example, when human rights violations are discussed, the cases used to illustrate the point are invariably from outside Australia,<sup>90</sup> and Australia is described as

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<sup>84</sup> Discovering Democracy Unit *Government and the Law*, Chapter 3, accessed at: [www.curriculum.edu.au/ddunits/guide/g3e\\_human.htm](http://www.curriculum.edu.au/ddunits/guide/g3e_human.htm) on 15 January 2007.

<sup>85</sup> Accessed at: [www1.curriculum.edu.au/ddunits/units/units.htm](http://www1.curriculum.edu.au/ddunits/units/units.htm) on 2 August 2007.

<sup>86</sup> Middle secondary school covers grades 8 and 9 by which time students are 14-15 years old.

<sup>87</sup> For example the Australian Government's decision not to grant a visa to David Irving.

<sup>88</sup> The example used for this exercise is Aung San Suu Kyi in Burma. The inference being that there are no Australian examples of breaches of this right.

<sup>89</sup> General Comment No. 1, above n 66, paragraphs 4 and 13.

<sup>90</sup> One case study looks at Paul Hill, who was convicted of bombing hotels in England in support of Irish independence. Amnesty International successfully campaigned for the conviction to be quashed, and

enjoying ‘a reputation as a country in which human rights have been observed and protected to a very high degree’.<sup>91</sup> When the rights of Indigenous Australians are addressed, it is in the context of historical wrongs,<sup>92</sup> the implication being that the rights of Indigenous Australians are now respected. The most recent activity with respect to Indigenous Australians is the passing of the *Racial Discrimination Act 1975* (Cth). There is no reference to HREOC’s teaching resources relating to Indigenous Australians, such as the *Bringing them Home* education module<sup>93</sup> which addresses the separation of Aboriginal and Torres Strait Islander children from their families, or other material HREOC has compiled on issues such as Indigenous deaths in custody,<sup>94</sup> native title<sup>95</sup> and reconciliation.<sup>96</sup> The fact that DEST does not link its resources to those developed by HREOC suggests that it is not willing to use materials which are critical of the Government or which suggest that violations of Indigenous Australians’ human rights are still occurring. The lack of any connection with HREOC’s HRE resources suggests that there is an absence of collaboration between the Federal Department of Education and Australia’s national human rights institution. The lack of cooperation between these two entities may be one of the reasons why there is not widespread HRE in Melbourne secondary schools as discussed in the next Chapter.

The National Committee is critical of the Discovering Democracy kit. Although it welcomed the inclusion of a unit on human rights, it expressed concern that human rights have not been incorporated across all levels of the Discovering

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the case was ultimately made into the film *In the Name of the Father*. Another example is of the fictional planet of ‘Hanic’ where everybody follows the same religion and the sexes are not treated equally. Accessed at: <http://www1.curriculum.edu.au/ddunits/units/ms2fq1acts.htm> on 2 August 2007.

<sup>91</sup> ‘Focus Question 4: What is Australia’s Record on Indigenous People’s Rights?’, Discovering Democracy Human Rights Unit, accessed at: <http://www1.curriculum.edu.au/ddunits/units/ms2fq4acts.htm> on 2 August 2007.

<sup>92</sup> For example the main issue examined with respect to Indigenous peoples is that they were not full citizens with a right to vote until 1967. Accessed at: [http://www1.curriculum.edu.au/ddunits/units/ms2human\\_glance.htm#Focus%20question%204](http://www1.curriculum.edu.au/ddunits/units/ms2human_glance.htm#Focus%20question%204) on 15 September 2007.

<sup>93</sup> Accessed at: [www.humanrights.gov.au/education/bth/index.htm](http://www.humanrights.gov.au/education/bth/index.htm) on 2 August 2007.

<sup>94</sup> *Indigenous Deaths in Custody 1989 – 1996* A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (October 1996), accessed at: [www.hreoc.gov.au/social\\_justice/publications/deaths\\_custody/index.html](http://www.hreoc.gov.au/social_justice/publications/deaths_custody/index.html) on 15 September 2007.

<sup>95</sup> Native Title Reports have been published by HREOC every year since 1994. All the reports accessed at: [www.hreoc.gov.au/social\\_justice/nt\\_report/index.html](http://www.hreoc.gov.au/social_justice/nt_report/index.html) on 15 September 2007.

<sup>96</sup> Reconciliation forms part of the resource *Social Justice and Human Rights for Aboriginal and Torres Strait Islander Peoples* accessed at [www.hreoc.gov.au/social\\_justice/info\\_sheet.html](http://www.hreoc.gov.au/social_justice/info_sheet.html) on 15 September 2007.

Democracy program.<sup>97</sup> While it has been critical of the *quantity* of HRE within the kit, the National Committee has not commented on the *substance* of the HRE, which is surprising, since this organisation is arguably the national peak body on HRE in Australia. It may be that the National HRE committee is too concerned about obtaining further funding from the Federal Government to be overly critical of its HRE efforts,<sup>98</sup> or alternatively, as a body run entirely by volunteers, it may not have the resources to conduct a comprehensive critical analysis of the content of the HRE in the Discovering Democracy kit.

Another aspect of the kit which is not in accordance with the HRE specified in Article 29(1) of CROC is the inference that human rights are conditional upon the fulfillment of responsibilities by the right-holder. This is seen in the following suggested activity:

Look at the following list of rights, and decide what a matching responsibility for each might be. Complete the sentence in each case.

- If we have a right to take part in political processes, then we have a responsibility to ...
- If we have a right to work in just conditions, then we have a responsibility to ...
- If we have a right to freedom of thought, conscience and religion, then we have a responsibility to ...
- If we have a right to be educated, then we have a responsibility to ...
- If we have a right to benefit from the earth's products, then we have a responsibility to ...<sup>99</sup>

Students undertaking this exercise could be left with the impression that the rights referred to in these examples are lost if the person does not adhere to the identified responsibilities. This linkage of human rights with responsibilities is contrary to the fundamental concept that human rights are inherent and inalienable,<sup>100</sup> but appears to be an objective of the current Federal

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<sup>97</sup> See Report of the Inquiry into Human Rights and Good Governance Education in the Asia Pacific Region, paragraph 3.17, accessed at: [www.aph.gov.au/House/committee/jfadt/HRGGoodGov/report/chapter3.pdf](http://www.aph.gov.au/House/committee/jfadt/HRGGoodGov/report/chapter3.pdf) on 25 February 2007.

<sup>98</sup> In its submission to the Inquiry into Good Governance and Human Rights Education, the National Committee's principal recommendation was that the Federal Government provide funding to the National Committee to establish a National Centre for Human Rights Education. Submission number 22 dated 15 January 2003, accessed at: [www.aph.gov.au/house/committee/jfadt/HRGGoodGov/subs/sub22.pdf](http://www.aph.gov.au/house/committee/jfadt/HRGGoodGov/subs/sub22.pdf) on 2 August 2007.

<sup>99</sup> [www.curriculum.edu.au/ddunits/units/ms2fq1acts.htm](http://www.curriculum.edu.au/ddunits/units/ms2fq1acts.htm) 'Activity 3: Rights and Responsibilities' accessed on 16 January 2007.

<sup>100</sup> Specifically referred to in the first paragraph of General Comment No. 1.

Government, as evidenced by its (failed) 1998 proposal that HREOC be renamed the ‘Human Rights and Responsibilities Commission’<sup>101</sup> and by its policies of ‘mutual obligations’.<sup>102</sup> One leading scholar has been highly critical of this attempt to link rights with responsibilities within HREOC, noting that the purpose appeared not to be to emphasize the Government’s responsibilities to respect human rights, but rather to justify the Government’s withdrawal from the enforcement of human rights, on the basis that victims of human rights violations must accept some responsibility for their circumstances.<sup>103</sup> The same criticism could be leveled at the linkage of rights with responsibilities in the Discovering Democracy Kit.

Unlike HREOC’s materials, the Discovering Democracy kit has been the subject of critical review by education scholars, who have voiced a number of concerns about the content of this resource. Eva Dobozy criticises the ‘narrow reading of democracy rather than a more sophisticated, dynamic perspective’, and is concerned that ‘human rights, which constitute a central aspect of democracy and democratic citizenship, are not given adequate consideration’.<sup>104</sup> She also expresses disappointment that CROC is not even mentioned in the unit on human rights.<sup>105</sup> Kerry Kennedy criticises the Discovering Democracy kit for its overemphasis on civil and legal matters.<sup>106</sup>

<sup>101</sup> The proposal was part of the *Human Rights Legislation Amendment Bill (No. 2) 1998* (Cth) which lapsed when Parliament was dissolved in September 1998 for an election.

<sup>102</sup> The current Federal Government is committed to a policy of mutual obligation which informs its ‘Work for the Dole’ program whereby people receiving unemployment benefits must engage in approved activities such as community work experience or training, accessed at: [www.aph.gov.au/library/intguide/sp/dolet.htm](http://www.aph.gov.au/library/intguide/sp/dolet.htm) accessed on 15 September 2007. The concept of mutual obligation also underpins the Government’s ‘Shared Responsibilities Agreements’ whereby government funding for infrastructure or services is made conditional on communities committing to specific behavioural change or other actions. The most high profile shared responsibility agreement is that of Mulan in Western Australia, where the Indigenous community agreed to wash their children’s faces daily in exchange for the Australian Government installing petrol bowsers. Accessed at: [www.indigenous.gov.au/sra.html](http://www.indigenous.gov.au/sra.html) accessed on 15 September 2007.

<sup>103</sup> Bailey, Peter ‘Implementing Human Rights – the Way Forward’ (1999) *Australian Journal of Human Rights* 31, 33.

<sup>104</sup> Dobozy, Eva ‘Teaching Democracy and Human Rights: A Curriculum Perspective’ (2003) 77 *Journal of Australian Studies* 31, 34

<sup>105</sup> Ibid.

<sup>106</sup> Kennedy, Kerry J. et al ‘Conversations about Civics: Practitioner Realities and Worldviews about Civic Education in Schools and Classrooms’. Paper presented at the Annual Conference of the Australian Association for Research in Education. Fremantle, 2–6 December 2001, accessed at <http://64.233.179.104/scholar?hl=en&lr=&q=cache:tfbe6YRkXmsJ:www.canberra.edu.au/civics/papers/convpapers.pdf+kennedy+%22conversations+about+civics%22> on 3 August 2007, 5.

While there are aspects of the Discovering Democracy kit that are congruent with Article 29(1) of CROC, including, for example, topics and activities relating to the Universal Declaration of Human Rights,<sup>107</sup> overall the resource falls short of the HRE contemplated by this norm as discussed in Chapter 3. There is insufficient focus on developing children's knowledge of, and respect for, the full gamut of human rights, and it fails to even mention the Convention on the Rights of the Child.

In any event, this research indicates that the Discovering Democracy kit does not appear to have had any measurable impact on HRE in Melbourne secondary schools since the majority of teachers interviewed did not use this resource.<sup>108</sup> This was explained as due to a variety of reasons, including that DEST has not identified curriculum links, that is, it has not specified how or where these materials fit within the Victorian Curriculum Standards Framework. In addition, the resource may have had more appeal if teachers perceived the content as balanced.<sup>109</sup> Finally, the minimal use of Discovering Democracy might be explained by obstacles not specific to this program, such as the crowded curriculum discussed in depth in the next chapter.

This finding of low uptake of this resource by Melbourne secondary schools is supported by the Federal Government's own evaluation which found that: 'significant use of the Discovering Democracy materials within a well-structured, whole school programme that can demonstrate improved student learning outcomes has been fully achieved in no more than half the schools nationally'.<sup>110</sup> This is consistent with other research which found that 54% of teachers were completely unaware of the Discovering Democracy program, and

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<sup>107</sup> For example 'Activity 2 - Where did human rights come from?' asks students to compare the rights set out in the Universal Declaration of Human Rights with the rights set out in the 1789 French Declaration of the Rights of Man and Citizen, and to explain the differences. Accessed at: <http://www1.curriculum.edu.au/ddunits/units/ms2fq2acts.htm> on 2 August 2007.

<sup>108</sup> For example Interviewee M1 was not aware of Discovering Democracy; Interviewee M2 taught the principles of democracy with reference to the Ancient Greeks, Egyptians and Romans, rather than use the Discovering Democracy kit; Interviewee M8 thought it sounded familiar, but couldn't remember where she had heard about it; and Interview M23 thought the kit looked beautiful – a glossy slick package – but had not used it.

<sup>109</sup> See comment from Interviewee M5 at the beginning of this section.

<sup>110</sup> 'Evaluation of the Discovering Democracy Programme 2000-2003' accessed at [www.dest.gov.au/sectors/school\\_education/publications\\_resources/discovering\\_democracy\\_evaluation/conclusions.htm](http://www.dest.gov.au/sectors/school_education/publications_resources/discovering_democracy_evaluation/conclusions.htm) on 16 February 2007.

a further 27% were only partly aware of it.<sup>111</sup> This is a poor result, given that the Federal Government spent \$31.6 million over seven years on this initiative, and supplied the kit free to every school in Australia.<sup>112</sup>

The production and distribution of the Discovering Democracy kit by the Federal Government does not constitute full implementation of Article 29(1) of CROC because the content is not in accordance with the HRE set out in that Article, and elaborated on in General Comment No. 1. Furthermore, this initiative cannot amount to compliance with an international norm if it is not in fact being used, that is, if a large proportion of teachers are unaware of the kit, or making a conscious decision not to use it.

#### *(ii) National Values Framework*

In 2002, Dr Brendan Nelson, the Federal Minister for Education announced that he considered many Australian schools were failing to teach their students about values, and commissioned a study into values education.<sup>113</sup> The outcome of this study was a report, released in 2003, that found that there was enormous diversity in how the term ‘values education’ was understood, as well as how it should be taught.<sup>114</sup> Recommendations included the development of a framework and set of principles on values education by the Federal Government. The result was that, in 2005, DEST released the National Values Framework, a set of materials for schools that set out nine values which should be taught in schools. The National Values Framework is administered by the same section of DEST as the Discovering Democracy kit, and is perceived by staff within that department to be a part of HRE.<sup>115</sup> Thus, it is reasonable to presume that it may be included in future periodic reports to the CRC as an example of Australia’s compliance with Article 29(1) of CROC.

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<sup>111</sup> Print, Murray, Moroz, Wally and Reynolds, Pat (eds) *Discovering Democracy in Civics and Citizenship Education* (2001) Social Science Press, Kattomba, NSW, 9.

<sup>112</sup> Erebus Consulting Partners *Evaluation of the Discovering Democracy Programme 2000-2003*, accessed at: [www.dest.gov.au/archive/schools/publications/2004/discovering\\_democracy/discovering\\_democracy.pdf](http://www.dest.gov.au/archive/schools/publications/2004/discovering_democracy/discovering_democracy.pdf) on 9 August 2007, ii.

<sup>113</sup> ‘Schools Must Teach Values’ *The Age*, Melbourne, 23 September 2002.

<sup>114</sup> Curriculum Corporation *Values Education Study Final Report*, August 2003, accessed at: [www.dest.gov.au/archive/schools/publications/2003/VES/VES\\_Report.pdf](http://www.dest.gov.au/archive/schools/publications/2003/VES/VES_Report.pdf), on 23 February 2007.

<sup>115</sup> Interview with two DEST employees, C1 and C2 on 18 June 2004.

The Values Framework includes a poster which was sent to all schools with a request that the ‘poster be displayed prominently in every school as a requirement under the *Schools Assistance Act 2004*.<sup>116</sup> The poster sets out the nine values against a backdrop of two white, male soldiers and the Australian flag.<sup>117</sup> The use of war imagery to promote values education seems inconsistent with Article 29(1) of CROC which specifically refers to educating children about peace,<sup>118</sup> and General Comment No. 1, which asserts that children must not only learn about peace, but also how to prevent violence and conflict.<sup>119</sup> The President of the Victorian Association of State Secondary Principals expressed similar concerns, asking ‘why would you go in with an image that is grounded in heroism in conflict, and not about tolerance, trust - all of the issues that are embedded in the program?’<sup>120</sup> Thus, not only is the imagery incompatible with Article 29(1) of CROC, because of the militaristic imagery but also because it does not include any women or people of colour. This may lead to the majority of students and teachers not relating to the campaign.<sup>121</sup> General Comment No. 1 expressly cautions against practices that are ‘inconsistent with the principles of gender equality’.<sup>122</sup>

The nine values that make up the Framework are listed in alphabetical order rather than in order of importance.<sup>123</sup> They have been developed for all schools, not just secondary schools, and are set out in the Framework as follows:

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<sup>116</sup> Media Release by Dr Brendan Nelson, former Minister for Education, ‘Promoting Values in our Schools - \$2.5 Million in Grants Announced’ 2 May 2005. Accessed at [www.dest.gov.au/Ministers/Media/Nelson/2005/05/n1107020505.asp](http://www.dest.gov.au/Ministers/Media/Nelson/2005/05/n1107020505.asp) on 4 August 2007.

<sup>117</sup> The image is based on John Simpson Kirkpatrick who has been described by the former Federal Minister for Education, Dr Brendan Nelson as ‘famous for his bravery under fire rescuing soldiers at Gallipoli and whose actions personify the meaning of selfless service for others.’ Media Release ‘Promoting Values in our Schools - \$2.5 Million In Grants Announced’ 2 May 2005. Accessed at [www.dest.gov.au/Ministers/Media/Nelson/2005/05/n1107020505.asp](http://www.dest.gov.au/Ministers/Media/Nelson/2005/05/n1107020505.asp) on 4 August 2007.

<sup>118</sup> Article 29(1)(d).

<sup>119</sup> General Comment No. 1, above n 66, paragraph 16.

<sup>120</sup> Blair, Andrew *The Age*, Education Section, 2 May 2006, accessed at [www.education.theage.com.au/pagedetail.asp?intpageid=1542&strsection=students&intsectionid=0](http://www.education.theage.com.au/pagedetail.asp?intpageid=1542&strsection=students&intsectionid=0) on 5 August 2007.

<sup>121</sup> The National Values Framework was released after the data for this thesis was collected from teachers. Thus the interviews and surveys contain no information about how teachers’ perceive this latest initiative from the Federal Government.

<sup>122</sup> General Comment No. 1, above n 66, paragraph 10.

<sup>123</sup> Accessed at: [www.valueseducation.edu.au/verve/\\_resources/Framework\\_PDF\\_version\\_for\\_the\\_web.pdf](http://www.valueseducation.edu.au/verve/_resources/Framework_PDF_version_for_the_web.pdf) on 3 August 2007.

<b>Care and Compassion</b> Care for self and others.
<b>Doing Your Best</b> Seek to accomplish something worthy and admirable, try hard, pursue excellence.
<b>Fair Go</b> Pursue and protect the common good where all people are treated fairly for a just society.
<b>Freedom</b> Enjoy all the rights and privileges of Australian citizenship free from unnecessary interference or control, and stand up for the rights of others.
<b>Honesty and Trustworthiness</b> Be honest, sincere and seek the truth.
<b>Integrity</b> Act in accordance with principles of moral and ethical conduct, ensure consistency between words and deeds.
<b>Respect</b> Treat others with consideration and regard, respect another person's point of view.
<b>Responsibility</b> Be accountable for one's own actions, resolve differences in constructive, non-violent and peaceful ways, contribute to society and to civic life, take care of the environment.
<b>Understanding, Tolerance and Inclusion</b> Be aware of others and their cultures, accept diversity within a democratic society, being included and including others.

Comparing these nine values with the HRE articulated in Article 29(1) of CROC, it is apparent that, while there are some similarities, there are also significant disparities. The similarities include the requirement that children develop respect for 'for the national values of the country in which the child is living'. It will be recalled that during the drafting of CROC it was Australia that proposed that national values be added, so perhaps it is not surprising that some twenty years later it is this component of Article 29(1) that the Government seems most

interested in complying with. A further similarity between the National Values Framework and Article 29(1) is the value relating to ‘freedom’, which could be considered to be consistent with Article 29(1)(b) in that it refers to respecting the rights of others.

However, overall the values are distinctly different from Article 29(1) because they are not framed in terms of human rights. For example, there are no explicit references to equality of the sexes and to Indigenous peoples as articulated in Article 29(1)(d). Furthermore, values are inherently subjective and differ according to a person’s moral philosophy and underlying belief system,<sup>124</sup> whereas human rights are universal and embedded in a concrete international legal framework. Thus, values education differs from HRE precisely because it lacks the authority of universally agreed norms.

The purpose of Article 29(1) of CROC is to ‘promote a culture which is infused by appropriate human rights values’,<sup>125</sup> and the National Values Framework does not do this. In the absence of a broader HRE program, this initiative does not amount to full compliance with Article 29(1) of CROC. This is not surprising since the National Values Framework does not appear to have been informed by, or based on, Australia’s obligations as a State Party to CROC, notwithstanding the close link to Article 29(1)(c). Rather the Government appears to have made a decision that Australian children need values education rather than human rights education.

#### *6.4.4 Inquiry into Good Governance and Human Rights Education in the Asia Pacific (the Inquiry)*

For the sake of completeness it is important to also consider the Inquiry into HRE that the Federal Government called in September 2002.<sup>126</sup> The request for the Inquiry came from the Foreign Affairs Minister and was directed to the Joint Committee on Foreign Affairs and Trade. This clearly determined the focus of the inquiry, which was to be HRE as a *foreign policy* issue, and this was

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<sup>124</sup> Hill, Brian V. ‘Values Education in Schools: Issues and Challenges’ Keynote address at the National Values Education Forum in Melbourne, April 28 2004. Accessed at: [http://www.valueseducation.edu.au/verve/\\_resources/ve\\_acsa\\_paper.pdf](http://www.valueseducation.edu.au/verve/_resources/ve_acsa_paper.pdf) on 13 February 2007.

<sup>125</sup> General Comment No. 1, above n 66, paragraph 2.

<sup>126</sup> Accessed at [www.aph.gov.au/house/committee/jfadt/HRGGoodGov/GoodGovindx.htm](http://www.aph.gov.au/house/committee/jfadt/HRGGoodGov/GoodGovindx.htm) on 15 September 2007.

reflected in the Terms of Reference.<sup>127</sup> The impetus for the Inquiry was purportedly the UN Decade for HRE;<sup>128</sup> however, the use of the Decade in this context was a distortion of its objectives which call on States to increase HRE within their domestic jurisdictions, for example by developing a National Action Plan for HRE, but said nothing about States pushing HRE in other countries in their region.

The chair of the Inquiry, Senator Marise Payne, opened the first public hearing by saying that ‘Australia, as arguably one of the world’s most successful democracies, is in a very good position to make, and indeed does already make, a strong contribution to human rights and good governance education in the Asia Pacific region’.<sup>129</sup> This remark neatly sums up the purpose and conduct of the Inquiry which was about Australia exporting its views about human rights to other countries via HRE, rather than examining the state of HRE within Australia. Thus, although this Inquiry is strictly speaking an HRE initiative of the Federal Government, it cannot be called a domestic initiative when its focus is on HRE in other countries.

#### *6.4.5 Conclusion Regarding National Initiatives*

The Australian Council of Social Service made a submission to a Senate Committee Inquiry that ‘the federal government has, with respect, made a fairly limited effort to support human rights education in its own executive role.’<sup>130</sup> This is consistent with this research which has found that the Australian Government has failed to fully implement, or comply with, Article 29(1) of CROC. The three domestic initiatives that it has undertaken – establishing the National Committee and developing the Discovering Democracy kit and National Values Framework – do at first glance suggest the Government has some commitment to providing HRE in Australian schools. However, deeper analysis reveals that these efforts do not come close to full compliance with Article 29(1) of CROC.

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<sup>127</sup> Accessed at [www.aph.gov.au/house/committee/jfadt/HRGGoodGov/GoodGovTor.htm](http://www.aph.gov.au/house/committee/jfadt/HRGGoodGov/GoodGovTor.htm) on 15 September 2007.

<sup>128</sup> See the Terms of Reference for the Inquiry, above n 127.

<sup>129</sup> Above n 126.

<sup>130</sup> Cassandra Goldie, Policy Adviser, Law and Justice, Australian Council of Social Service Official, Committee Hansard Senate Legal and Constitutional Legislation Committee Reference: Australian Human Rights Commission Legislation Bill 2003, 29 April 2003, Sydney, 38.

The level of funding to the National Committee has been minimal, and suggests a lack of genuine support for this body. As long as the National Committee remains essentially an organisation of volunteers it will be unable to monitor HRE within Australia, or develop a national plan of action for HRE, as recommended by the CRC.<sup>131</sup> The Government's support of the National Committee appears to be motivated by a desire to represent itself to the international community as being proactive in the area of HRE, rather than by an authentic commitment to implementing and complying with Article 29(1).

Of the 18 units that make up the Discovering Democracy kit, only one is expressly about human rights. The remaining 17 units address issues of government, federalism and national symbols without incorporating human rights principles. Furthermore, the unit that is notionally devoted to human rights, deals with only civil and political rights, is presented in an unbalanced manner, and suggests that human rights are conditional upon the right-holder fulfilling certain responsibilities. For these reasons, this initiative does not constitute full compliance with the norm in Article 29(1) of CROC; at best it could constitute a small step towards implementing aspects of Article 29(1)(b).

The National Values Framework Australia also fails to comply with the HRE set out in Article 29(1). Its focus on subjective values rather than universal human rights is contrary to the HRE required by Article 29(1). Like the Discovering Democracy kit it could play a small part in achieving partial compliance with Article 29(1), in particular, it may help satisfy the requirement for education about national values, is an aspect of Article 29(1)(c) that Australia sought to include during the drafting process.

Even taken together, the above three initiatives do not amount to full compliance with Article 29(1) of CROC, because in addition to the criticisms outlined above, these initiatives do not include HRE that leads to the development of respect for the full range of human rights, including ESC rights; they do not advocate respect for other civilizations and cultures; they do not encourage peace; and they do not promote a culture which is infused by

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<sup>131</sup> General Comment No. 1, above n 66, paragraphs 22 and 23.

appropriate human rights values, all of which are core elements of HRE as illustrated in Chapter 3.

Full compliance with Article 29(1) is unlikely to be achieved unless the Australian Government adopts the various recommendations of the CRC set out in General Comments 1 and 5 including developing a comprehensive national action plan that covers goals, priorities and time frames for complying with Article 29(1);<sup>132</sup> providing appropriate human rights training for teachers;<sup>133</sup> embedding HRE in school curricula;<sup>134</sup> and enacting legislation or providing administrative directives mandating HRE,<sup>135</sup>

Australia's NHRI is making a genuine effort to promote HRE in schools; however, the reality is that this appears to be having little impact on HRE in secondary schools in Melbourne. This finding is consistent with the research of Darren Hawkins analysed in section 2.3.4 in Chapter 2 which also found that national human rights institutions did not have a significant impact on States' levels of compliance with human rights treaties.<sup>136</sup> The lack of awareness of HREOC's HRE materials by teachers who participated in this study may be due to the low profile of HREOC in the education sector, and because when it comes to sourcing HRE materials, teachers seem to look to either high profile NGOs such as Amnesty International, or their state Department of Education. This highlights the obstacle that federalism presents when it comes to implementing Article 29(1) of CROC. Although the Australian Government has an international obligation to ensure that Article 29(1) of CROC is complied with in all parts of the federation, the fact the education is the responsibility of the states and territories complicates the realisation of this right. Using the foreign affairs power to give effect to Article 29(1) of CROC is an option, but as already discussed, not one that is very attractive to the Federal Government. This leaves cooperation and collaboration with state governments, and using financial incentives, as the only methods available to the Federal Government

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<sup>132</sup> General Comment No. 5, above n 2, paragraph 32.

<sup>133</sup> General Comment No. 1, above n 66, paragraph 18.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid, paragraph 17.

<sup>136</sup> Hawkins, Darren 'The Domestic Impact of International Human Rights Norms' Paper presented at the 42<sup>nd</sup> Annual Convention of the International Studies Association, Chicago, Illinois, 20-24 February 2001, accessed at: [www.isanet.org/archive/hawkins.html](http://www.isanet.org/archive/hawkins.html) on 7 May 2007, 3.

for giving effect to Article 29(1). The distribution of the Discovering Democracy kits and National Values Framework directly to schools is evidence of the Federal Government's disinclination to work cooperatively with the state governments in the implementation of Article 29(1) of CROC. It appears that the journey of HRE from convention to classroom breaks down at the point where the Federal Government needs to work with the state governments in order to achieve compliance with this international norm. Thus, federalism can be a barrier to compliance if the Federal Government does not have jurisdiction over the subject matter of the norm.

## 6.5 Victorian Government Initiatives Relating to HRE

In Victoria, the Department of Education and Training (DET) has responsibility for delivering education in government secondary schools. The *Education Act 1958* (Vic)<sup>137</sup> governs and regulates education in Victoria and is administered by DET. This Act is largely silent as to the content of education that school students are to receive, with Section 22 merely providing that students are to receive education in the areas set out in Schedule 2 of the Act. That schedule lists the following subjects: the Arts, English, Health and Physical Education (including Sport), Languages other than English, Mathematics, Science, Studies of Society and Environment (SOSE), and Technology. With only a very general direction on the content of education, it is necessary to look to other sources to ascertain whether the Victorian Government has taken any steps to promote HRE in Victorian secondary schools.<sup>138</sup> Three initiatives are relevant to such an inquiry, namely the Curriculum and Standards Framework published by the Victorian Curriculum and Assessment Authority (VCAA);<sup>139</sup> the *Ideas for Human Rights Education* booklet published by DET,<sup>140</sup> and finally the role that the

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<sup>137</sup> The *Education Act 1958* (Vic) was the legislation in place at the time this research was undertaken. The Victorian Government recently passed the *Education and Training Reform Act 2006* which is expected to be proclaimed in early 2007.

<sup>138</sup> For this research, it is necessary to evaluate the extent to which the Victorian Government has taken steps to provide HRE in Melbourne schools, notwithstanding that it has no obligation to implement Article 29(1) of CROC, which is the sole responsibility of the Federal Government.

<sup>139</sup> A statutory body established under the *Victorian Curriculum and Assessment Authority Act 2000* (Vic) to develop curriculum for all Victorian schools and which reports directly to the Victorian Minister for Education and Training.

<sup>140</sup> Department of Education and Training (Vic) *Ideas for Human Rights Education* (2005) Department of Education and Training, Melbourne. Electronic copy accessed at: [www.eduweb.vic.gov.au/edulibrary/public/teachlearn/student/lem/Human\\_rights\\_final.pdf](http://www.eduweb.vic.gov.au/edulibrary/public/teachlearn/student/lem/Human_rights_final.pdf) on 16 September 2007.

Victorian Equal Opportunity and Human Rights Commission plays in promoting HRE.

### 6.5.1 Curriculum and Standards Framework (CSF)

*A curriculum embodies the aspirations a community holds for the next generation of learners.<sup>141</sup>*

The VCAA published the Curriculum and Standards Framework II (CSF) in 2000,<sup>142</sup> the purpose of which is:

To support teachers and parents in meeting the learning needs of all students. It provides a strong focus for teaching and learning (the curriculum) and clear statements of what students are expected to achieve (the standards) in eight key learning areas during the first eleven years at school.<sup>143</sup>

Teachers look to the CSF for direction as to what they are expected to teach and what students are expected to learn.<sup>144</sup> This research found, that the majority of teachers interviewed felt constrained by what the CSF says they should be teach.<sup>145</sup> The CSF consists of eight books based on different subjects; however, teachers' responses to question 3 on the survey indicated that if HRE is included in any subject, it tends to be SOSE or English. For this reason, this analysis of the CSF is limited to these two subjects.

The CSF is divided into two distinct sections. The first is the curriculum focus that guides teachers as to what they should be covering at different levels, and the second is the learning outcomes and indicators. It is this second part that is the most important and influential part of the CSF, because it is what teachers must use to evaluate and report on students' progress. Both sections of the

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<sup>141</sup> Preface to the CSF.

<sup>142</sup> Recently the Victorian Government mandated a major reform of schooling, which resulted in *Victorian Essential Learning Standards* (VELS) being implemented in 2006. Since it was the CSF that was in operation at the time this research was undertaken, that is, at the time the interviews were conducted and surveys administered, it is the appropriate document for analysis here. In addition, the Victorian Government has stated that 'The CSF will remain as an important curriculum resource to help teachers in writing teaching and programs.' *Introducing the Victorian Essential Learning Standards* p 3, published by VCAA and accessed at: [www.vels.vcaa.vic.edu.au/downloads/introducing](http://www.vels.vcaa.vic.edu.au/downloads/introducing) on 3 November 2005.

<sup>143</sup> Foreword to the CSF.

<sup>144</sup> See section 7.5.3 in the next chapter for a discussion of how teachers see the lack of explicit HRE in the CSF as one of the obstacles to widespread HRE in schools.

<sup>145</sup> For example Interviewee M16 described the CSF as 'rigid' and not allowing a teacher to 'explore beyond the boundaries of what's been set'.

SOSE and English CSFs are analysed below, but it is the presence, or absence, of HRE in the learning outcomes and indicators that is most revealing of the Victorian Government's commitment to HRE.

The SOSE CSF covers three distinct subject areas namely, History; Geography; and Economy and Society.<sup>146</sup> The History strand is the one that contains the most opportunities for teachers to incorporate human rights into their lessons. By way of example, in the curriculum section there are references to discussing contemporary issues such as 'social justice and welfare and human rights'; to exploring 'issues such as poverty, old age, ethnic groups, freedom of speech, and personal rights and responsibilities';<sup>147</sup> and to investigating the reasons for the establishment of organisations, such as the United Nations and Amnesty International.<sup>148</sup> These are all consistent with Article 29(1) of CROC, and provide an opportunity for discussion of both civil and political rights as well as ESC rights. However, in the outcomes and indicators section, it becomes much more difficult to find any reference to human rights. There is a statement that students should be able to 'evaluate the extent to which contemporary notions of civic rights and responsibilities have their origin in an ancient and medieval society'<sup>149</sup> and 'analyse the movement of Aboriginal and Torres Strait Islander communities for civil and political rights', but that is the extent of it.<sup>150</sup> Thus the SOSE CSF, while containing some opportunities for teachers to incorporate HRE into their lessons, fails to systematically and comprehensively address HRE. The limited references to rights in the SOSE CSF, particularly in the learning outcomes and indicators, do not come close to the HRE articulated in Article 29(1). General Comment No. 1 recommends that school curricula must be reworked to explicitly include the aims of education set out in Article 29(1) of CROC, and the required HRE must be integrated into the curricula, not be

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<sup>146</sup> The CSF is divided into levels according to school grades. Since this research is limited to secondary schools, it is only levels four and five that are analysed in this thesis. Levels one to three cover the primary school curriculum.

<sup>147</sup> SOSE CSF, Level 5, 28.

<sup>148</sup> SOSE CSF, Level 6, 34.

<sup>149</sup> SOSE CSF, Level 5, 29.

<sup>150</sup> SOSE CSF, Level 6, 37.

merely incidental to it.<sup>151</sup> Contrary to this recommendation, the HRE in the SOSE CSF are incidental to, rather than infused in, the curriculum.<sup>152</sup>

The second curriculum framework to be examined is the English CSF. The rationale underpinning this syllabus is that students are:

encouraged to explore and engage with a range of literature ... from their own and different cultures, to take pleasure in using texts to explore ideas and to think critically about their world and the global community. Knowledge about how language functions and how it both reflects and shapes social attitudes assists students to achieve a better understanding of themselves, their culture and the contemporary world.<sup>153</sup>

The reference to exploring cultures different from their own is similar to the language of Article 29(1)(c) of CROC, which refers to children developing respect for civilisations different from their own. So from the opening paragraphs of the CSF teachers could see an opportunity to use the CSF to incorporate some aspects of HRE consistent with Article 29(1) of CROC.

The English CSF is not prescriptive, in that it does not specify, or even recommend, texts or materials teachers can use in order to implement the curriculum. It merely guides teachers as to the general nature of materials that should be used, for example, students should ‘read texts that reflect the range and diversity of sociocultural groups’.<sup>154</sup> There is certainly opportunity for English teachers to use the CSF to justify selecting books, plays, poetry and films that have human rights themes, but there is no mandate that they do so. Like the SOSE CSF, HRE is not embedded in the English CSF, and is at best an incidental part of the curriculum, rather than fully integrated as the CRC recommends.<sup>155</sup>

In addition to General Comment No. 1, General Comment No.5 ‘places special emphasis on incorporating learning about the Convention and human rights in

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<sup>151</sup> General Comment No. 1, paragraph 18.

<sup>152</sup> It is acknowledged that this recommendation is directed at the State Party to CROC, that is, it is the Australian Government, rather than the Victorian Government, that the CRC is speaking to in General Comment No. 1.

<sup>153</sup> English CSF, Introduction, 5.

<sup>154</sup> English CSF, Level Five.

<sup>155</sup> General Comment No. 1, above n 66, paragraph 18.

general into the school curriculum.<sup>156</sup> Thus there are two separate directives from the CRC stressing the importance of embedding HRE into school curricula. The SOSE and English CSFs do not conform with this directive, with HRE being only incidental to the core curriculum and not part of the key learning outcomes or objectives. This suggests that the Victorian Government is not dedicated to implementing Article 29(1) of CROC.<sup>157</sup> However, the analysis in the next section suggests that this may be changing, and that DET may be moving towards increased HRE.

### 6.5.2 *Ideas for Human Rights Education Booklet*

This resource was published by DET in 2005<sup>158</sup> and reflects an initiative of the Victorian Human Rights Education Committee (VHREC). The members of this body represent teachers' unions, principals' associations, NGOs and other organisations interested in HRE.<sup>159</sup> The VHREC is focused on increasing HRE in Victorian schools and has a much more grass roots focus than the National Committee, which as discussed above, appears to be more concerned with national and international policies relating to HRE. The VHREC has developed close ties with DET, and this appears to have been successful in motivating the Department to be more proactive in the area of HRE.

The 20 page *Ideas for Human Rights Education* booklet was the outcome of several workshops organised by DET which involved teachers developing ideas about how to teach students about human rights. Thus all of the suggested activities in the booklet come directly from teachers.<sup>160</sup> The booklet contains 107 ideas that teachers can use to initiate human rights lessons and activities, and the content and layout of the publication make it very accessible to

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<sup>156</sup> General Comment No. 5, above n 2, paragraph 63.

<sup>157</sup> Of course, the Victorian Government has no obligation under international law to implement Article 29(1) of CROC, that responsibility resting solely on the Australian Government.

<sup>158</sup> *Ideas for Human Rights Education*, above n 140.

<sup>159</sup> The author is a member of the VHREC, representing both the Human Rights Committee of the Law Institute of Victoria, and the Castan Centre for Human Rights Law.

<sup>160</sup> The author attended one workshop where teachers developed ideas for the booklet. However, she was a spectator rather than participant at this workshop, and took no direct part in the development of this resource. Nevertheless, as the author was tangentially involved in this initiative, she may not be completely unbiased in analysing this booklet.

teachers.<sup>161</sup> It contains a diverse range of human rights issues and exercises, including for example:

As part of a class project, read the Convention on the Rights of the Child. (Australia ratified this convention on 16 January 1991.)

- Develop a list of questions to ask the country's leaders.  
The list can include:
  - What does this *mean* for Australia?
  - What *advances* have occurred in Australia or Victorian law since 1991 that relate to children's rights?
  - Does Australia meet all of its obligations under the convention?  
or
- Produce a list of recommendations, which pursue, improve, promote and protect children's rights, or
- Draw up a proposal, including recommendations, to send to your members of parliament and local government.<sup>162</sup>

This exercise is significant for its explicit reference to CROC, which is in stark contrast to the notable absence of CROC from the Federal Government's HRE initiatives, such as the Discovering Democracy kit and the National Values Framework. Activities such as this provide students with an opportunity to gain a more detailed awareness of international human rights laws and to evaluate how they are working in practice in their country. This is consistent with Article 29(1)(b) of CROC, and General Comment No. 1 which recommends that the HRE provided pursuant to Article 29(1) include education about all the rights set out in CROC and that children should be familiar with the text of this convention.<sup>163</sup>

The majority of exercises within the booklet are congruent with Article 29(1). Illustrations of this include an exercise that involves a class developing an exchange program with a group from a different region or culture, so as to learn about the background and interests of others,<sup>164</sup> giving effect to Article 29(1)(c)

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<sup>161</sup> This booklet was published after the date was collected for this research and thus this thesis has no empirical evidence relating to this resource. However, there is data available from other resources that suggest the booklet is considered a valuable resource; for example see feedback from the Commonwealth Secretariat, Human Rights Unit in London below.

<sup>162</sup> *Ideas for Human Rights Education*, above n 140, Exercise 18.

<sup>163</sup> General Comment No. 1, above n 66, paragraphs 6 and 20.

<sup>164</sup> *Ideas for Human Rights Education*, above n 140, Exercise 3.

which refers to developing respect for different civilizations; and an exercise that asks students to compare levels of support for ‘the poor, the sick and the homeless’<sup>165</sup> demonstrating the inclusion of ESC rights as recommended by General Comment No. 1.<sup>166</sup> It even has an activity related to training teachers about how to teach human rights<sup>167</sup> and the CRC has identified teacher training as essential to the realisation of the aims in Article 29(1).<sup>168</sup>

One criticism of this resource is that unlike the HREOC materials analysed above, this resource does not contain any links to the CSF and does not provide direction to teachers as to how they can integrate the exercises into their curriculum. The result is that the activities in the booklet may be perceived as *ad hoc* tasks lacking context. To be more congruent with Article 29(1) the *Ideas for Human Rights Education* booklet should provide guidance to teachers as to how to use the exercises as part of a holistic HRE program.

The booklet is designed to be used by all schools, and the exercises have not been categorised into those appropriate for primary school children and those appropriate for secondary school students. From a practical point of view, it may have increased the ease of using this resource if the activities had been separated out in this way, or even two separate books developed, rather than teachers having to scrutinise all the tasks to determine which ones are appropriate for primary school students and which for secondary school students.

However, overall this resource is compatible with Article 29(1) of CROC, and could help teachers implement HRE. This has been recognised by others, including the Commonwealth Secretariat, Human Rights Unit in London who in a letter to the Victorian Department of Education stated that:

Your publication is among the best of practical teacher guides that we have come across during a survey of human rights education materials across the Commonwealth, the EU and the US ... We would be very

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<sup>165</sup> Ibid, Exercise 37.

<sup>166</sup> General Comment No. 1, above n 66, paragraph 2.

<sup>167</sup> *Ideas for Human Rights Education*, above n 140, Exercise 94.

<sup>168</sup> General Comment No. 1, above n 66, paragraph 18.

grateful for permission to adopt some of the ideas contained in the publication for the benefit of teachers in developing Commonwealth countries.<sup>169</sup>

This endorsement of this resource may motivate DET to undertake more work in the field of HRE. The *Ideas for Human Rights Education* booklet, more than any of the other initiatives analysed above, represents the kind of undertaking contemplated by the CRC in General Comment No. 1, although it still approaches HRE in an *ad hoc* rather than integrated manner.

One problem related to this initiative is that DET sent only one copy of the booklet to each Victorian school. Sending one copy to each school is unlikely to result in widespread use of this resource.<sup>170</sup> A possible outcome is that the book will simply be filed in the library, or perhaps given to a teacher who the principal considers will be most interested in it. In order to see widespread use of this resource, a copy needs to be provided to every teacher, and this could be achieved by giving a copy to teachers when they either initially register as a teacher with the Victorian Institute of Teaching, or renew their registration.

### 6.5.3 Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity Commission (EOC) was established in 1984 by the *Equal Opportunity Act 1984* (Vic), and had its name and functions modified with the enactment of the *Charter of Human Rights and Responsibilities 2006* (Vic). The functions of the Commission include ‘to establish and undertake information and education programs’ about the elimination of discrimination, sexual harassment, vilification on the ground of race or religious belief or activity, and the promotion of equality of opportunity.<sup>171</sup> Pursuant to this mandate it has developed resources for schools on specific human rights issues, including ‘Play by the Rules’,<sup>172</sup> designed to tackle discrimination and harassment in sports; ‘Cultural Diversity Quest’,<sup>173</sup> a competition where

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<sup>169</sup> Letter from Commonwealth Secretariat to Victorian Department of Education dated 4 August 2006. Copy on file with the author.

<sup>170</sup> However, 3000 copies were printed in 2005, and a further 3000 were printed in 2006. In addition the booklet can be downloaded from the internet at: [www.sofweb.vic.edu.au/lem/multi/mhredu.htm](http://www.sofweb.vic.edu.au/lem/multi/mhredu.htm). There is no record of how many booklets have been downloaded off the web.

<sup>171</sup> *Equal Opportunity Act 1995* (Vic), s. 161(1)(c) and 162.

<sup>172</sup> Accessed at [www.humanrightscommission.vic.gov.au/types%20of%20discrimination/sport/play%20by%20the%20rules/default.asp](http://www.humanrightscommission.vic.gov.au/types%20of%20discrimination/sport/play%20by%20the%20rules/default.asp) on 7 August 2007.

<sup>173</sup> Developed and managed in conjunction with the Victorian Department of Education. Ibid.

students express cultural diversity through a range of media, such as art, design, digital media and writing; and ‘Closets, Classrooms and Change – Challenging Homophobia in Schools’.<sup>174</sup> All of these resources are aimed at combating discrimination which is expressly encouraged by the CRC who note that education of the kind set out in Article 29(1) is one of the best ways of responding to racism and discrimination based on ethnic, religious, cultural and linguistic differences.<sup>175</sup> Thus the nature and content of these resources are consistent with Article 29(1). However, like the HREOC resources, none of the teachers surveyed or interviewed for this research identified the EOC as a HRE resource, and there is no other evidence available as to the extent to which teachers are using the HRE resources developed by the EOC. This suggests that the EOC, like the federal human rights institution, appears not to be teachers’ preferred source for HRE resources and support.

The role of the EOC changed with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), which was enacted subsequent to the collection of the data for this research.<sup>176</sup> However, its changed role is extremely relevant to HRE in the State of Victoria, and it is therefore important to consider its potential impact on HRE. Section 41 of the Charter sets out the responsibilities of the EOC and provides that: one of its functions is ‘to provide education about human rights and this Charter’. The most significant aspect of this provision is that it refers to human rights AND the Charter, and not human rights /N the Charter. Because the Charter only includes civil and political rights; not ESC rights,<sup>177</sup> this language may result in more inclusive HRE because it invites analysis of what human rights are in the Charter; what rights have been excluded; and why that might be. If the Charter is used in this way, it would be compatible with parts of Article 29(1).

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<sup>174</sup> Ibid.

<sup>175</sup> General Comment No. 1, above n 66, paragraph 11.

<sup>176</sup> The majority of the Charter came into operation on 1 January 2007. However, Divisions Three and Four of Part Three do not come into effect until 1 January 2008.

<sup>177</sup> Although economic, social and cultural rights are not presently part of the Charter, s 44 requires the Victorian Government to conduct a review after the Charter has been in operation for four years. The review must include a consideration of whether the rights articulated in the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women should be incorporated into the Charter.

However, the evidence from previous HRE initiatives analysed above, seem to indicate that the EOC will be ineffective in incorporating the education mandated in s 41 into children's education unless and until the Victorian school curriculum is modified to expressly include a direction that students learn about the Charter. Furthermore, there would need to be widespread training of teachers relating to the Charter, because as the data collected for this study demonstrates, a lack of teacher training on HRE is one of the significant obstacles to HRE in schools.<sup>178</sup>

#### 6.5.4 Conclusion Regarding Victorian Initiatives

As between the Federal and Victorian jurisdictions, it is the latter that has been the most proactive in promoting HRE that is congruent with Article 29(1). Although HRE has not been embedded in the CSF, as recommended by the CRC, the publication of the *Ideas for Human Rights Education* booklet suggests that DET may be moving towards greater 'compliance' with Article 29(1) of CROC. Furthermore, DET is cooperatively engaging with civil society through its close collaboration with the VHREC, and this is consistent with the CRC's recommendations.<sup>179</sup>

There is, however, much more that the Victorian Government could do to promote HRE in schools. In particular, it could develop a Victorian plan of action for children, or for human rights more generally, that sets out goals, priorities and time frames for HRE.<sup>180</sup> It could also collect data about HRE in schools, and provide appropriate training for teachers, both of which the CRC endorse.<sup>181</sup>

It is apparent that although the Victorian Government is taking some steps towards increasing HRE in schools, this is not because it is being encouraged to do so by the Federal Government as part of any initiatives to implement Article 29(1) of CROC. Rather the impetus for projects such as *the Ideas for Human Rights Education* booklet have come from DET's engagement with civil society, in particular the VHREC. Thus, the human rights education that is being

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<sup>178</sup> See section 7.5.3 in the next chapter.

<sup>179</sup> General Comment No. 5, above n 2, paragraph 58.

<sup>180</sup> Ibid, paragraph 32.

<sup>181</sup> Ibid, paragraphs 48 and 53.

promoted in Victoria is not HRE that has journeyed from convention to classroom, but rather HRE that has come from grass roots efforts. It is a ‘bottom-up’ journey borne of domestic initiatives, rather than a ‘top-down’ journey stemming from international mandates.

The impact of the new Charter on HRE in Victorian schools remains an unknown quantity. Some guidance can perhaps be gleaned from the United States experience with a Bill of Rights,<sup>182</sup> and the influence it has had on HRE in schools which is analysed in the next section.

## **SECTION THREE – THE UNITED STATES**

### **6.6 The Non-Ratification of CROC**

A leading American scholar, David Golove, stated that ‘the United States has been and remains ambivalent about human rights treaties.’<sup>183</sup> This statement is problematic for two reasons. First, if Professor Golove is referring to the United States’ conduct regarding human rights treaties in the international arena, then the term ‘ambivalent’ is too weak. As was illustrated in the previous chapter, the United States has been involved in the drafting of many human rights treaties, including CROC. Second, if Golove is referring to the United States’ conduct regarding ratification and implementation of human rights treaties domestically, then the language is again too weak – this chapter will argue that the United States’ position in relation to human rights treaties generally, and CROC specifically, is more hostile than ambivalent.

It is necessary to explore the United States’ approach to human rights treaties generally, in order to provide context for an examination of its position on CROC. The United States’ hostility to human rights treaties is reflected in its refusal to be bound by such treaties. Historically, this took the form of failing to ratify these treaties; the President might sign a treaty, but the Senate would

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<sup>182</sup> However, the applicability of the United States’ experience of education about the Bill of Rights may be limited because of the very different nature of the Victorian Charter of Rights compared to the United States constitutional Bill of Rights.

<sup>183</sup> Golove, David ‘Human Rights Treaties and the U.S. Constitution’ (2002) 52 *DePaul Law Review* 579, 580.

refuse to provide the necessary constitutional consent,<sup>184</sup> resulting in the Senate being described as the “grave-yard of treaties”.<sup>185</sup> However, more recently the United States has sought to avoid being bound by human rights treaties by ratifying with numerous reservations, understandings and declarations (RUDs) that limit the extent of its obligations under the treaty.<sup>186</sup> However, CROC is a treaty that the United States has refused to ratify, even with RUDs.

The United States’ resistance to committing to human rights treaties seems to lie partly in constitutional hurdles, and partly in political considerations. The former relate to the fact that the United States is a monist State, meaning that once a treaty is ratified, it immediately becomes part of the domestic law without the need for enabling legislation.<sup>187</sup> To give international treaties such status in domestic law has been a cause of anxiety for some time, as evidenced by Senator Bricker’s effort, in the 1950s, to amend the Constitution to provide that treaties would not form part of United States law without the passage of separate enabling legislation through Congress.<sup>188</sup> However, the amendment failed to pass in the Senate by a single vote, and the position in the United States remains that treaties, once ratified, immediately form part of the supreme law of the land. This appears to be one of the factors that inhibit the United States ratifying human rights treaties.<sup>189</sup>

The previous chapter demonstrated that the United States was actively involved in the drafting of CROC, albeit focusing more on civil and political rights than ESC rights such as Article 29(1). Yet this support for a convention on children’s right in the international arena is not replicated in the domestic arena. Over

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<sup>184</sup> Pursuant to the United States Constitution (Article 2, section 2), the President has power to ratify treaties but only after he has obtained a two-thirds majority vote in the Senate.

<sup>185</sup> Henkin, Louis *Foreign Affairs and the Constitution* (1972) Foundation Press, New York, p. 602.

<sup>186</sup> Roth, Kenneth ‘The Charade of US Ratification of International Human Rights Treaties’ (2000) 1 *Chicago Journal of International Law* 347, 349.

<sup>187</sup> Article 6 of the Constitution of the United States (Also known as the Supremacy Clause) provides that ‘all Treaties made, or which shall be made, under the Authority of the United states, shall be the Supreme Law of the Land, and Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding’.

<sup>188</sup> Schubert, Glendon Austin ‘Politics and the Constitution: The Bricker Amendment During 1953’ (1954) 16(2) *The Journal of Politics* 257.

<sup>189</sup> Bradley, Curtis A. and Goldsmith, Jack L. ‘Treaties, Human Rights and Conditional Consent’ (2000) 149 *University of Pennsylvania Law Review* 399, 400-401.

twenty-five years ago, Louis Henkin described this as the United States being a ‘flying buttress’ rather than a ‘pillar’ – supporting the structure of international human rights from the outside, rather than being a key part of the system.<sup>190</sup> Henkin said that while the reasons for this are not obvious, he believes it is related to deep isolationism – the United States wants to export its notion of rights to others, and believes it has nothing to learn or gain from subjecting itself to international scrutiny.<sup>191</sup> By being a flying buttress rather than a pillar, the United States helps to shape the rules that others abide by, but remains free to apply, or not apply, such standards to itself, safe in the knowledge that its performance will never be monitored by the system it helped set up for the monitoring of others.<sup>192</sup>

The United States’ general resistance to committing to international human rights treaties applies equally to its decision not to ratify CROC. While the rest of the world rushed to adopt CROC, many in the United States saw it has a threat to families, an attack on parents, ‘a tool for perverts’ and even compared it to policies used by the Nazis.<sup>193</sup> Most of the opposition to CROC has come from the conservative ‘religious right’ which is vocal in its efforts to ensure that the United States does not ratify this treaty.<sup>194</sup> United States Senate staff report that they receive 100 letters opposing ratification of CROC for every one letter that they receive in support.<sup>195</sup> This kind of campaign opposing ratification, directed at individual senators, makes it unlikely that CROC will receive the required two-thirds vote in the Senate, and therefore makes any submission of this treaty to the Senate for approval to ratify pointless. This organised opposition to CROC has many parallels with the response to the JSCOT Inquiry into CROC in Australia, which also received numerous emotive submissions

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<sup>190</sup> Henkin, Louis ‘Rights: American and Human’ (1979) 79(3) *Columbia Law Review* 405, 421.

<sup>191</sup> Ibid, 422-423.

<sup>192</sup> Koh, Harold Hongju ‘America’s Jekyll-and-Hyde Exceptionalism’ in Ignatieff, Michael (ed) *American Exceptionalism and Human Rights* (2005) Princeton University Press, Princeton, New Jersey, 116.

<sup>193</sup> See Kilbourne, Susan ‘The Wayward Americans – Why the USA has Not Ratified the UN Convention on the Rights of the Child’ (1998) 10(3) *Child and Family Law Quarterly* 243.

<sup>194</sup> See for example Wilkins, Richard G., Becker, Adam, Harris, Jeremy and Thayer, Donlu ‘United States and its Participation in the Convention on the Rights of the Child: Why the United States Should Not Ratify the Convention on the Rights of the Child’ (2003) 22 *St Louis University Public Law Review* 411, and *The Phyllis Schlafly Report* accessed at: [www.eagleforum.org/psr/1997/oct97/psroct97.html](http://www.eagleforum.org/psr/1997/oct97/psroct97.html) on 9 August 2007.

<sup>195</sup> Kilbourne, above n 192.

opposing CROC.<sup>196</sup> However, a significant difference is that by the time opponents of CROC in Australia had an opportunity to express their views to the Federal Government, CROC had already been ratified. Whereas in the United States the oppositional campaign can have a direct impact on whether the United States will ratify this convention.

The opposition to CROC within the United States falls into two categories – jurisdictional and substantive. The jurisdictional arguments in turn fall into two further categories. The first is that the United States should not cede domestic laws and policy to the UN. The argument is that to allow a UN body, such as the CRC to monitor the United States' record on children's rights would be to surrender American sovereignty.<sup>197</sup> The second argument is that the jurisdiction to make laws relating to children under the Constitution belongs to the governments of the 50 states, not the Federal Government, and therefore ratification of CROC would be an attack on federalism, and a violation of states' rights.<sup>198</sup> This argument stems from the Supreme Court decision in *Missouri v Holland*<sup>199</sup> which held that the Federal Government can use the Constitutional treaty power to override state power. Thus, the fear has been that if the United States ratified CROC, the Federal Government would acquire the power to legislate under the Necessary and Proper clause of the Constitution<sup>200</sup> in a subject matter reserved to the states.<sup>201</sup> However, this concern may no longer be valid since there is now doubt about whether *Missouri v Holland* is still good law.<sup>202</sup>

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<sup>196</sup> Jones, Melinda 'Myths & Facts Concerning the Convention on the Rights of the Child in Australia' (1999) *Australian Journal of Human Rights* 28.

<sup>197</sup> Gregory, David L. 'The United States' Concerns about the Convention on the Rights of the Child' (2002) 14(3) *Education and the Law* 141, 145.

<sup>198</sup> Kilbourne, above n 192, 244

<sup>199</sup> (1920) 252 U.S. 416.

<sup>200</sup> Article 1, Section 8.

<sup>201</sup> This is similar to the situation in Australia where the Federal Government can use its foreign affairs power under s 51(xxix) of the Constitution to implement treaties in Australia in subject matter areas where it would not otherwise have jurisdiction.

<sup>202</sup> See the dicta in *Reid v Covert* (1957) 354 U.S. 16 which suggests that the U.S. Supreme Court may not reach the same decision if presented with a scenario similar to *Missouri v Holland* today. In particular, Justice Black stated that 'treaties must comply with the constitution', that is the treaties cannot be used as a way of circumventing the division of power between Federal and State Governments under the Constitution. See also Healy, Thomas 'Is "Missouri v. Holland" Still Good Law? Federalism and the Treaty Power' (1998) 98(7) *Columbia Law Review* 1726.

Another substantive argument against the United States ratifying CROC comes from a powerful body of people in the United States who see CROC as appropriate for other countries, but not for the United States, because of the inclusion of ESC rights. Thus, Michael Southwick, the United States Ambassador to the UN has commented that:

The Convention on the Rights of the Child may be a positive tool in promoting child welfare for those countries that have adopted it. But we believe the text goes too far when it asserts entitlements based on the economic, social and cultural rights contained in the Convention and other instruments. The human rights-based approach, while laudable in its objectives, poses significant problems as used in this text.<sup>203</sup>

The other substantive arguments in opposition to the United States ratification of CROC focus on the specific rights articulated in CROC. Much has already been written about the more frequently voiced objections, such as those pertaining to abortion,<sup>204</sup> corporal punishment<sup>205</sup> and juvenile justice,<sup>206</sup> and these do not relate directly to this thesis. However, there has also been specific unease expressed regarding Article 29(1). For example, the American Bar Association (ABA) has voiced such a concern in its policy on CROC, which in an effort to encourage ratification, sets out eight suggested RUDs, including the following:

Addressing Article 29 of the Convention, an Understanding that the United States is not required to regulate private educational institutions in any way beyond

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<sup>203</sup> Ambassador E. Michael Southwick, Deputy Assistant Secretary of State for International Organization Affairs Statement in the Preparatory Committee for the General Assembly Special Session on the Children's World Summit, February 1, 2001 accessed at: [www.un.int/usa/01\\_015.htm](http://www.un.int/usa/01_015.htm) on 22 October 2003.

<sup>204</sup> Although CROC does not deal with abortion, it defines a child as every human being below the age of eighteen years (Article 1). There are people who see the failure to expressly define a child as being from *conception*, means CROC implicitly sanctions abortion. For a discussion of this issue see Alston, Philip 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 156.

<sup>205</sup> See for example Imbrogno, Andre R. 'Corporal Punishment in America's Public School and the U.N. Convention on the Rights of the Child: A Case for Nonratification' (2000) 29 *Journal of Law and Education* 125.

<sup>206</sup> See for example Hancock, Cele 'The Incompatibility of the Juvenile Death Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns' (1995) 12 *Arizona Journal of International and Comparative Law* 699; Hafen, Bruce C. and Hafen, Jonathan O. 'Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 *Harvard International Law Journal* 449; and the Spring 2006 issue of the *Emory International Law Review* which is devoted entirely to children's rights and contains 12 articles exploring various issues relating to the Convention and the United States' refusal to ratify it. (2006) 20 *Emory International Law Review*.

that which is permitted by the First Amendment of the Constitution.<sup>207</sup>

The ABA is in essence asserting that the United States constitutional right of free speech under the First Amendment prevents the Government from regulating what schools must teach their students. Thus any obligation on the Government to prescribe a human rights curricula would arguably violate the First Amendment.<sup>208</sup>

Professor David Smolin also identified Article 29(1) as a reason why the United States should not ratify CROC, suggesting that it will be used to promote ‘propaganda within schools’ and referring to the requirement in paragraph (b) that children learn about the principles of the UN Charter as a ‘sinister, or at least self-serving agenda’.<sup>209</sup> Somewhat surprisingly for a law professor writing in a reputable law journal, Smolin asserts that ‘schools that oppose the United Nations become illegal’ under CROC and speculates whether the CRC would ‘have jurisdiction to mandate curricular revisions in every school within the United States, if the United States were to finally ratify [CROC].’<sup>210</sup> It appears that Smolin’s scholarly writing may be informed by his religious beliefs which seem to be on the conservative side, although he has not identified himself as a member of the ‘religious right’.<sup>211</sup> With such misconceptions about the nature of the obligation in Article 29(1) and such misconstruing of the powers of the CRC, appearing in respectable law journals, it is perhaps not surprising that there is strong opposition to ratifying CROC within the United States.

Article 29(1) has also been criticised by the religious right. Thus Richard Wilkins, founder of the conservative NGO Family Voice, asserts that the requirement of parents and others to develop a child’s personality, talents and mental and physical abilities to their fullest potential (as required by paragraph

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<sup>207</sup> Policy provided to the author by the ABA and held on file with the author.

<sup>208</sup> Indeed this argument has already been asserted in a constitutional challenge to the validity of the *Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues* by a group of public school students and teachers. The case has yet to be decided. See *Griswold v Driscoll* United States District Court for the State of Massachusetts, Docket No. 05 CA 12147 MLW.

<sup>209</sup> Smolin, David M. ‘A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood’ (2003) 17 *Emory International Law Review* 967, 982.

<sup>210</sup> *Ibid.*

<sup>211</sup> For example, he is a regular contributor to a religious publication *First Things* accessed at: <http://sandbox.firstthings.com/> on 16 September 2007.

(a)), while at the same time maintaining the child's own cultural identity, language and values (as required by paragraph (c)) places too great a burden on parents and others, particularly when CROC proclaims children 'to be the "equal" of their parents'.<sup>212</sup> Similarly, the conservative organisation, Eagle Forum whose mission it to 'oppose all encroachments against American sovereignty through treaties'<sup>213</sup> has described Article 29(1) as requiring children to be taught about 'feminism, and radical environmentalism'.<sup>214</sup> Thus Article 29(1) has featured quite prominently in the campaigns opposing United States' ratification of CROC.

It is clear that the United States Government and Administration is implacably opposed to ratifying CROC, based on its strong history of exceptionalism to international law,<sup>215</sup> as well as the various pressures – both jurisdictional and substantive – that it is subjected to on the domestic front, including in relation to Article 29(1). There appears to be little chance of CROC being ratified by the United States in the near future, but this does not mean that the United States, or jurisdictions within the United States, cannot implement and comply with individual norms in CROC. The following section considers whether the Federal or Massachusetts' Governments have taken any steps to provide HRE of the kind mandated in Article 29(1).

## **6.7 United States Federal Government Initiatives Regarding HRE**

This section, examining the United States' Federal Government's initiatives regarding HRE, is brief because there is very little to analyse. Unlike Australia, the United States does not have a national human rights institution that could promote HRE, nor does it have a national human rights education committee.<sup>216</sup> The only initiatives that the Government has taken in the area of HRE are a limited number of programs by the Federal Department of Education. These

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<sup>212</sup> Wilkins, above n 193, 414.

<sup>213</sup> Accessed at: [www.eagleforum.org/misic/descript.html](http://www.eagleforum.org/misic/descript.html) on 9 August 2007.

<sup>214</sup> *The Phyllis Schlafly Report* accessed at: [www.eagleforum.org/psr/1997/oct97/psroct97.html](http://www.eagleforum.org/psr/1997/oct97/psroct97.html) on 9 August 2007.

<sup>215</sup> For a detailed discussion of this isolationism see Ignatieff, Michael (ed) *American Exceptionalism and Human Rights* (2005) Princeton University Press, New Jersey.

<sup>216</sup> This is not to imply that the Australian NHRI and National Human Rights Education Committee have been particularly successful in promoting HRE in Australia, but they have been working, to greater or lesser degrees, in the field of HRE, and thus there were activities to analyse.

are analysed in the next section, followed by a consideration of the role the American Bill of Rights plays in school education about human rights.

### 6.7.1 *Federal Department of Education*

The United States Department of Education has the mission of ensuring equal access to education and promoting educational excellence.<sup>217</sup> Recently, the Department's highest priority has been implementing the *No Child Left Behind Act 2001* (NCLB Act), an initiative of President Bush designed to improve students' literacy and numeracy. It involves regular testing of students' reading and mathematics skills. The funding incentives in the NCLB Act effectively force teachers to focus on numeracy and literacy to the exclusion of other areas of learning.<sup>218</sup> The result is that the NCLB Act is likely to have a negative impact on HRE by narrowing school syllabuses, making HRE even less visible in the curriculum.

However, the Department of Education does have one program which could be characterised as HRE. It is called '*We the People: The Citizen and the Constitution*' ('We the People'), and it is in many ways similar to the Australian Government's Discovering Democracy kit discussed in section 6.4.4 above. 'We the People' was designed to promote civic competence and responsibility among school students. According to Ardice Hartry and Kristie Porter it was motivated by 'a decline in the political involvement of youth over the previous two decades: only about one-third of young people aged 18-29 voted in the 2000 presidential election'.<sup>219</sup> As part of the program students undertake study of the Constitution and Bill of Rights before participating in a simulated congressional hearing in which they 'testify' before a panel of 'judges'.<sup>220</sup> While the program includes some education about rights, it is very narrow and parochial in its focus, looking only at the American Constitution and Bill of Rights. Furthermore, it is aimed at increasing civic *responsibility* rather than

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<sup>217</sup> Department of Education web page accessed at: [www.ed.gov/about/landing.jhtml?src=gu](http://www.ed.gov/about/landing.jhtml?src=gu) on 12 February 2006.

<sup>218</sup> McKenzie, Jamie 'Gambling with Children' (2003) *No Child Left* accessed at: <http://nochildleft.com/2003/jan03.html#2> on 7 August 2007.

<sup>219</sup> Hartry, Ardice and Porter, Kristie 'We the People Curriculum: Results of Pilot Test', July 2004, accessed at: [http://eric.ed.gov/ERICDocs/data/ericdocs2/content\\_storage\\_01/0000000b/80/2e/1b/da.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/2e/1b/da.pdf) on 27 February 2007, 1.

<sup>220</sup> Centre for Civic Education accessed at: [www.civiced.org/index.php?page=wtp\\_introduction](http://www.civiced.org/index.php?page=wtp_introduction) on 7 August 2007.

promoting individual *rights*, and in this respect is similar to the Discovering Democracy kit. It is therefore almost a distortion to even categorise it as HRE.

Clearly, the United States Department of Education has been much less active in the area of HRE than the Australian Department of Education, and there are no initiatives that attempt to promote HRE of the kind articulated in Article 29(1) of CROC. Chapter 8 considers whether this disparity in efforts to promote HRE at the federal level is attributable to the fact the United States has not ratified CROC.

#### *6.7.2 U.S. Congressional Human Rights Caucus on HRE in Theory and Practice*

The United States Congressional Human Rights Caucus<sup>221</sup> (Human Rights Caucus) is a bi-partisan body that endeavours to bring human rights issues to the attention of both the House of Representatives and the Senate.<sup>222</sup> On 16 February 2007 it conducted a special briefing on ‘Human Rights Education in Theory and Practice’ at which a number of different HRE experts were invited to speak, including Felisa Tibbitts, Executive Director of the NGO HREA, who highlighted HREA’s work in ‘having trained over 1,000 human rights defenders from more than 75 countries, including members of Human Rights Commissions, prosecutors for special International Courts, human rights observers, and international and grassroots non-governmental organizations.’<sup>223</sup> Although Tibbitts concluded by calling on the Government to provide ‘federal leadership in promoting human rights education in schools’<sup>224</sup> within the United States, the focus of her presentation was on the provision of HRE overseas. The Human Rights Caucus was also addressed by Theodore Orlin, an academic from Utica College in New York and President of the NGO

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<sup>221</sup> This body was founded in 1983 by Tom Lantos (D-CA) and John Edward Porter (R-IL) for the purpose of educating Congress about human rights abuses across the world, accessed at: <http://harkin.senate.gov/news.cfm?id=251635> on 14 August 2007.

<sup>222</sup> There has been very little research conducted into the Human Rights Caucus; and it was observed that: ‘the Congressional Human Rights Caucus has received surprisingly scant attention, either by congressional or human rights scholars.’ McCormick, James and Mitchell, Neil ‘The Congressional Human Rights Caucus: Who Belongs and What Does it Do?’ *Paper presented at the Annual Meeting of the International Studies Association, Hawaii*, 5 March 2005 accessed at [www.allacademic.com/meta/p69918\\_index.html](http://www.allacademic.com/meta/p69918_index.html) on 15 August 2007.

<sup>223</sup> Press Releases: ‘HREA Director Testifies before U.S. Congressional Human Rights Caucus’, 19 February 2007, accessed at: [www.hrea.org/US-Congress-testimony-Feb-2007.html](http://www.hrea.org/US-Congress-testimony-Feb-2007.html) on 14 August 2007.

<sup>224</sup> Ibid.

International Human Rights Education Consortium.<sup>225</sup> Like Tibbitts, Orlin's presentation focused on regional and global HRE.<sup>226</sup> After emphasising the historical importance the United States played in establishing the UN, and drafting its Charter and the UDHR, Orlin referred to his forthcoming trips to India to conduct a human rights training program, Albania to attend a human rights film festival, and Bulgaria to host a human rights roundtable for academics.<sup>227</sup> The purpose of providing this travel itinerary appears to have been to represent to the Human Rights Caucus that the United States is continuing to play an important role in providing HRE around the world. Other speakers briefing the Human Rights Caucus included Raymond Copson from Johns Hopkins University, who talked about 'Human Rights in Bush Administration Africa Policy' and Lynn Fredriksson, from Amnesty International who presented on 'Human Rights in the Horn of Africa'.<sup>228</sup> Thus, it is clear the thrust of the briefing was about the United States' involvement in HRE overseas, not within its domestic jurisdiction, and that the Human Rights Caucus understands human rights as a foreign rather than domestic issue.

### 6.7.3 *Bill of Rights*

Undoubtedly one of the most influential documents in the United States is the Bill of Rights, which is made up of the first ten amendments to the United States Constitution. Studies have revealed that American high school students receive a significant amount of education about the United States Constitution and Bill of Rights.<sup>229</sup> The Bill of Rights does not contain any mandate that it be used to educate students about rights, but it is such an important part of American history and culture that it is embedded in the school curricula in the United States.

Education about the Bill of Rights is not, on its own, sufficient to achieve the HRE contemplated by Article 29(1) of CROC because it does not have any

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<sup>225</sup> The Consortium is made up of 13 Universities, Colleges and Human Rights Institutes, 14 Human Rights NGOs, and over 40 academics and human rights advocates from 24 countries.

<sup>226</sup> Briefing paper to the Human Rights Caucus dated 16 February 2007, received via email from Professor Orlin. Copy on file with author.

<sup>227</sup> Ibid.

<sup>228</sup> Accessed at: [www.udayton.edu/News/Article/?contentId=2242](http://www.udayton.edu/News/Article/?contentId=2242) on 14 August 2007.

<sup>229</sup> See for example Gaudelli, William and Fernekes, William R. 'Teaching and Global Human Rights for Global Citizenship: Action Research in the Social Studies Curriculum' (2004) Jan/Feb *The Social Studies* 16.

international element to it, and does not cover the full gamut of human rights enshrined in international human rights law, for example, it does not include any ESC rights. Thus, educating students about the Bill of Rights does not constitute the HRE contemplated by Article 29(1) of CROC. However, the significance that the Bill of Rights plays in education in United States schools does suggest that it may be more feasible to base HRE on a domestic instrument than an international instrument. Research suggests students learn about the Bill of Rights in at least four different classes throughout their schooling.<sup>230</sup> Surveys have been conducted that demonstrate Americans have a high degree of knowledge about their Bill of Rights.<sup>231</sup> By contrast, another study found that only 8% of American adults, and 4% of American young people were aware of the Universal Declaration of Human Rights. Indeed, 50% of adults who participated in the study, and 59% of the youth did not believe such a document existed!<sup>232</sup>

It is clear that the United States Bill of Rights is embedded in the education of children in the United States in a way that is similar to the way that the CRC recommends that Article 29(1) of CROC form part of the curriculum.<sup>233</sup> Thus, if the content of the Bill of Rights more closely resembled the HRE set out in CROC, the United States would be compliant with Article 29(1).

#### *6.7.4 Conclusion Regarding National Initiatives*

The United States Government's position on HRE in the domestic arena mirrors the position it adopted during the drafting of CROC (making it a better treaty for 'others') and the position it expressed at the proclamation of the UN World Programme for HRE (that human rights are an important part of the United

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<sup>230</sup> Students will generally study the Bill of Rights for the first time in a fifth-grade American studies course, then in a junior high/middle school American history course, then in a high school American history course, and finally in a high school American government or civics course. Source: ERIC Clearinghouse for Social Studies/Social Science Education, accessed at: [www.ericdigests.org/pre-929/rights.htm](http://www.ericdigests.org/pre-929/rights.htm) on 6 March 2007.

<sup>231</sup> Quigley, Charles N. et al. *Preliminary Report on High School Students' Knowledge And Understanding Of The History And Principles Of The United States Constitution And Bill Of Rights* (1987) Center for Civic Education, Calabasas, California.

<sup>232</sup> Hart Research Associates 'Report Card on Human Rights in the USA' (1997) accessed at: <http://wwwserver.law.wits.ac.za/humanrts/160.94.193.60/repcard> on 6 March 2007.

<sup>233</sup> General Comment No. 1, above n 66, paragraph 18.

States foreign policy).<sup>234</sup> Thus the United States' approach to HRE is consistent regardless of whether it is acting on the international stage or within the domestic arena – that is it does not perceive the norm in Article 29(1) as being relevant to the United States.

It is not just the United States Government that seems to perceive international human rights norms as only applicable to other States; there is evidence that academics may be adopting a similar attitude in their scholarship. It is reasonable to expect that an article entitled 'A United States Human Rights Policy for the 21<sup>st</sup> Century'<sup>235</sup> by leading international human rights scholar Professor Harold Koh would discuss domestic human rights policies. However, the vast majority of the article focuses on human rights as part of the United States foreign policy. It appears that human rights generally, and HRE specifically, are not perceived as a domestic issue in the United States, at least not by the Federal Government and some scholars.

The next section analyses whether this lack of interest in HRE as a domestic issue at the federal level filters down to the state level. In particular, has the Massachusetts Government embarked on any HRE initiatives or demonstrated any commitment to the type of education set out in Article 29(1) of CROC.

## **6.8 Massachusetts' Government Initiatives Regarding HRE**

Given the dearth of HRE initiatives at the federal level, one might expect a similar lack of HRE initiatives at the state level. However, at least in Massachusetts, this is not the case. There are state laws and policies that positively promote HRE in Massachusetts schools. Furthermore, this HRE is not limited to the Bill of Rights, although this has a strong presence, but also incorporates international human rights instruments, including treaties not ratified by the United States. This section examines three specific initiatives of the Massachusetts Government relating to HRE, namely the Massachusetts *General Laws*, the Curriculum Frameworks, and the *Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues*. This

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<sup>234</sup> It is also similar to the position that the Australian Government adopted when calling for the Inquiry into Good Governance and Human Rights Education in the Asia Pacific Region, discussed in section 6.4.4 above.

<sup>235</sup> Koh, Harold Hongju 'A United States Human Rights Policy for the 21<sup>st</sup> Century' (2002) 46 *Saint Louis University Law Journal* 293.

analysis reveals that while the *General Laws* do not mandate HRE in accordance with Article 29(1) of CROC, there are aspects of the other two publications that are congruent with this norm.

#### 6.8.1 Massachusetts Legislation

In Massachusetts, the relevant legislation is the *General Laws* Part I, relating to the Administration of the Government, and in particular Chapters 69 on the Powers and Duties of the Department of Education, and Chapter 71, dealing with Public Schools. Section 1 of Chapter 69 describes the paramount goal of education in Massachusetts as extending to all ‘children the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy.’ This bears some similarity to the aims of education identified in Article 29(1)(a) of CROC, in that it refers to children developing to their fullest potential, but there is no reference to human rights or concepts such as equality, tolerance, peace and understanding which make up the rest of Article 29(1). Furthermore, the reference to contributing to the economy rather than to his/her society suggests that fiscal factors are more important than community considerations in a child’s education. Thus, the very first section of the legislation dealing with education creates an impression that education about human rights is not a concern or priority of the Massachusetts Government.

The Board of Education, established under Chapter 69, section 1D has responsibility for establishing academic standards for the state which set out the core skills, competencies and knowledge students are expected to have at the conclusion of their school education. Relevant to this research is the legislative directive that: ‘The standards shall provide for instruction in at least the major principles of the Declaration of Independence, the United States Constitution, and .... shall be designed to inculcate respect for the cultural, ethnic and racial groups of the commonwealth [of Massachusetts].<sup>236</sup> Education directed at developing respect for difference is consistent with Article 29(1) of CROC, particularly paragraphs (c) and (d). Where this provision deviates from the requirements of Article 29(1) is in basing this education on national documents that contain only limited rights, rather than international instruments that contain

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<sup>236</sup> Massachusetts General Laws, Chapter 69, Section 1D.

a broader range of human rights, including ESC rights. Furthermore, the focus is very parochial because it limits the education that students receive to learning only about cultural, ethnic and racial groups within Massachusetts. Article 29(1) of CROC, as elaborated on by General Comment No. 1 takes a more global approach to HRE and is aimed at promoting respect for all civilizations and peoples.<sup>237</sup>

The General Laws set out what subjects are mandatory, and provides that all high schools must teach students about:

civics, including the Constitution of the United States, the declaration of independence and the bill of rights... for the purpose of promoting civic service and a greater knowledge thereof, and of fitting the pupils, morally and intellectually, for the duties of citizenship.<sup>238</sup>

The language used in this section is revealing because the reference to the duties of citizens, without mention of the rights of citizens, or the responsibilities of government, indicates that the purpose of the proposed civics education is not about empowering individuals to invoke their rights, but rather about ensuring they understand their duties. This approach is similar to the initiatives undertaken by the Australian Government, such as the Discovering Democracy kit, but is contrary to the HRE prescribed in Article 29(1) of CROC, which is focused on ensuring that children learn about their rights, not duties that they may have to the State.

These provisions highlight the importance of the United States Bill of Rights in education in Massachusetts. The absence of any reference to international human rights or to issues beyond the borders of the United States indicates that Article 29(1) of CROC was not in mind when the legislature was developing the academic standards for school education in Massachusetts.

### 6.8.2 Curriculum Frameworks

The academic standards referred to in the Massachusetts General laws are expanded in curriculum frameworks (CF) developed by the Massachusetts

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<sup>237</sup> Paragraphs (c) and (d) of Article 29(1) and paragraph 13 of General Comment No. 1 which discusses the need to focus on 'national and international problems'.

<sup>238</sup> *Massachusetts General Laws*, Chapter 71, section 2.

Board of Education.<sup>239</sup> It is not mandatory that schools follow the CFs. However, there are compulsory state-wide tests<sup>240</sup> which students have to pass in order to get a high school diploma, and these tests are based on the CFs. Thus there is a strong incentive for teachers to follow the CFs developed by the State Board of Education.<sup>241</sup>

Like the Victorian CSF, the Massachusetts curriculum standards most relevant to HRE are the English Language Arts CF (2001) and the History and Social Science CF (2003), both of which are analysed in this section. The English CF begins with a set of guiding principles. One of these principles picks up on the concept of individual responsibility referred to in Chapter 71 of the General Laws. It states that: ‘an effective English language arts curriculum nurtures students’ sense of their common ground as present or future American citizens in order to prepare them for responsible participation in our schools and in civic life.’<sup>242</sup> Again this sends a message to teachers that it is students’ responsibilities that are to be emphasised, not their rights, and this is converse of the HRE mandated in Article 29(1) of CROC.

The English CF includes two appendices setting out suggested authors and literary works for teachers to use. While there is no shortage of literary works that explore human rights themes and could be used as part of an English curriculum,<sup>243</sup> none of these are included. Thus the English CF does not direct teachers towards human rights related resources they could use. The only item in the English CF that is connected to HRE is an activity for grade 9-10 students which requires them to ‘discuss similarities and differences in the social and political contexts for the views of Thoreau, Gandhi and Martin Luther King Jr. on

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<sup>239</sup> There are a total of eight curriculum frameworks in Massachusetts, namely Art; Foreign Languages; Mathematics; Comprehensive Health; Science Technology/Engineering; History and Social Science, English Language Arts and English Language Proficiency. Accessed at: [www.doe.mass.edu/frameworks/current.html](http://www.doe.mass.edu/frameworks/current.html) on 4 August 2007.

<sup>240</sup> Massachusetts Comprehensive Assessment System, commonly known as MCAS.

<sup>241</sup> See for example Survey B8 who indicated that the reason she believed HRE was not widespread at her school was that ‘most classes follow the curriculum frameworks which are not, to the best of my knowledge, dedicated to human rights education’.

<sup>242</sup> *Massachusetts English Language Arts Curriculum Framework* (2001), 6.

<sup>243</sup> For example the University of Minnesota Human Rights Resource Centre maintains a bibliography of human rights literature that is divided into categories, such as poetry, plays, novels, non-fiction and biographies. Accessed at: [www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-3/Activity\\_13.htm](http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-3/Activity_13.htm) on 20 February 2007.

civil disobedience.<sup>244</sup> While this activity gives students some exposure to civil rights, and is not limited to purely American discourse, that it is the only HRE opportunity in the entire English CF demonstrates that HRE is not embedded in the English curriculum.

The second CF is the History and Social Science CF and this includes significantly more HRE, and many of the items relate to international and global aspects of HRE, which is unexpected, given the parochial nature of the efforts at the Federal level, and in the Massachusetts *General Laws*. There are, of course, numerous references to the United States Constitution and the Bill of Rights, but these are focused more on the rights of individuals and the responsibilities of governments. Thus, one exercise requires students to:

Describe the responsibilities of government at the federal, state and local levels (e.g. protection of individual rights...) and Describe ... and explain how the Constitution and Bill of Rights reflect and preserve ... (a) individual rights and responsibilities (b) equality (c) the rule of law.<sup>245</sup>

While the concentration is still on civil and political rights, the emphasis is at least on the rights of the individual, and the responsibilities of government.

This CF has a distinctly global orientation, which includes opportunities for teachers to incorporate HRE. For example, it is suggested that teachers can ask students to ‘Describe reasons for the establishment of the United Nations in 1945 and summarize the main ideas of the Universal Declaration of Human Rights.’<sup>246</sup> This presents an opportunity for students to engage in in-depth discussions about the nature and extent of human rights, as well as the role of international organisations and international instruments in the protection and promotion of human rights. The Appendix to the CF sets out primary sources recommended for use when implementing the CF, and many of the readings have a human rights focus, including: the UDHR; the French *Declaration on the Rights of Man and Citizen*; Nelson Mandela’s *Statement at the Rivonia Trial*;

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<sup>244</sup> English CSF, above n 241, 16.

<sup>245</sup> Massachusetts History and Social Science Curriculum Framework (2003), 31.

<sup>246</sup> Ibid, 61.

Andrew Sakharov's *Peace, Progress and Human Rights*; Fang Lizhe's *Human Rights in China*; and Franklin Roosevelt's *Four Freedoms Speech*.<sup>247</sup>

The Massachusetts CFs appear to provide slightly more opportunity for teachers to incorporate HRE into their classrooms than do the Victorian CSFs, although neither embed HRE into the curriculum, as required by Article 29(1) of CROC and General Comment No. 1. If ratification of a human rights treaty has a positive impact on the human rights practices of a State Party, one would expect the Victorian CSFs to conform to Article 29(1) of CROC more than the Massachusetts CFs, yet this is not the case.

#### 6.8.3 *Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues*

In 1998, the Massachusetts Legislature unanimously passed a law directing the Department of Education to develop standards on curricular materials and resources related to teaching about genocide and human rights.<sup>248</sup> The Bill was introduced by Senator Steven Tolman, whose motivation appears to have been to increase education about the Armenian Genocide in schools. He appears to have been deeply touched by his neighbour, Leon Krikorian's story of surviving the Armenian Genocide stating:

Sadly Leon is not here anymore and I know that there are not enough Leon Krikorians to tell their stories to every person who might doubt history. It is up to all of us to tell Leon's story.<sup>249</sup>

Senator Tolman was committed to encouraging students to speak out against intolerance whenever they encounter it, and for this reason the Act covers more than just the Armenian Genocide, and addresses human rights more generally.<sup>250</sup>

There were some obstacles encountered during the passage of the Act. The first draft of the Bill called for education about genocide and human rights to be

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<sup>247</sup> Ibid, Appendix B, 91.

<sup>248</sup> *An Act Requiring Certain Instructions in the Public Schools of the Commonwealth*, Chapter 276 of the Acts of 1998.

<sup>249</sup> Speech made by Senator Tolman at a Town Meeting on 2 October 2006, accessed at: [www.anca.org/press\\_releases/press\\_releases.php?prid=894](http://www.anca.org/press_releases/press_releases.php?prid=894) on 7 August 2007.

<sup>250</sup> Ibid.

mandatory. This was opposed on the basis that there are very few elements of the Massachusetts CFs that are compulsory. The Bill was therefore modified to recommend, rather than mandate, such education, and this resulted in it being passed unanimously by both the House of Representatives and the Senate.<sup>251</sup>

The Board of Education implemented the legislation by publishing the *Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues* (the Guide),<sup>252</sup> which not only makes recommendations for locating and choosing curriculum materials on genocide and human rights, but also offers guidance to teachers on how to use such materials. The Guide states that it is to be used in conjunction with the curriculum frameworks, particularly the English and History and Social Science CFs.<sup>253</sup>

The Guide achieves a good balance between domestic and international human rights issues; when studying the United States, it suggests resources that deal with the slave trade, treatment of Native Americans, segregation, and suffragettes, while international issues recommended for study include the Irish famine, the Armenian genocide, the Holocaust, and the Mussolini fascist regime.<sup>254</sup> These are historical matters that generally form part of the Massachusetts school curriculum, but are not usually examined through the lens of human rights. The manner in which the Guide is set out ensures that human rights abuses are not presented as something that happens only in other countries, and not in the United States; a problem that many Boston teachers identified in interviews, and which are analysed in the next chapter.

The *Act Requiring Certain Instructions in the Public Schools of the Commonwealth* is the only legislative mandate relating to HRE in schools in any of the four jurisdictions analysed in this chapter, and as such is the only example of a state ‘complying’ with the CRC’s recommendation that HRE be

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<sup>251</sup> Ibid.

<sup>252</sup> Published in June 1999 and accessed at: [www.doe.mass.edu/frameworks/news/1999/hrltr699.html](http://www.doe.mass.edu/frameworks/news/1999/hrltr699.html) on 27 February 2007.

<sup>253</sup> *The Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues* accessed at [www.doe.mass.edu/frameworks/news/1999/hr699.html](http://www.doe.mass.edu/frameworks/news/1999/hr699.html) on 7 August 2007.

<sup>254</sup> Ibid.

specifically and formally endorsed in legislation.<sup>255</sup> It appears that it took a politician being personally touched by human rights abuses for this to happen.

Notwithstanding this legislative endorsement of HRE, none of the 20 Boston teachers who participated in this research referred to the Guide in their discussion of HRE. It appears it was not the motivations for these teachers' HRE work,<sup>256</sup> and was not relied upon as a resource. One resource that many teachers indicated they used when teaching the Holocaust<sup>257</sup> was the materials produced by Facing History and Ourselves, an NGO that is not even included in the Guide as one of the organisations teachers can access for additional information.<sup>258</sup>

The reason for the low profile of the Guide in the data collected for this study is not readily apparent. It may be because the Guide sits apart from the CFs rather than being embedded in them, and thus is not part of the core documents that teachers rely on when developing their lessons; it may be that it is a relatively recent initiative,<sup>259</sup> and thus was not yet widely known; or it may be that there has not been sufficient training provided to teachers about how to use the Guide. This research suggests that, despite having legislative imprimatur, as recommended by the CRC, the Guide is not being widely used as a platform for providing HRE in Boston secondary schools.

#### *6.8.4 Conclusion Regarding Massachusetts' Initiatives*

The language of human rights is not widespread in the United States' education sector; the narrower term of 'civil rights' being more prevalent.<sup>260</sup> Thus the move by the Massachusetts Legislature to use and promote human rights in education is a significant departure from the United States' trend to focus on civil rights, and constitutes a move towards the HRE mandated in Article 29(1) of CROC. Indeed, the Guide includes as an appendix a summary of CROC and specifically refers to the content of education spelt out in Article 29(1). Thus,

<sup>255</sup> General Comment No. 1, above n 66, paragraph 17.

<sup>256</sup> What motivates teachers to focus on human rights education is discussed in section 7.5.4 in the next chapter.

<sup>257</sup> See for example Surveys B1, B4 and B7.

<sup>258</sup> *Guide to Choosing and Using Curricular Materials*, above n 252.

<sup>259</sup> At the time data was collected for this thesis, the Guide had been in place less than four years.

<sup>260</sup> See discussion in section 7.2.1 in the next Chapter.

notwithstanding that the United States has not ratified CROC, Massachusetts appears to be making a concerted effort to provide HRE consistent with Article 29(1) of that Convention. This, however, seems to be due to the efforts of one person motivated by a personal desire to see children learn about the Armenian Genocide, rather than a desire to comply with international human rights norms. Chapter 8 considers whether Senator Tolman can be considered a ‘governmental norm sponsor’, which is one of the elements Koh identifies in his transnational legal process model.

## **SECTION 4 – MAPPING THE TERRAIN: EVALUATING AUSTRALIA AND THE UNITED STATES’ DOMESTIC COMMITMENT TO HRE**

### **6.9 Conclusion**

The data analysed in this Chapter demonstrates the Australian Government has undertaken a limited number of initiatives that relate to HRE, but they fall well short of that set out in Article 29(1) of CROC. The United States Federal Government has not undertaken any domestic initiatives that could genuinely be described as HRE. This is not the result one would expect if ratification of an international human rights treaty has a positive impact on a State’s human rights practices. If commitment to an international human rights norm influences State practice, one would expect to find that the Australian Government has engaged in significantly more HRE of the kind mandated by Article 29(1) of CROC, than the United States Government. However, this research found that while the Australian Government has engaged in activities that it represents to the international community are HRE, the reality is that these activities do not amount to HRE as defined in Article 29(1) of CROC. At best they constitute partial compliance with some aspects of Article 29(1). In contrast, the United States, which has no international reporting requirements, has not sought to engage in even minimal domestic HRE efforts. Thus, being a State Party to CROC appears to have an impact on Australia in terms of form rather than substance, in that Australia seems to be more concerned with how it is perceived by the international community vis-à-vis HRE, than it is with whether it is fully *complying* with the mandated HRE.

When it comes to HRE initiatives at the state level, both Victoria and Massachusetts had engaged in considerably more initiatives that are congruent with Article 29(1) of CROC, than have their Federal counterparts. In both jurisdictions there was a trace of HRE in the curriculum frameworks, but most significantly, each state had one key HRE initiative – in Massachusetts: the *Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues*, and in Victoria: the *Ideas for Human Rights Education* booklet. In neither state were these initiatives stimulated by international HRE endeavours such as Article 29(1) of CROC, the UN Decade for HRE or the World Programme for HRE, nor were they provoked or encouraged by the Federal Governments. These state-based initiatives aimed at increasing HRE in secondary schools were driven by ‘bottom-up’ movements rather than ‘top-down’ mandates. In Victoria, the push for DET to publish an HRE resource came from civil society, namely the VHREC, while in Massachusetts, the campaign for increased education about human rights and genocide came from a Senator who felt passionately about the issue. Thus, when it comes to practical compliance with international HRE norms, it appears that it is grass roots, domestic factors that are influential, rather than whether a State has ratified CROC.

The data from Australia suggests that federalism impacts on compliance levels when, as in the case of Article 29(1) of CROC, the Federal Government does not have constitutional jurisdiction over the subject matter of the norm. Thus, the inability to directly implement Article 29(1), unless it resorts to the external affairs power, appears to be an impediment to achieving full compliance with this norm. Furthermore, the Australian Government has not been successful in using financial inducements to get state schools to embrace either the Discovering Democracy kit or the National Values Framework. However, at the same time as being an impediment to achieving full compliance with Article 29(1), federalism may be stimulating a grass roots HRE movement, in that individuals and organisations committed to HRE have been able to provoke action, at a state level, that is compatible with the HRE required by Article 29(1). So while federalism appears to act as a blockage on the journey of HRE from convention to classroom, it also facilitates a journey of HRE in the opposite direction – from civil society to state Departments of Education.

When it comes to the content of HRE, A Bill of Rights is a factor that appears to significantly influence the nature and extent of HRE in schools, in both positive and negative ways. On the one hand, a Bill of Rights makes HRE more likely, but on the other hand, it may make the HRE narrower, by limiting the HRE to only those rights included in the Bill of Rights which in both the United States and Victoria means only civil and political rights.

This Chapter has demonstrated that whether or not a State has ratified CROC is of minimal significance when it comes to actual ‘compliance’ with Article 29(1). At the national level this treaty appears to have little impact on Federal Governments’ laws or policies relating to HRE in either Australia or the United States. However, at the state level, while Article 29(1) does not *motivate* HRE, it does to some degree shape or influence the content of HRE as evidenced by the fact that the resources developed by the Massachusetts and Victorian Governments both explicitly include aspects of CROC.

The next Chapter considers whether Article 29(1) of CROC impacts on the nature or extent of HRE taking place in secondary schools in Melbourne and Boston, independently of domestic laws and policies. That is, are educators complying with Article 29(1) of CROC, notwithstanding a lack of effective leadership in this area by the federal and state governments?

## **CHAPTER 7 – TAKING THE TEMPERATURE OF HUMAN RIGHTS EDUCATION IN SCHOOLS**

### **Contents**

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- 7.4.3 Impediments to Incorporation of HRE into the Curriculum
- 7.4.4 Teachers' Motivation for Incorporating HRE

#### **7.5 Conclusion**

*If you are thinking a year ahead – plant seeds,  
If you are thinking 10 years ahead – plant a tree,  
If you are thinking 100 years ahead – educate the people.<sup>1</sup>*

## 7.1 Introduction

A critical component of this socio-legal research is to ascertain to what extent the initiatives analysed in the previous two chapters relating to Australia and the United States' conduct have resulted in HRE in accordance with Article 29(1) of CROC at the grassroots level, that is, in secondary schools. This chapter completes the picture regarding the extent to which Australia and the United States are giving effect to the norm in Article 29(1) of CROC. Laws relating to HRE, be they international or domestic, are not achieving their purpose if they are not being complied with at the 'coal face', which in the case of HRE, means that teachers are educating students about human rights. This chapter explores the final part of the journey of Article 29(1) of CROC, which began with the drafting of the norm in Geneva, and should end in school classrooms, where it is intended to be ultimately implemented.

Thus this chapter seeks to evaluate the nature and extent of HRE in secondary schools in Melbourne and Boston through analysis of data collected by way of surveys and interviews with teachers. It begins by considering the responses to the survey, as well as briefly analysing the impediments to collecting completed surveys from teachers. In particular, the gathering of data from Melbourne schools proved difficult, with school principals frequently acting as gatekeepers – refusing to pass on the survey to teachers.

Following on from this is an in-depth analysis of the data collected from both the completed surveys and the interviews with teachers. This examination is in three stages; firstly by examining the extent of HRE in schools, secondly by examining the nature of that HRE, and finally, by examining the four main themes to emerge from the data. The extent of HRE is assessed by analysing teachers' responses to questions regarding the scope of HRE in their school, while the nature of HRE is considered by identifying the main themes to emerge

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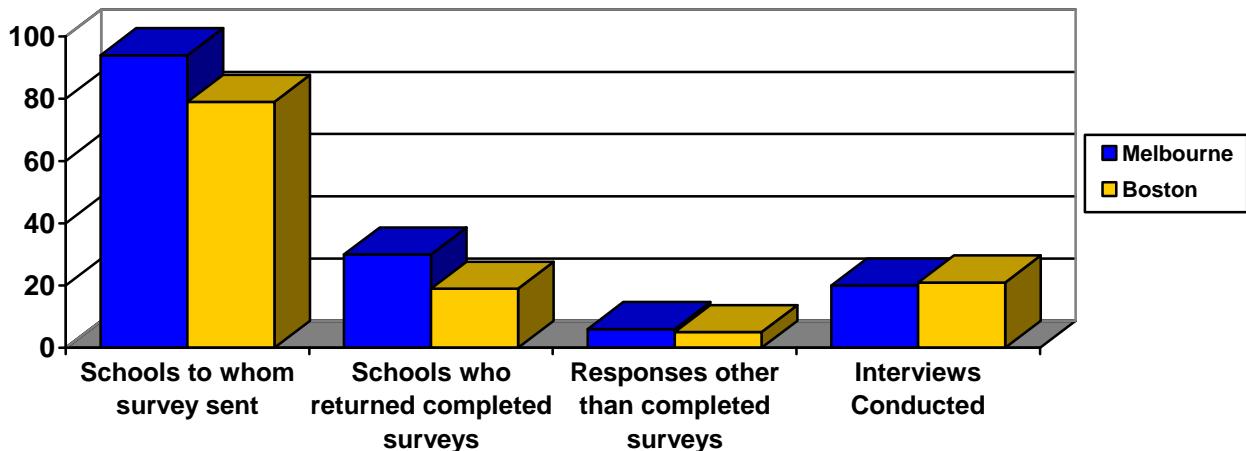
<sup>1</sup> Kuan-Tzu (4<sup>th</sup> - 3<sup>rd</sup> Century BC) China.

from the data. The four most important themes to emerge are teachers' understanding of HRE, their knowledge of Article 29(1) of CROC, their perceived impediments to HRE in schools, and their motivation for teaching human rights. This scrutiny leads to an increased understanding of the extent to which Article 29(1) of CROC is being complied with in schools, and to the extent it is not, why that might be.

## 7.2 Response Rates for Surveys and Interviews

The overall response rate was poor, as illustrated in Table 1 below. A total of 30 teachers in Melbourne and 19 in Boston completed and returned the survey, a response rate of 28% and 15% respectively. However, when coupled with the interviews<sup>2</sup> this amounts to an adequate and reliable sample size for a small-scale qualitative case study.

**Table 1: Survey Response Rate (raw scores)**



Note: Responses other than completed surveys consist of letters from school principals explaining why they would not be passing the survey on to their teachers to complete.

When the surveys responses are analysed alongside the in-depth interviews of teachers (21 in Boston, and 20 in Melbourne), it is possible to draw meaningful conclusions. This use of multiple methods, or triangulation, is a way of overcoming possible sample size variations (between Melbourne and Boston).

<sup>2</sup> A number of interviews were conducted with teachers who had not completed a survey. This was particularly the case in Boston where teachers were referred to the researcher and agreed to be interviewed without having previously having completed a survey. This increased the size of the sample pool from which data was gathered.

As such, this research employs an ethnographic approach to understanding compliance with Article 29(1) of CROC in schools, rather than a more narrow scientific methodology that focuses on issues of bias, representativeness and validity. The sample size, while insufficient for quantitative research, is sufficient for meaningful qualitative research.<sup>3</sup> The key to an adequate sample size is being able to generate enough in-depth material that patterns, concepts, categories and understandings emerge from the data.<sup>4</sup> Thus in qualitative research it is the quality and richness of the data obtained that is important, rather than the size of the sample.<sup>5</sup> Furthermore, there are no formulas for calculating the minimum required sample size, as this is relative to the research aims and methodology employed.<sup>6</sup> Forty-nine completed surveys and 41 interviews with teachers provided sufficient data to answer the research questions posed in this study.

The differing survey response rate between Melbourne and Boston is of interest. Only after conducting interviews with teachers in the United States did the explanation become apparent. During the course of interviews with Boston teachers, a number of them revealed that ‘human rights education’ is not language they are familiar with, or would use. In some cases teachers revealed that they were uncomfortable with such terminology. One Boston teacher stated:

*Teacher:* I think the term ... has an element of confrontation in it. If I talk about the Bill of Rights, you think about Thomas Jefferson and George Washington, or James Madison, and people are perfectly comfortable with this because they've been around forever, and they're all around in our culture and our monetary currency and the whole thing. So that's

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<sup>3</sup> Indeed qualitative research into educational practices has been carried out using an in-depth study of just one school. See McInerney, Peter *Making Hope Practical: School Reform for Social Justice* (2004) Post Pressed, Flaxton, Queensland.

<sup>4</sup> Auberbach, Carl F., and Silverstein, Louise B. *Qualitative Data: An Introduction to Coding and Analysis* (2003) New York University Press, New York, 91.

<sup>5</sup> Patton, M.Q. *Qualitative Evaluation and Research Methods* (1990) Sage Publication, Thousand Oaks, California, 169.

<sup>6</sup> Sandelowski, Margarete 'Sample Size in Qualitative Research' (1995) 18 *Research in Nursing and Health* 179.

fine. So sometimes we use different terminology for the same thing.

*Interviewer:* So why do you think that it has an element of confrontation about it?

*Teacher:* Because that's what's happened. I mean, if you look at someone as being in violation of human rights, that's usually what you're thinking. You know, when you say 'Bill of Rights', "Oh that's a right that everybody is guaranteed, and I have it" okay? I basically have it. Sometimes I have to fight for it, but basically I have it.<sup>7</sup>

Other teachers in Boston commented about the term 'human rights education' not having wide currency in the United States:

*Teacher 1:* I think the language that I like to use more often is inclusive curriculum. I'm thinking about multicultural education. Human rights I think is part of that, but the language that I use regularly is multiculturalism, which is sort of cliché in the USA at this point in time, which is a little dangerous. Sort of like 'diversity awareness' and that kind of stuff.<sup>8</sup>

*Teacher 2:* I don't know that human rights education is anything that I've ever heard before, in terms of education.<sup>9</sup>

*Teacher 3:* I am not familiar with this term or this type of education. I would assume it might be similar to social justice or social responsibility in the classroom, or perhaps similar to teaching tolerance programs.<sup>10</sup>

Furthermore, the executive Director of the NGO Human Rights Education Associates stated in an interview that if an NGO wanted to access schools in the United States 'it is worth considering not presenting what you do as human rights education per se'.<sup>11</sup> Thus it appears that American teachers do not relate

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<sup>7</sup> Interviewee B9.

<sup>8</sup> Interviewee B1.

<sup>9</sup> Interviewee B17.

<sup>10</sup> Survey B4.

<sup>11</sup> Interview with the Executive Director of Human Rights Education Associates on 2 December 2003.

to the term human rights education. The survey that was mailed to teachers (attached as Appendix 1) had a prominent heading “Human Rights Education Survey”. If the above attitudes to the term ‘human rights’ were shared by a majority of teachers in Boston, it is not surprising that there was a low response rate to the survey. Receiving a document headed ‘Human Rights Education Survey’ did not motivate them to become involved in this research project. This finding fits with existing bodies of literature on surveys that assert that survey response rates are lower when the respondent is uninterested in the subject of the survey.<sup>12</sup> Accordingly, the low survey response rate in the United States can be accounted for by a level of disinterest in the apparent content of survey because Boston teachers do not perceive what they do as HRE, but rather as civil rights education, multicultural education or anti-racism. Such a distinction is crucial in this research because it provides a greater level of understanding of HRE in the United States. Teachers’ different understanding of HRE is explored in-depth in section 7.4.1 where their interpretations of HRE are analysed.

The survey response rate in Melbourne was within the range expected for mailed out surveys.<sup>13</sup> However, as outlined in Chapter 4, school principals were found to act as gatekeepers, at times thwarting the researcher’s attempts to get the survey to appropriate teachers. Nevertheless, by employing alternative methods of survey distribution, a sufficient response rate was achieved.

### 7.3 Nature and Extent of HRE in Secondary Schools

Question 3 on the survey asked teachers: ‘Do you teach (or have you in the past taught) human rights in any of your classes?’ In Boston 95% (18 out of 19 teachers) responded in the affirmative, while in Melbourne, only 77% (23 out of 30 teachers) responded in the affirmative. The difference in the affirmative response rates in Boston and Melbourne is not so surprising, given the broader understanding of HRE that American teachers seem to have, (discussed in detail in section 7.4.1 below). For example, one Boston music teacher stated that she taught human rights by ‘making sure my students follow some basic

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<sup>12</sup> Moser, C.A. and Kalton, G. *Survey Methods in Social Investigation* (2<sup>nd</sup> ed, 1993) Dartmouth Publishing, Aldershot, England, 263.

<sup>13</sup> There is no generally accepted response rate for mailed out surveys, but 15% has been suggested as a sufficient rate of response, see Baldauf, A., Reisinger, H. and Moncrief, W. C. ‘Examining Motivations to Refuse in Industrial Mail Surveys’ (1999) 41 (3) *Journal of the Market Research Society*, 345.

rules in my classroom (No touching, raise your hand to share, no unsafe behaviour etc).<sup>14</sup> Yet another Boston teacher who responded in the affirmative to the question on whether they taught human rights, elaborated on this by saying that HRE in her teaching was ‘incidental’ and only occurred ‘when an opportunity presents itself.<sup>15</sup> Neither of these activities amount to HRE as defined in Article 29(1) of CROC. When teachers understand HRE to include such diverse endeavours, it is not surprising that 95% of teachers who responded to the survey asserted that they engaged in HRE. Furthermore, this data is not as revealing as might be thought at first glance, because, as discussed above, teachers who do not teach HRE are unlikely to have been motivated to respond to the survey, not seeing it as relevant to their work. Thus the data is inherently skewed towards those favourably disposed to the subject matter being investigated.

From the data collected no definitive conclusion can be drawn as to whether HRE as defined in Article 29(1) of CROC and General Comment No. 1 is greater in Boston or Melbourne secondary schools. The results do, however, provide important insights into the nature and method of HRE undertaken in schools. The extent of HRE undertaken in schools was assessed by having teachers respond to questions about the policy frameworks in schools that support or impede HRE; if human rights were taught in their school, at what levels and how much time was dedicated to these issues.

### 7.3.1 *Melbourne*

From the survey, only 23% of Melbourne educators (seven teachers) responded that they had undertaken formal teacher training in human rights. These seven teachers indicated that this training consisted of learning about specific human rights violations and teaching tolerance in their initial university education or subsequent in-service training (professional development). This data corresponds to the researcher’s analysis of university handbooks relating to subjects offered in education faculties which revealed a dearth of courses with any human rights components. It also corresponds to interviews with education academics who confirmed that there were no mandatory subjects relating to

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<sup>14</sup> Survey B14, question 3.

<sup>15</sup> Survey B19, question 3.

HRE in education degrees, and very few elective courses that contain any human rights. These findings are indicative of two things – that human rights issues are not considered fundamental to secondary education in Victoria, and thus not a core part of the formal training that teachers receive; and where teachers have undertaken additional training in human rights specific courses, it was done because of their own interest in human rights, rather than because of any direction or mandate from the Government or their school.

Given the lack of teacher training in HRE, it would be expected that there would be very few teachers who taught human rights in their classes. However, 77% of Melbourne teachers responded that they currently, or in the past, have taught human rights in their classes. Approximately 50% of these teachers included HRE in general social science courses that included world history and country specific history, while 23% stated that they covered human rights issues in a standard English (literature) based course. Teachers were also asked to indicate in what other courses HRE was taught across their schools. An overwhelming majority (67% - 20 teachers) stated that human rights was taught in SOSE (Study of Society & the Environment), while seven teachers stated that HRE was incorporated into English classes. This illustrates that teachers specialising in SOSE and English are more likely to incorporate HRE into their teaching. This is not a surprising outcome, since human rights seems to fit more naturally into these subjects; through historical analysis of human rights violations such as the Holocaust or apartheid in South Africa, and through the analysis of human rights issues in literary works such as the *Diary of Anne Frank* or *Rabbit Proof Fence*.<sup>16</sup> Furthermore, as illustrated in Chapter 6, to the extent that there are opportunities for HRE identified in the curriculum frameworks, they are in English and SOSE. However, there are opportunities for incorporating HRE into other subject areas, such as science, mathematics and languages, and resources have been specifically developed to support HRE in these fields.<sup>17</sup>

From these responses, there is a contradictory image of HRE in the Melbourne schools surveyed. On the one hand, it appears that teachers are not generally

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<sup>16</sup> These were books that several Melbourne teachers identified as resources they used in their HRE.

<sup>17</sup> Wright, Peter *Human Rights in the Curriculum: Mathematics* (2004) Amnesty International, London; and Brown, Margot *Human Rights in the Curriculum: Spanish* (2002) Amnesty International, London.

trained in human rights, on the other hand they still teach HRE content within a generalist curriculum. This suggests that teachers who are incorporating HRE into their work are doing so with a great deal of passion, but not necessarily a great deal of knowledge about how to do so.

All schools in Victoria tend to have either a charter or mission statement which sets out the school's philosophy, values and attributes. These documents therefore provide insight into what a school identifies as its aims and priorities. Teachers were asked as part of the survey:

1. Does your school's charter or mission statement include a statement about its values and beliefs in relation to human rights?
2. To the best of your knowledge, does your school have a policy regarding human rights education?

The responses indicate that only 23% (seven schools) have a mission statement or charter that includes a reference to human rights, and only 7% (two schools) have any policy relating to HRE. The absence of any reference to human rights in these core school documents sends a clear message to teachers that HRE is not a priority within their school. The lack of a directive from the school leadership regarding the importance of HRE is one possible explanation for the state of HRE in secondary schools in Boston and Melbourne. Indeed General Comment No. 1 suggests that Article 29(1) of CROC cannot be effectively implemented in schools unless there is a fundamental reworking of key documents including the curriculum and school policies.<sup>18</sup>

In the survey responses 70% (21 teachers) indicated that human rights were taught at their school. Of these 33% (10 teachers) suggested that HRE was undertaken in an integrated fashion, while 37% (11 teachers) considered the implementation to be *ad hoc*. The inclusion of human rights into classes seems, from these responses, to be high. However, there is a differentiation at what year levels human rights is taught. Only 17% (five teachers) responded that human rights were taught at all year levels. A further 26% (eight teachers) responded that human rights was only taught at upper level grades (years 10,

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<sup>18</sup> General Comment No. 1: Aims of Education, 17 April 2001, CRC/GC/2001/1, paragraph 18.

11 and 12). This indicates that to the extent HRE is included in classes, it tends to be at the upper level of schools. Indeed, when teachers were asked to consider at which levels most time is spent on human rights issues, 40% (12 teachers) responded years 10, 11 and 12. The consequence of this is clear – students who do not complete the upper levels of secondary education will receive little or no HRE, even if they are in a school that does teach human rights.

One way of measuring the importance that schools place on HRE was to ask teachers the extent to which students had an opportunity to implement or use their human rights knowledge beyond the class environment. Forty-seven percent (14 teachers) responded that there were pathways made for students to apply their human rights learning. Examples of such opportunities included ‘rewarding individual student’s positive action towards others’;<sup>19</sup> ‘fund raising’,<sup>20</sup> and ‘leadership programs’.<sup>21</sup> This suggests that a relatively high proportion of students learning about human rights get an opportunity to put what they have learnt into practice, and this is consistent with General Comment No. 1 which recommends that students’ education about human rights should include involvement in the practical implementation of human rights standards, for example within the school or local community.<sup>22</sup>

The perceived adequacy of HRE was also covered in the survey. Teachers were asked to indicate if they considered the amount of time spent on HRE was sufficient. It is recognised that this question calls for a subjective answer from teachers, and that these teachers, by agreeing to participate in this research, are perhaps already biased in favour of HRE. However, the results are nevertheless of interest, because they reveal what teachers think about the adequacy of HRE in their school. Overall 53% (16 teachers) considered HRE in their schools was not adequate. Only 17% (five teachers) thought there was enough time spent, with a further 27% (eight teachers) responding that they did not know.<sup>23</sup> With the majority of teachers thinking that HRE in their schools was

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<sup>19</sup> Survey M9.

<sup>20</sup> Survey M2.

<sup>21</sup> Survey M17.

<sup>22</sup> General Comment No. 1, above n 18, paragraph 15.

<sup>23</sup> Three percent of those surveyed did not respond to this question.

inadequate, teachers were asked to suggest the reasons for this, and how this situation could be improved. The results are analysed in detail in section 7.4.4 below which considers perceived impediments to greater HRE in schools.

Overall, the Melbourne teachers who completed the survey indicated a range of patterns regarding HRE generally, as well as its implementation in their schools. The data suggests that these teachers incorporate HRE with little or no support, without a mandate from their school, and despite, rather than because of, the government curriculum frameworks. The majority of Melbourne teachers who participated in this study felt isolated in their HRE work and considered the level of HRE within the entire school to be inadequate. The lack of a ‘whole of school’ approach to HRE appears to have sent a message to these teachers that human rights education is not regarded as important by their school administrators or the Victorian Department of Education.

### *7.3.2 Boston*

In Boston, the data indicates that teacher training in human rights was marginally higher than in Melbourne, with 32% (six teachers) having undertaken training in HRE. However, the type of training that teachers embarked on was different. In Boston, 21% of teachers received training in programs that were on specific human rights issues or violations, rather than general training about HRE. Thus, common examples of training undertaken by Boston teachers included Holocaust education training provided by the NGO ‘Facing History and Ourselves’, and training about combating homophobia and heterosexism provided by the ‘Gay, Lesbian & Straight Teachers Network’. Like Melbourne, the training levels were low, and teachers indicated that they undertook such training out of their own commitment to human rights.

As stated earlier, 95% of Boston teachers (18 out of 19 survey respondents) indicated that they teach their students about human rights. Like Melbourne, the subjects into which HRE is predominantly incorporated are general social science subjects (58%) or within a US history framework (21%). The issues covered by teachers mostly related to the history of civil rights activism in the United States, or included human rights issues pertaining to significant minority populations now settled in the United States; for example, the Holocaust is particularly relevant to America’s large Jewish population. This education is

consistent with the Massachusetts curriculum frameworks analysed in the previous chapter, that is, that to the extent that HRE is provided it is often limited to civil rights and the Holocaust.

The survey and interview responses revealed that human rights issues were covered in Boston over a smaller range of classes than in Melbourne, but still predominantly taught within social studies/history (47%). While in Melbourne, this was dictated by an inflexible curriculum, in Boston it was seen by teachers to be the only place for the incorporation of human rights. This result suggests that when curricula do not have dedicated human rights links; social studies, humanities and history become the default classes in which to locate HRE. In neither Boston nor Melbourne was there any evidence of efforts to incorporate HRE into other subjects such as math or science.

In Boston 69% (13 teachers) responded that human rights was taught in their schools, with 32% (six teachers) saying it was provided in an *ad hoc* manner, while 37% (seven teachers) thought it was integrated into the curriculum. However, this is unlikely to be an accurate reflection of the extent to which HRE, that is consistent with Article 29(1) of CROC, is being provided, because as section 7.4.1 below demonstrates, Boston teachers tended to perceive HRE differently to how it has been defined in Article 29(1) and General Comment No. 1.

The extent of human rights taught in Boston schools was also measured according to the range of year levels where HRE occurred. Sixteen percent (three teachers) responded that human rights was covered in all years within their school, with 37% indicating that most of the HRE occurred only at the higher levels, that is, in years 11 and 12. Like Melbourne, this results in students who do not continue to these grades missing out on learning about human rights.

In Melbourne the percentage of teachers who provided opportunities for students to apply their human rights knowledge was 46%. In Boston it was slightly higher – 53%. Furthermore, the examples given by teachers demonstrated that the practical activities had a closer connection to HRE than was seen in Melbourne, for example:

- Teacher 1:* Food drives (locally), letter writing campaigns and Gay-Straight Alliance;<sup>24</sup>
- Teacher 2:* Immediately after the events of September 11 [students] put on a series of seminars about human rights and tolerance;<sup>25</sup>
- Teacher 3:* A student chapter of Amnesty International exists;<sup>26</sup> and
- Teacher 4:* Students form what they call a Youth Council, and they have a sum of money which they distribute in grants to support community service projects... they do a needs assessment – defining their own community.<sup>27</sup>

Projects of this nature give students a real opportunity to use their knowledge of human rights in an applied way, and takes HRE from the theoretical to the practical. It is also in keeping with the HRE articulated in Article 29(1); in particular, the recommendation in General Comment No. 1 that HRE incorporate the ‘practical dimensions’ of human rights.<sup>28</sup>

Boston teachers also commented on the adequacy of HRE within their school. Fewer Boston teachers than Melbourne teachers thought that the HRE in their schools was adequate (21% - four teachers). A further 47% (nine teachers) thought that the amount of HRE was insufficient. The reasons behind this perception of inadequacies is analysed in section 7.4.3 below which considers impediments to HRE.

### 7.3.3 *Similarities and Differences*

Overall there were more similarities than differences between in the provision of HRE in secondary schools in Boston and Melbourne. In both cities, the majority of teachers who responded to the invitation to participate in this research considered that while they engaged in HRE, it was not widespread across their school. The majority indicated that they considered themselves to be ‘lone wolves’ in the push to teach human rights in their school.

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<sup>24</sup> Survey B17.

<sup>25</sup> Survey B18.

<sup>26</sup> Survey B7. A student Amnesty International group was also cited in Survey B10.

<sup>27</sup> Interviewee B12.

In both cities HRE was largely limited to Social Studies/SOSE, although in Melbourne, English was also identified as a subject in which HRE occurred. In both jurisdiction, HRE tended to take place mostly in the upper level years of schooling. Boston students appeared to have more opportunity to apply their human rights knowledge in a practical way, which is congruent with Article 29(1) of CROC and General Comment No. 1. Finally, Boston teachers' self-assessment of the level of HRE being provided is higher than Melbourne teachers, but this is likely due to their different understanding of HRE, and the focus of their HRE on their Bill of Rights.

Differences between HRE practices in Boston and Melbourne became more apparent when the main themes to emerge from the data were analysed. The following section demonstrates that the starker points of divergence are revealed in teachers' understanding of the term 'human rights education', and their knowledge of international human rights instruments and initiatives.

#### **7.4 Main Themes to Emerge from Data**

Upon comprehensively and systematically analysing the survey and interview data, four key themes emerged. The first theme builds on the foundational work in chapter 3, which analysed how HRE is understood by key stakeholders working in the area, but expressly excluded teachers. It is therefore appropriate to consider in this section the critical question of how teachers understand HRE, in particular important differences between Boston and Melbourne teachers' understanding, as well as differences between how the UN has defined HRE and how teachers perceive it.

The second theme relates to teachers' knowledge and use of CROC, which is particularly relevant because Australia has ratified this treaty, and the United States has not. Section 7.4.2 examines whether this difference has filtered through to secondary schools, that is, whether Melbourne teachers have a greater awareness of CROC than Boston teachers, and whether it informs their teaching of human rights.

The third significant issue to be considered is the impediments to HRE that Boston and Melbourne teachers identified. There was a recurring theme that it

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<sup>28</sup> General Comment 1, above n 18, paragraph 12.

was extremely difficult for teachers to incorporate HRE into their work. A number of reasons were identified and these are considered in section 7.4.3.

The final theme to emerge related to teachers' motivation for incorporating human rights into their teaching. The data suggests that the impetus to practise HRE is generally very personal, and not at all related to the curriculum frameworks, or any mandate from government or the UN. This obviously has a bearing on the efficacy of Article 29(1) of CROC and is discussed in detail in section 7.4.4.

#### *7.4.1 Teachers' Understanding of HRE*

As was seen in Chapter 3, defining HRE is a complex and difficult task, and different entities and individuals have different understandings of this concept. Since teachers are the ones charged with educating students about human rights, it was important to determine what they actually understand HRE to mean. Thus the very first question in the survey asked teachers to state, in their own words, what they understand is meant by the term 'human rights education'. All the responses to this question are set out in Appendix 3. An alternative approach would have been to provide teachers with a definition of HRE, for example give them a copy of Article 29(1), and have all the questions relate to whether HRE, as defined in CROC, is taught by them or at their school. While basing all surveys on the same definition of the key term would have made data analysis easier, the results would not have been nearly as instructive. For this reason, the approach of self-definition by teachers was adopted and revealed enormous disparities, not only between Melbourne and Boston teachers, but also between how teachers understand the term, and how it has been defined by Article 29(1) of CROC and General Comment No.1. This section comprehensively analyses teachers' understanding of HRE from a variety of perspectives.

As was seen in Chapter 3, persons involved in HRE outside of schools, that is, Department of Education employees and NGOs, perceive human rights in a very legalistic manner. They equate human rights with human rights *law*, and are very strongly guided by UN documents, such as the Universal Declaration of Human Rights (UDHR). However, in schools, the influence of UN documents diminishes considerably, particularly in Boston schools. Of the 30 teachers in

Melbourne who returned completed surveys, ten mentioned UN instruments (most often the UDHR) in their definition of HRE. In addition, a further seven teachers were interviewed who had not completed a survey, and of these, two referred to the United Nations when defining HRE. Thus 32% of participating Melbourne teachers defined human rights education, using a framework of international human rights law. By contrast, of Boston teachers surveyed and interviewed, only three mentioned the UN or international human rights instruments in their definition of HRE, which translates to 9%. This suggests that Boston teachers' understanding of HRE is less informed by international proclamations or definitions of human rights, than Melbourne teachers' understanding of this term. The idea that there is a relationship between HRE and international human rights instruments was something that was understood by Melbourne teachers to a greater degree than their Boston counterparts, however the proportion was still not high, with less than one third including UN documents in their definition of HRE.

While Boston teachers did not refer to international instruments when defining HRE, many did place emphasis on national instruments, in particular documents such as the Bill of Rights and the Declaration of Independence. It was clear from both the interviews with Boston teachers and their survey responses, that domestic laws strongly influenced their understanding of HRE. Examples of this attitude are clear from the following extracts:

*Teacher 1:* As human beings we are entitled to certain inalienable rights. Our Declaration of Independence includes among them life, liberty, and the pursuit of happiness. When we are denied these, it may be considered a violation of human right.<sup>29</sup>

*Teacher 2:* I suppose if I was going to make it a definition, I'd have to call upon the American Declaration of Independence which says that we have the right to life, liberty and the pursuit of happiness and that rights of citizenship should be offered equally to all. That's what it says in our Fourteenth Amendment, equal protection under the law.<sup>30</sup>

*Teacher 3:* We do the Bill of Rights. When I started talking about China, I compared it to the Bill of Rights here

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<sup>29</sup> Survey B18.

<sup>30</sup> Interviewee B19.

in the United States... I ask kids if you could only pick one [right] to keep, which one would it be? I guess in some ways we relate it more to American-oriented ideas of liberty and privilege.<sup>31</sup>

The impact of this focus on domestic instruments is twofold. First, the existence of a constitutional Bill of Rights stimulates teachers to have a dialogue with their students about the whole notion of rights. The American Bill of Rights and the Declaration of Independence provide a focal point which teachers are comfortable with, because these domestic documents are a core part of America's history, culture and identity. They are not perceived as too political or challenging, an accusation that has been levelled at international human rights treaties.<sup>32</sup> The second effect is that it narrows the scope of HRE. Thus, when students in Boston schools are taught about rights solely based on their domestic instruments, they are learning only a very narrow and parochial set of rights, well short of the rights education contemplated by Article 29(1) of CROC.

The *Charter of Human Rights and Responsibilities 2006* (Vic) did not exist at the time the data for this thesis was collected, and therefore it is not possible to say what influence this will have on Melbourne teachers' HRE practices. However, as discussed in section 6.5.3 of the previous Chapter, the Charter has the potential to increase the depth and breadth of HRE in Melbourne schools, because of the language of s 41, and because it is based on the rights set out in an international human rights instrument (International Covenant on Civil and Political Rights), albeit one that does not include economic, social and cultural rights (ESC rights). However, it is likely to take some time before the Charter becomes as embedded (if it ever does) in Victorian culture, as the United States Bill of Rights is embedded in American culture and education.

Linked to Boston teachers' reliance on domestic instruments, such as the Bill of Rights, is an equating of civil rights with human rights. For many Boston teachers, human rights and civil rights are one and the same. The following extract from an interview with a Boston teacher exemplifies this.

*Interviewer:* So how do you see the connection between civil rights and human rights?

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<sup>31</sup> Interviewee B22.

<sup>32</sup> See for example extract from Interviewee B9, above n.1.

*Teacher:* They are the same thing. If you're not respecting someone's civil rights, you're violating their human rights. If you don't allow them to vote, to practise the religion they choose, to wear the headdress that their religion calls for, you're violating their human rights.<sup>33</sup>

On the other hand, teachers misconstrue the two, for example:

*Teacher:* Human rights are a little more general, maybe a little more like the most basic of rights. And then civil rights are more the laws that go to back up these human rights.<sup>34</sup>

This confusion between civil rights and human rights resulted in Boston teachers having a narrow understanding of HRE that excluded a large section of human rights, such as ESC rights. The majority of teachers gave as examples of HRE, lessons on Martin Luther King Jr, free speech and slavery. This is in contrast to Melbourne teachers, who generally included ESC rights in their understanding of HRE, and gave examples of lessons on the 'Rugmark' label,<sup>35</sup> and the Fairwear campaign.<sup>36</sup>

Those Boston teachers who did see a distinction between civil rights and human rights made an interesting distinction between the two. A number of teachers expressed views similar to that voiced by one teacher:

People know about civil rights and social justice and racism and equality, but the concept of human rights seems to be something that happens 'over there'. Something that happens in Africa or Iraq.<sup>37</sup>

Thus, there were a number of Boston teachers who did not perceive HRE as relating to events or circumstances within the United States. It is difficult to have

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<sup>33</sup> Interviewee B30.

<sup>34</sup> Interviewee B18.

<sup>35</sup> Rugmark is a global non-profit organisation working to end illegal child labour through encouraging consumers to buy carpets with the Rugmark label which guarantees that no child labour was used in the manufacture of the carpet.

<sup>36</sup> This is an initiative that aims to end the exploitation of outworkers in the Australian clothing industry.

<sup>37</sup> Interviewee B11.

widespread HRE if the very people entrusted with delivering it do not understand the fundamental principle of the universality of human rights. This situation is linked with the issue of lack of available training for teachers in HRE, something that is discussed in detail in section 7.4.3 below which addresses impediments to HRE.

Another way of analysing teachers' understanding of HRE is to classify their responses according to whether they consider HRE in terms of violations of human rights, for example genocide, slavery and torture, or whether they view HRE in terms empowering students to become aware of, and defend human rights. The following quotes highlight this distinction:

Violations Approach:

*Teacher 1:* I would consider human rights education to mean teaching people about human rights violations throughout history and throughout the world. I would define human rights violations as any instance in which a group of people are singled out and attacked (may include imprisonment, torture, killing, genocide etc.) or just generally denied basic rights (such as freedom of religion).<sup>38</sup>

*Teacher 2:* I'm teaching it from a historical perspective. So looking at various times in history where human rights have been denied to people and trying to address those issues.<sup>39</sup>

*Teacher 3:* We have much dirtier air here than just at the town over, and because of that we have the highest asthma rates in the State. And why? Because they put the trash transfer station in our neighbourhood. Because they put the bus parking lots in this neighbourhood. It's unequal. ... Teaching human rights is first making students aware that the situations they are living in are not by accident, that decisions were made that placed their health or their welfare in jeopardy by the government or big business, and they need to be aware of those forces.<sup>40</sup>

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<sup>38</sup> Survey B13.

<sup>39</sup> Interviewee B5.

<sup>40</sup> Interviewee B20.

### Empowerment Approaches:

*Teacher 1:* The teaching of human rights is not confined to teaching students about documents which are supposed to give rights to individuals, but about attitudes to others at age specific times, which broaden their concepts not only of rights, but responsibilities. These ideas should be explored and discussed so that a personal philosophy of inclusiveness should be developed.<sup>41</sup>

*Teacher 2:* To learn about treating people with respect and compassion on a physical and emotional level within the immediate/local and international areas.<sup>42</sup>

*Teacher 3:* Human rights education to me is being able to impart a sense of responsibility towards other human beings within your community, and to me it is developing strategies that make us able to see that not everything is in black and white, that there are shades of grey, and that not everybody is the same, and that we need to respect and understand those differences. So it's breaking down the barriers between different groups so that we can co-exist.<sup>43</sup>

The data revealed that there was no real distinction between Boston and Melbourne teachers in terms of one group focusing on violations and one on empowerment. What is apparent, however, is that there was no uniformity in the way teachers understood HRE. Indeed there was huge disparity in the way this term is understood by teachers in both jurisdictions.

When these understandings are contrasted with Article 29(1) of CROC, it is apparent that the empowerment approach bears a closer resemblance to the HRE mandated in that treaty. Article 29(1) refers to aims, such as 'The development of respect for human rights and fundamental freedoms'<sup>44</sup> and 'The preparation of the child for responsible life in a free society, in the spirit of

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<sup>41</sup> Survey M10.

<sup>42</sup> Survey M12.

<sup>43</sup> Interviewee M16.

<sup>44</sup> Article 29(1)(b).

understanding, peace, tolerance, equality of sexes, and friendship among all peoples.<sup>45</sup> Section 5.2 in Chapter 5 referred to the debates that surrounded the drafting of Article 26(2) of the UDHR and in particular the shift from language that was perceived as negative (combating intolerance and hatred) to positive language that promoted tolerance and friendship. Thus, it is clear that the drafters of the original international law provision relating to HRE, and on which all subsequent HRE treaty provisions have been built, were very conscious of stipulating the positive nature of HRE. Teaching students about past human rights violations may be a way of achieving the positive outcomes expressed in Article 29(1), but it is suggested that the empowerment approach used by some teachers aligns more closely with Article 29(1) of CROC.

Another area where there was a clear distinction between Boston and Melbourne teachers' understanding of HRE was the geographical breadth of their focus. Boston teachers tended to interpret HRE as being about human rights issues in, or relevant to, the United States, which stems from their focus on domestic instruments such as the Bill of Rights, and on civil rights rather than human rights. Melbourne teachers tended to adopt a more global approach to HRE, as the following excerpts from interviews illustrate.

*Melbourne Teacher 1:* [We] look at in Australia, and worldwide, the trend and the reasons for homelessness. And we pose a question to the students, 'where would you prefer to be homeless?' In a developing country, a third world country, or a developed country?<sup>46</sup>

*Melbourne Teacher 2:* I'd say the global thing is more what we look at and I suppose that's what the kids are interested in too in a way.<sup>47</sup>

*Melbourne Teacher 3:* We're looking at development and things like China, Indonesia, and India and we will be incorporating a component about living standards and human rights there about issues involved there and how it's different to Australia.<sup>48</sup>

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<sup>45</sup> Article 29(1)(d).

<sup>46</sup> Interviewee M5.

<sup>47</sup> Interviewee M25.

<sup>48</sup> Interviewee M22.

*Boston Teacher:* Americans tend to be very, very nationalistic and see the world from the United States out. So we're concerned with issues here, and we let other people take care of things in their country.<sup>49</sup>

This global focus adopted by many Melbourne teachers is congruent with Article 29(1)(c) which refers to the teaching of respect for the values of other countries, and civilizations different from their own.

In conclusion, the data revealed that there is no common understanding amongst teachers as to what human rights education means or entails. However, there were some trends that became apparent, including that teachers perceive HRE as being about much more than just providing *information* about human rights to their students. On the whole teachers understood HRE to be about changing attitudes and behaviours and that wanted to increase students' understanding of human rights and encourage them to reflect on the causes of human rights abuses. This is consistent with General Comment No. 1 which emphasises that HRE is not just about the accumulation of knowledge about human rights or the dissemination of information about the content of human rights treaties, but should be about developing skills that empower the child.

Another common trend was the inclusion of concepts of equality and non-discrimination which form a key part of Article 29(1)(d) and are underscored in General Comment No. 1. However, overall, teachers did not appear to understand HRE in the way it has been defined in Article 29(1) of CROC and elaborated on in General Comment No. 1, in that many teachers incorporated some of the elements of Article 29(1) in their articulation of HRE, but none engaged with the many and varied dimensions of Article 29(1). Furthermore, the majority of teachers did not conceptualise HRE in legalistic terms, or base their understanding on international human rights instruments.

Boston teachers' understanding of HRE is narrow, being predominantly limited to concepts of democracy and civil and political rights, while Melbourne

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<sup>49</sup> Interviewee B17.

teachers' understanding encompasses the full gamut of human rights, including ESC rights and has more of an activist flavour. It is clear that the presence of a Bill of Rights that is well entrenched in society significantly influences teachers' understanding of HRE in two ways. First, it enhances their general awareness of rights discourse, and stimulates them to include education about rights in their classroom activities. However, unless the Bill of Rights contains the full gamut of human rights, the presence of such a national instrument is likely to significantly narrow teachers' understanding of HRE by excluding education about ESC rights, and also potentially limiting the rights analysis to a national perspective. Thus, a bill of rights can have a negative impact on HRE if it has the effect of limiting the nature of HRE, even though, at the same time it may increase the extent of education about rights.

#### *7.4.2 Knowledge of Article 29(1) of CROC*

Towards the end of every interview, teachers were shown a copy of Article 29(1) of CROC and asked whether they had seen or heard of this section before. The overwhelming response from teachers was one of surprise that such a provision existed at all. Of the 21 teachers interviewed in Boston, four (20%) stated that they had previously seen Article 29(1) of CROC. However, upon further questioning, it appeared that the majority of these four had a general familiarity with CROC, rather than specific knowledge about Article 29(1). Nevertheless, the data reveals an overwhelming ignorance of Article 29(1) by Boston teachers. It is perhaps not surprising that very few Boston teachers have an awareness of Article 29(1) of CROC, since it is part of a treaty that their government has not ratified. Boston teachers' reactions to Article 29(1) are revealing, not only because of their lack of knowledge about this provision, but also because of their varied responses upon first reading the Article. A selection of responses appear below:

*Interviewer:* Have you ever seen this before [Article 29(1) of CROC]?

*Teacher 1:* No. You know what's kind of interesting? I think we hear about the rights of the child and all of the UN conventions, and

somehow it's sort of 'over there'. It doesn't apply to us.<sup>50</sup>

*Interviewer:* Have you ever seen this before [Article 29(1) of CROC]?

*Teacher 2:* No.

*Interviewer:* What's your first impression upon reading it?

*Teacher 2:* A crock of shit. But my second impression is, this is flowery language, to say what people should be doing. I don't need to read that to know what my role as an educator is.<sup>51</sup>

*Interviewer:* Have you ever come across this before [Article 29(1) of CROC]?

*Teacher 3:* Never seen it before.

*Interviewer:* What's your first impression upon reading it?

*Teacher 3:* This is just kind of legal speak that everything is right about it, and it's just too hard to really define... It's just too vague.<sup>52</sup>

*Interviewer:* Have you ever come across this before [Article 29(1) of CROC]?

*Teacher 4:* No

*Interviewer:* What's your first impression upon reading it?

*Teacher 4:* Me personally, I like it. In the United States I think there is this element of arrogance but I also think the people who refused to sign it sort of realise that if we actually signed it, we'd have to hold ourselves accountable for things that we assume are okay but we don't really address and that's why we sort of have a fear of the inequality of sexes, peace, tolerance. We do a good job of giving lip service to things but then in terms of pointing out actual examples, we don't do a very good job of it.<sup>53</sup>

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<sup>50</sup> Interviewee B11.

<sup>51</sup> Interviewee B17.

<sup>52</sup> Interviewee B24.

<sup>53</sup> Interviewee B22.

Thus Boston teachers did not seem to value the utility of Article 29(1) of CROC, and considered it to have been drafted in a language that was not particularly helpful for teachers trying to implement it. Perhaps, these teachers may have felt more comfortable about the requirements of Article 29(1) if they had an opportunity to also peruse General Comment No. 1, which in effect puts ‘flesh’ on the ‘bones’ of Article 29(1) of CROC. These reactions from teachers illustrate that the intended audience of Article 29(1) is ultimately governments, who are the ones with the responsibility to implement this norm. Thus the language that has been used is perhaps more appropriate for government bureaucrats than school teachers.

Australia ratified CROC in 1990,<sup>54</sup> and it might be expected that teachers would by now be familiar with the provisions that relate to education. However, the interviews with Melbourne teachers revealed a similar level of ignorance regarding this international law provision. Only five teachers (25%) had any prior awareness of Article 29(1). Samples of teachers’ reactions to learning about Article 29(1) appear below:

- Interviewer:* Have you ever seen this before [Article 29(1) of CROC]?
- Teacher 1:* No. What is it? Is it something that we should be adhering to as teachers?
- Interviewer:* It’s part of an international treaty that Australia has ratified...
- Teacher 1:* So why are we, myself as a teacher, not aware of this?<sup>55</sup>
- Interviewer:* Have you ever seen this before [Article 29(1) of CROC]?
- Teacher 2:* No... It’s surprising that I haven’t actually come across this particular Article, even though I’ve read bits and pieces of the Convention on the Rights of the Child.<sup>56</sup>

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<sup>54</sup> Australia ratified CROC on 22 August 1990.

<sup>55</sup> Interviewee M23.

<sup>56</sup> Interviewee M25.

*Interviewer:* Have you ever seen this before [Article 29(1) of CROC]?

*Teacher 3:* No. ... I don't think we, as Australians, follow this for a lot of people. I think if you're in the right socio-economic group you probably get it followed, but there'd be a lot of people that it probably isn't true. ... But no, I haven't actually ever seen it in writing.<sup>57</sup>

Based on the levels of ignorance of Article 29(1) of CROC among Melbourne teachers interviewed for this research, it is apparent that the Australian Government is not only not fully complying with its obligations under Article 29(1), but also its obligation under Article 42 of CROC to 'make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.'

The fact that both Melbourne and Boston teachers appear to be equally unaware of Article 29(1) of CROC suggests that whether or not a State has ratified this treaty is not a particularly relevant to teachers' knowledge of this provision. Thus what is critical to teachers' awareness of this provision is not ratification, but rather whether the government is committed to complying with the norms set out in this treaty. It seems that neither the Australian nor United States' Governments have taken steps to inform the education profession about Article 29(1) of CROC. The logical place for teachers to learn about the provisions of Article 29(1) would be in their teacher training. However, as highlighted in the section 7.4.3 below, the lack of teacher training about HRE is one of the perceived obstacles to more widespread human rights education.

#### *7.4.3 Impediments to Incorporation of HRE into the Curriculum*

In both the survey and interviews teachers were asked to identify what they perceived to be the major impediments to HRE in their school. A broad range of responses were given, but five particular obstacles were repeatedly identified, namely the phenomenon known as the crowded curriculum; the lack of government mandate; a lack of resources; confusion about where/how to

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<sup>57</sup> Interviewee M8.

incorporate HRE; and a lack of training regarding how to teach human rights. Each of these is analysed in this section.

Both Boston and Melbourne teachers complained that they were already expected to cover more material than was possible in the time available, making it difficult to fit in HRE. A selection of responses addressing this issue are set out below.

*Teacher 1:* The State mandates so much material we must cover that it is always difficult to insert anything new.<sup>58</sup>

*Teacher 2:* The curriculum is too crowded already.<sup>59</sup>

*Teacher 3:* Knowing what to move out so this can move in.<sup>60</sup>

*Teacher 4:* Curriculum is too tight.<sup>61</sup>

The general sense is that teachers are constantly overwhelmed by what they are expected to achieve in terms of learning outcomes. If Article 29(1) is to be complied with in schools, it will have to be done in a way that does not unduly increase the burden on teachers. How this might be achieved is beyond the scope of this thesis, but certainly an area where further research is required.

Another common explanation for the lack of widespread HRE in both Boston and Melbourne was the absence of any direction or mandate from government or school administrators that this is a priority area that teachers should focus on. In response to a survey question asking teachers why they think their school does not provide HRE (if they had answered ‘no’ to the previous question about whether their school provided HRE), teachers expressed opinions such as:

*Teacher 1:* Lack of Support from DET [Department of Education and Training];<sup>62</sup>

*Teacher 2:* People mean well but the CSF controls content and method;<sup>63</sup>

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<sup>58</sup> Survey B7, Question 17.

<sup>59</sup> Survey M14.

<sup>60</sup> Survey M6.

<sup>61</sup> Survey M24.

<sup>62</sup> Survey M12.

<sup>63</sup> Survey M25.

*Teacher 3:* The state has not made human rights a priority in their standardized testing requirements for graduation. Teachers need to stick to certain guidelines,<sup>64</sup> and

*Teacher 4:* Most classes follow the curriculum frameworks which are not, to the best of my knowledge, dedicated to human rights education.<sup>65</sup>

Similar views were expressed in the in-depth interviews, for example:

*Teacher 5:* If you could get some assistance in human rights education, what would be of greatest assistance to you?

*Teacher 6:* Well a directive from DEET [Commonwealth Department of Employment, Education and Training] to the principal would be good, so the principal can say at the next curriculum meeting “*We’ve got to incorporate human rights.*” That would be good.<sup>66</sup>

Teachers in both jurisdictions felt compelled to teach to the curriculum frameworks published by the Departments of Education. The absence of HRE in these documents, as discussed in Chapter 6, leaves teachers feeling that they cannot, or should not, incorporate human rights into their teaching. Thus increased commitment to HRE from governments would help to overcome one of the perceived obstacle to HRE. Teachers look for guidance from their governments as to what they should be educating students about, so while HRE is not legislatively mandated and/or not emphasised in the curriculum frameworks, it will continue to receive little priority by teachers. This reflects General Comment No. 1 which notes that HRE is unlikely to occur in the absence of formal endorsement of Article 29(1) in national legislation or policies.<sup>67</sup>

A further impediment to incorporation of HRE that was expressed by teachers concerned the availability of resources. In particular, two themes emerged. The first was the difficulty that teachers had in accessing materials for teaching

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<sup>64</sup> Survey B1.

<sup>65</sup> Survey B8.

<sup>66</sup> Interviewee M1.

<sup>67</sup> General Comment 1, above n 18, paragraph 17.

HRE, and the second was how dependent teachers are on human rights NGOs to support them in their HRE work.

It might be expected that in the age of the internet, accessing resources on HRE would not have been an issue. However as the following exchanges demonstrate, this is not the case.

*Survey Question:* What do you perceive to be the obstacles to human rights education in your school?

*Teacher 1:* Resources – up to date/accurate information.<sup>68</sup>

*Interviewer:* What would you identify as the biggest obstacle or impediment to more widespread human rights education?

*Teacher 2:* Lack of resources, but not in the sense that they are not out there. Just in the sense that they're not talked about and they are not offered to teachers... So it's out there, but you've go to go hunting for it, and a lot of teachers aren't willing to put in the time, or just flat out don't know.<sup>69</sup>

Most of the materials that teachers identified as resources for their HRE were publications by NGOs, or even speakers from NGOs.<sup>70</sup> The result is that the materials have an activist bent, that is, they are not just about increasing understanding or critically analysing human rights, but focus on encouraging students to take action, that is, to become human rights activists.<sup>71</sup> As discussed in Chapter 3, while this may well be worthwhile, it is not what is mandated by Article 29(1) or called for by General Comment No. 1. Both these articulations of HRE were developed and agreed to by States and do not support an activist model of HRE. As was demonstrated in Chapter 5 the

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<sup>68</sup> Survey M2.

<sup>69</sup> Interviewee B6.

<sup>70</sup> For example M30 responded to question 4 on the survey by stating that 'we have had speakers from Amnesty'; M29 responded to question 4 by referring to an 'Amnesty video'; and M28 referred to 'Amnesty case studies and kit'. In Boston, B7 stated in his answer to survey question 4 that 'Facing History and Ourselves has extensive Holocaust related materials'; and B18 referred to 'invited speakers eg from Amnesty International'. In Boston Facing History and Ourselves and PBS documentaries were the most oft cited resources used by teachers.

<sup>71</sup> See section 3.4 in Chapter 3.

drafters of Article 26(2) of the UDHR, which informs Article 29(1) of CROC, were concerned about engendering respect for human rights so as to prevent human rights abuses, rather than creating human rights activists, and the language of the norm reflects this.

Some teachers may be reluctant to use materials produced by NGOs in light of this strong activist bias. HRE materials developed and promoted by State Departments of Education, such as the *Ideas for Human Rights* booklet,<sup>72</sup> published by the Victorian Department of Education, may help address this perceived impediment to HRE in schools.

Another impediment identified by teachers was confusion about where HRE fits within the broader curriculum. The following responses to the question 'What do you perceive to be the obstacles to human rights education in your school?' illustrate this:

*Teacher 1: A classroom context – what subject is it? (or 'is it in')<sup>73</sup>*

*Teacher 2: Disappearance of real humanities subjects (history etc...) to be replaced by the wishy washy nature of SOSE.<sup>74</sup>*

*Teacher 3: Where you fit it into the curriculum? Do you make a subject called Human Rights? Do you link it into Civics and Citizenship? Does it fit within English? Does it fit within Geography?<sup>75</sup>*

This is an obstacle that could be overcome by greater clarity/direction about HRE in the curriculum frameworks. Forty-one percent of Boston teacher thought that the way to increase HRE was by having a wider curriculum that could incorporate a dedicated unit on human rights. This was almost double the number of Melbourne teachers who suggested that human rights be a stand alone subject.

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<sup>72</sup> Department of Education and Training (Vic) *Ideas for Human Rights Education* (2005) Department of Education and Training, Melbourne. This booklet had not been published at the time the data was collected for this thesis.

<sup>73</sup> Survey M2.

<sup>74</sup> Survey M24.

<sup>75</sup> Interviewee M22.

There were two schools of thought expressed by teachers about how to increase HRE within the curriculum frameworks. One approach is that human rights should be a separate subject, while the other is that human rights should be integrated across the entire curriculum. The latter approach has been adopted in South Africa, where HRE programs are ‘designed to permeate the entire school curricula and not be confined to a specific subject area’.<sup>76</sup> Similarly, a New Zealand study recommended ‘Interweaving of human rights education throughout the whole curriculum.’<sup>77</sup> This approach seems likely to be less burdensome for teachers, but runs the risk that HRE ‘falls between the cracks’, with individual teachers believing that it will not matter if they do not address human rights in their classes because students will be getting it as part of all their other subjects. Which approach is preferable is beyond the scope of this research.

From both the survey responses and interviews, it was apparent that teachers see a lack of training as being one of the main impediments to more extensive HRE in schools. This data is important because teacher training exposes what governments consider to be important skills that teachers must possess. In both Victoria and Massachusetts, teachers are required to be licensed, and in order to obtain their licence must satisfy a number of formal requirements. In neither jurisdiction is training in HRE a requirement for teacher licences. It follows that if teachers have no training in HRE they cannot reasonably be expected to teach human rights.

One of the questions on the survey was ‘have you received any training in how to teach human rights?’. In Melbourne, 23 teachers (77%) responded in the negative. In Boston, 13 teachers (68%) responded in the negative. These figures are consistent with another study undertaken regarding training of teachers in human rights in Slovenia, where 88% of teachers indicated that they would like to receive additional training in HRE.<sup>78</sup> However, in studies in

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<sup>76</sup> Pitts, David ‘Human Rights Education in Diverse, Developing Nations: A Case in Point – South Africa’ (2002) 7(1) *Issues of Democracy* 2.

<sup>77</sup> See report commissioned by Building Human Rights Communities in Education, an initiative of Amnesty International, the Development Resource Centre, the Human Rights Commission, the Children’s Commissioner, and the Peace Foundation, accessed at: [www.rightsined.org.nz/baseline.htm](http://www.rightsined.org.nz/baseline.htm) on 15 July 2007.

<sup>78</sup> Sardoč, Mitja ‘Evaluation of the OSCE Pilot Project on Human Rights Education – Our Rights – initiated by the Slovenian Chairmanship of the OSCE in 2005’ (2006) accessed at: [www.mzz.gov](http://www.mzz.gov).

Croatia, Germany and Ireland only 50% of teachers indicated that they would like additional training in human rights.<sup>79</sup> Thus, lack of teacher training in HRE appears to be a global issue, although not every country appears to experience this problem to the same degree.

Teachers in Melbourne and Boston who indicated that they had received training in how to teach human rights were asked to provide details of such training. The overwhelming majority indicated that the training they had received was by way of short courses run by NGOs. This is again consistent with other studies into HRE training for teachers, like a study in Armenia which found that the overwhelming majority of such training had been provided, or funded, by international NGOs.<sup>80</sup> Melbourne teachers indicated a more diverse source of training providers than did Boston teachers, referring to courses run by Community Aid Abroad, AusAid, Amnesty International and World Vision, as well as a couple of teachers indicating that their training was 'self-taught'. No teacher in either city indicated in their survey responses that they had received any instruction about HRE as part of their formal pre-service teacher training, or by the government as part of an in-service training program.

The in-depth interviews with teachers allowed for further exploration of this issue. They revealed that teachers felt frustrated by the lack of available training in HRE, as the following extracts demonstrate:

*Interviewer:* Do you think that teachers generally have the skills to teach human rights?

*Teacher 1:* I think it would take some training. I'm not doing a lot with it [HRE] but I'm probably doing more than a lot of teachers. And I still struggle with it because I'm not really clear, and I haven't been taught about it. Teachers tend to teach what they're familiar with and how they were taught and

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si/fileadmin/pageuploads/Zunanja\_politika/Evaluation\_Report\_Final\_15.3.2006.pdf on 15 July, 2007, 26.

<sup>79</sup> Ibid.

<sup>80</sup> The NGOs identified included the Norwegian Refugee Council, USAID, the Dutch Interchurch Organisation for Development Cooperation and the Danish Refugee Council. Danielian, Lucig, Umroyan, Lilit and Khorozyan, Theresa 'Baseline Study on Human Rights Education in Armenia' (2005) UNDP accessed at: [www.undp.am/docs/publications/2005publications/hreducationeng.pdf](http://www.undp.am/docs/publications/2005publications/hreducationeng.pdf) on 15 July 2007, 23-25.

the information they were taught, and I didn't really get any of this in college.<sup>81</sup>

*Teacher 2:* The next step is to train teachers so that they're comfortable teaching this [human rights]... teachers aren't going to teach it unless that have the skills.<sup>82</sup>

It is clear that HRE in secondary schools will not become more widespread unless and until the issue of teacher training in human rights is addressed. This has also been recognised by the CRC who in General Comment No. 1 state that training for teachers, (both pre-service and in-service), which promotes the principles reflected in Article 29(1) of CROC, is essential for the realisation of the right in Article 29(1).<sup>83</sup> The failure of the Australian Government, as a State Party to CROC to ensure that trainee teachers receive instruction in human rights, and how to teach children about human rights, demonstrates that this key recommendation of the CRC has not been acted upon. This may be due in part to the constitutional divisions of power between federal and state governments regarding education. However, as discussed in Chapter 6, there are measures that the Federal Government could be taking, such as providing financial incentives to encourage universities to provide HRE as part of their pre-service teacher training, or State Departments of Education to provide in-service teacher training on HRE.

The lack of teacher training in HRE is not only a problem for Melbourne and Boston teachers. A study commissioned by the UK Department for International Development on HRE in secondary schools in Botswana, India, Northern Ireland and Zimbabwe found that in each of these countries pre-service and in-service teacher training did not include human rights.<sup>84</sup> Thus, the finding regarding a lack of teacher training in HRE in Melbourne and Boston is consistent with other research in this field, suggesting that this is a widespread problem.

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<sup>81</sup> Interviewee B18.

<sup>82</sup> Interviewee M20.

<sup>83</sup> General Comment No. 1, above n 18, paragraph 18.

<sup>84</sup> Bourne, R. Gundara, J. Dev, A. Ratsoma, N. Rukanda, M. Smith, A. and Birthistle, U. 'School-Based Understanding of Human Rights in Four Countries: A Commonwealth Study' (1997) Research Paper No. 22, Department for International Development, London, section 2(c).

#### *7.4.4 Teachers' Motivation for Incorporating HRE*

One of the advantages of conducting interviews was that it permitted deeper exploration about teachers' personal experience of HRE. A question asked of all interviewees who indicated that they included human rights in their teaching was: 'Why do you teach your students about human rights?'. Upon analysing their responses, a common theme emerged, namely that many teachers were motivated by deeply personal reasons that had nothing to do with what was mandated in CROC, or what the Department of Education specified in the curriculum frameworks, or even what their school policies dictated. Rather, they were driven to raise issues of human rights in their classes because of their own personal background and experience. The following excerpts from interviews exemplify this:

- Teacher 1:* I suppose I'm driven very much because I come from a Jewish background, and even though my people have been here for many generations, so they weren't caught up in the Holocaust, learning about the Holocaust as a boy was stunning.... And to rescue something from it is very difficult. If, as an educator and a schoolteacher, I don't move people a tiny step down the path away from that horror, I shouldn't be here.<sup>85</sup>
- Teacher 2:* [I teach human rights] because of my background. My heritage is Lebanese. And there are a lot of human rights abuses in Lebanon, even now more so than during the war. And so I can relate to the problems that people are experiencing, both here and in overseas countries, in developing countries.<sup>86</sup>
- Teacher 3:* When I was growing up, I always wanted to do stuff to make the world a better place... and being aware of my own Asian-American identity and realising that there's a lot of messed-up stuff out there and becoming passionate about changing those perceptions.<sup>87</sup>
- Teacher 4:* It is personal... It's my own evolution as a person of color in the United States. A long time ago I had this element of, I guess you would call it self-hatred, because I was in a school of all white people and all I wanted to be was white, and I had no exposure to this idea of exploring racial identity, or even that there was one.<sup>88</sup>

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<sup>85</sup> Interviewee M15.

<sup>86</sup> Interviewee M5.

<sup>87</sup> Interviewee B13.

<sup>88</sup> Interviewee B22.

*Teacher 5:* I grew up with a father who was an Anglican priest. My mother was a schoolteacher. During the sixties my father was a socially active priest and we spent a lot of time living off the same amount of money that they gave welfare recipients, and donating the rest of our money to charities and proving our solidarity with those who earned less than we did. So for me it just comes out of the social justice work that my family had been involved in; this idea of human rights was something that was ingrained in me.<sup>89</sup>

As the above extracts demonstrate, this is one area where there is little or no difference in the responses given by Melbourne teachers and those given by Boston teachers. It seems that regardless of which side of the Pacific Ocean they are working, many teachers introduce human rights concepts into their classroom because of some personal motivation or drive, not because anyone has directed them to. What are the implications of this for the future of HRE? The extent of HRE will remain extremely limited if it is only addressed by teachers who, because of their background, have some deep personal commitment to human rights. Although this research indicates that the majority of teachers working in HRE share a dedication to human rights, this should not mean that such a commitment is a prerequisite to working in this field. As demonstrated in the previous section, the majority of pre-service teacher training does not include HRE. The result is that many teachers lack the formal knowledge and skills that would equip them to teach human rights. The ideals of Article 29(1) of CROC could be incorporated into the educational experience of secondary school students without teachers necessarily having a personal passion for human rights, if teachers were trained in HRE.

## 7.5 Conclusion

One of the aims of this research was to ascertain whether international human rights laws, such as CROC, have an impact at the grass roots level, that is, in school classrooms. In particular, can commitment to Article 29(1) as evidenced by ratification of CROC be used as a litmus test to measure a State's commitment to human rights education? Qualitative research of this kind cannot provide a definitive answer to this question. However, the data suggests that

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<sup>89</sup> Interviewee B28.

whether or not a State has ratified CROC may have little impact on the nature and extent of HRE in secondary schools. Overall, the results demonstrate that HRE in schools in both Boston and Melbourne falls well short of that which is mandated under international law. Article 29(1) contemplates that *all* children receive HRE, and General Comment No. 1 refers to HRE as being the right of every child.<sup>90</sup> Yet the data collected for this study suggests that HRE is only taught in Boston and Melbourne secondary schools in an *ad hoc* manner, predominantly in the later years of school, and by teachers who considered themselves to be ‘lone wolves’ in the push to teach human rights within their school. Thus, this empirical research indicates that the extent of HRE in secondary schools in Boston and Melbourne is considerably less than that contemplated by Article 29(1) of CROC, and students will only receive HRE if they manage to get one of the teachers who is committed to teaching human rights notwithstanding the absence of any direction or mandate to do so.

The findings of this study suggest that the journey of HRE from convention to classroom breaks down well before it gets to schools. In the result, instead of having comprehensive and integrated HRE coming from the ‘top down’, there is intermittent and *ad hoc* HRE coming from the ‘bottom up’. The failure of the United States Government to commit to CROC, and the Australian Government to fully implement and comply with Article 29(1), has led to there being a vacuum in the provision of HRE which is being filled by grass roots initiatives from teachers, supported by NGOs. The diagram on page 8 of this thesis illustrates how this is happening in practice and how it is in many ways the opposite of what is contemplated by Article 29(1) of CROC and General Comment No. 1, in that the HRE is not informed by, or based on, international norms and is happening despite, rather, than because of government initiatives. Thus, the limited HRE initiatives that the various Departments of Education in this case study have undertaken (as discussed in the previous Chapter) are not leading to the widespread provision of HRE in secondary schools in accordance with Article 29(1) of CROC.

A further key finding arising from the data collected from teachers working in this field is that widespread HRE of the type contemplated by Article 29(1) of

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<sup>90</sup> General Comment No. 1, above n 18, paragraphs 1, 2, 3, 9 and 22.

CROC is unlikely to be achieved unless and until a number of critical obstacles are overcome. In particular there must be HRE training for current and future teachers, and there must be efforts made to overcome the problem of the ‘crowded curriculum’, which makes it difficult for teachers to incorporate any education that is not mandated by the curriculum frameworks. Only teachers committed to HRE have taken the initiative to find ways of teaching students about human rights, notwithstanding these impediments.

This Chapter has shed light on what is needed in order for a State to comply with Article 29(1) of CROC. Some of these are addressed in General Comment No. 1, for example, the need for teacher training and for a government mandate regarding HRE in either legislation or an administrative directive.<sup>91</sup> In addition, General Comment No. 1 refers to the need for a complete reworking of the curriculum,<sup>92</sup> but is silent as to whether this should be by adding a new subject on human rights and/or integrating human rights into all, or perhaps a selection of subjects. Guidance from the CRC on this issue might have been useful for State Parties. Overall the majority of obstacles to HRE identified by Boston and Melbourne teachers are recognised by the CRC and addressed in General Comment No.1; however, this does not appear to have prompted greater efforts by Australia to comply with this norm.

The next chapter draws together the empirical findings from this, and the previous two chapters, and considers whether any of the eight theories analysed in Chapter 2 can explain the practices of Australia and the United States regarding HRE at the international and domestic levels.

The nature of the HRE provided in Boston and Melbourne becomes more apparent when the main themes to emerge from the data are analysed. The following section demonstrates that there are some significant differences between the nature of HRE provided in Boston and Melbourne, as well as between the nature of HRE provided in these two jurisdictions and the nature of HRE set out in Article 29(1) of CROC.

The nature of the HRE provided in secondary schools in these two cities appears to also fall short of the HRE articulated in Article 29(1) of CROC and

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<sup>91</sup> Ibid, paragraphs 17 and 18.

<sup>92</sup> Ibid, paragraph 18.

General Comment No.1. In particular no teacher who participated in this study indicated that they provide education about the principles enshrined in the UN Charter as required by Article 29(1)(b). No teachers it is not In both cities HRE was largely limited to English and Social Studies/SOSE, and to the upper level years of schooling. Boston students appeared to have more opportunity to apply their human rights knowledge in a practical way, which is congruent with Article 29(1) of CROC and General Comment No. 1. Finally, Boston teachers' self-assessment of the level of HRE being provided is higher than Melbourne teachers, but this is likely due to their different understanding of HRE, and their focus on the US Bill of Rights.

## **CHAPTER 8 – THEORETICAL IMPLICATIONS: WHAT ARE THE RAMIFICATIONS OF THIS CASE STUDY FOR EXISTING THEORIES?**

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#### **8.6 Evaluating the Overall Utility of Existing theories for Explaining States behaviour vis-à-vis compliance with Article 29(1) of CROC**

*Domestic variables matter more than international factors in determining state compliance with international norms.<sup>1</sup>*

## 8.1 Introduction

Before revisiting the rational actor, normative and hybrid theories, and discussing their explanatory powers, it is appropriate to draw together the findings regarding Australia and the United States' conduct regarding Article 29(1) of CROC in each of the jurisdictions examined in the previous three chapters. Section 8.2 integrates the conclusions regarding the practices of Australia and the United States in the international, domestic and education arenas in order to provide a foundation for the re-examination of the compliance theories analysed in Chapter 2.

It is difficult to make broad generalisations about States' motivations for committing to, and complying with, international human rights treaty obligations, based on the behaviour of just two States with respect to a single human rights norm. Nonetheless, the case study in this thesis provides data that may usefully supplement current theories about States' compliance with international norms. It is also difficult to try to identify singular or multiple causes influencing States' decision-making when it comes to international human rights treaties. Andrew Moravcsik asked the question: 'How should analysts combine major theories into testable explanations of classes of phenomena in world politics without permitting the resulting empirical analysis to degenerate into a mono-causal approach, on the one hand, or an indeterminate 'everything matters' approach, on the other?<sup>2</sup>' To overcome this dilemma, this chapter has the major theories on States' compliance 'compete' with each other to explain Australia and the United States' practices surrounding Article 29(1) of CROC, and through this process, theoretical weaknesses are identified, as well as synergies that exist between several theories. In the result, just a few key

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<sup>1</sup> Hawkins, Darren 'The Domestic Impact of International Human Rights Norms' Paper presented at the 42<sup>nd</sup> Annual Convention of the International Studies Association, Chicago, Illinois, 20-24 February 2001, accessed at: [www.isanet.org/archive/hawkins.html](http://www.isanet.org/archive/hawkins.html) on 7 May 2007, 3.

<sup>2</sup> Moravcsik, Andrew 'Liberal International Relations Theory: A Scientific Assessment' In Elman, Colin and Elman, Miriam Fendius (eds) *Progress in International Relations Theory: Appraising the Field* (2003) 159–204. MIT Press, Cambridge, 200.

factors emerge that may help to explain why a State commits to, and complies with, an international human rights norm.

Applying each of the eight theories analysed in Chapter 2 to the empirical findings from Chapters 5, 6 and 7 leads to the conclusion that no single theory can entirely explain these States' behaviours. The findings from this research suggest that there are factors which none of the existing theories consider, yet which this case study indicate may influence whether States are likely to commit to, implement, and comply with international human rights treaties. This case study indicates that the main deficiency of existing models is their preponderance to focus on international factors influencing States' practices without regard to domestic factors. Darren Hawkins suggests there is a strong argument that it is domestic rather than international factors that most impact on a State's conduct vis-à-vis international human rights treaties and the findings from this research support that theory.<sup>3</sup>

## **8.2 Summary of Empirical Findings**

The empirical findings from this research relate to the practices of Australia and the United States regarding Article 29(1) on the international stage, in domestic laws and policies, and within the school system. Since these findings are spread across three chapters, it is helpful to briefly summarise them here before embarking on a consideration of the theoretical implications of these findings.

Chapter 5 demonstrated that Australia was an active participant in the drafting of Article 29(1) of CROC and directly contributed to the language in paragraph (c). However, Australia's involvement in the drafting process, like the United States' participation, appears to have been motivated by a desire to manage and control the content, and limit the scope of the norms in the treaty. Australia, conscious of maintaining an international reputation as a strong supporter of human rights, also participated in the UN Decade for HRE and sponsored the resolution establishing the World Programme for HRE. However, both Australia and the United States supported these HRE initiatives with the apparent understanding that they were really about *other* States embracing HRE, rather

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<sup>3</sup> Hawkins, above n 1, 3.

than Australia and the United States needing to take steps to promote HRE within their sovereign jurisdictions. The conclusion drawn from these findings is that Australia and the United States were *involved* in, rather than *committed* to, international HRE efforts.

The reasons behind Australia's decision to ratify CROC, and the United States' decision not to, were explored in Chapter 6. It was found that there were several reasons behind these two States disparate decisions including, the influence of monist/dualist systems, the United States status as a Superpower, Australia's concern for its international reputation in human rights, the requirement of a two-thirds majority vote in the Senate prior to ratification of a treaty by the United States, the well organised opposition to CROC within the United States, particularly by the religious right, and finally, the balance of power between the federal and state governments, which sees the United States Government subjected to pressure to not use the treaty power to encroach on subject matter jurisdictions reserved to the states by the Tenth amendment.

There was evidence of HRE activity at the federal level in Australia, namely funding of the National Committee on Human Rights Education, and developing the Discovering Democracy kit and National Values Framework. However, these fall far short of the HRE required by Article 29(1) of CROC. The funding to the National Committee is not sufficient to enable it to undertake any measures to promote HRE in Australia, and the other two initiatives are about civics and citizenship and values education rather than comprehensive education about universal human rights. The Australian Government has not adopted the majority of recommendations of the Committee on the Rights of the Child (CRC) regarding implementing CROC generally, and Article 29(1) specifically, including embedding the requirements of HRE in legislation or administrative directives, and preparing a National Plan of Action for HRE. Finally, the attempts by Australia's national human rights institution, HREOC to develop HRE resources have only been partially successful. On the one hand they are comprehensive materials that are broadly consistent with the requirements of Article 29(1), and include links to the state-based curriculum frameworks. However, they do not appear to have penetrated into schools, with little

evidence of these resources being used by teachers in Melbourne secondary schools.

The United States Government's approach to HRE domestically is much the same as its approach to HRE in the international arena. Its only specific HRE initiative was the Congressional Human Rights Caucus briefing on HRE which confirmed that the Federal Government views HRE as a matter of foreign policy, not a domestic imperative. Thus, at the Federal level there were more domestic initiatives identified as HRE in Australia than in the United States but in neither State did this amount to substantive compliance with Article 29(1) of CROC.

At the state government level there were considerably more HRE initiatives in both Victoria and Massachusetts. However this was not as part of a journey from convention to classroom, but rather an entirely separate journey going in the opposite direction. That is, activities that were congruent with Article 29(1) of CROC such as the *Ideas for Human Rights Education* booklet in Victoria and the *Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues* in Massachusetts were inspired by a local NGO in the case of the former, and a personally committed senator in the case of the latter, not by an international norm. The overall finding in Chapter 6 was that the HRE journey from convention to classroom is interrupted at the juncture of federal/state politics. That is, the distribution of power in a federated State operates as a significant hurdle to comprehensive compliance with Article 29(1).

Human rights education was found to be occurring in secondary schools in Boston and Melbourne to a similar extent. In both cities, the HRE that was taking place was *ad hoc* and happening despite a lack of direction or guidance from the state Departments of Education or the school administration. There was a scarcity of HRE in the curriculum frameworks, a dearth of teacher training in HRE, and a crowded curriculum, which all act as obstacles to HRE in schools. Teachers were generally unaware of the mandate in Article 29(1) of CROC and were teaching their students about human rights out of personal motivation and commitment. Given the similarity in the provision of HRE in schools in Melbourne and Boston, it was apparent that ratification of CROC had

little impact on the extent of HRE in schools. What did influence HRE in schools was the presence of a domestic Bill of Rights in the United States. Education about this national instrument was not only embedded in the Massachusetts curriculum frameworks but also mandated in that state's legislation governing the content of education. Thus a Bill of Rights provokes HRE in schools, at the same time as it limits that HRE to the rights in the Bill of Rights and to a parochial rather than global focus.

The diagram on page 8 depicted the HRE journey from convention to classroom envisaged by Article 29(1) and the CRC. However, the findings from this research demonstrate this is not a single uninterrupted journey. Rather, there are two parallel voyages going in opposite directions. Although these journeys start at opposite ends, they share a common goal, namely to ensure that children are educated about human rights as part of their schooling. However, despite these two separate efforts to promote HRE – one international, and one local – the vision of HRE as part of every child's education has yet to be realised, at least in the two States considered in this case study.

### **8.3 Do Rational Actor Theories Explain Australia and the United States' Conduct Pertaining to Article 29(1) of CROC?**

Chapter 2 outlined three rational actor theories relating to States' conduct pertaining to international human rights treaties, namely realism, institutionalism and liberalism. This section revisits each of these theories in light of the empirical findings set out above.

#### *8.3.1 Realism*

Realists assert that States' decisions are based on a rational calculation of how to most effectively enhance their power, and that a State's decision to ratify an international human rights treaties is only made after an assessment of its interests. As discussed in Chapter 2, neorealists built on this theory by asserting that international structures, such as alliances between State actors, economic inter-dependence, and transnational actors, impact on a State's calculation of its self-interest.<sup>4</sup> The question that must therefore be asked is: whether self-

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<sup>4</sup> Waltz, Kenneth *Theory of International Politics* (1979) McGraw-Hill, USA.

interest was the primary motivator for Australia's ratification of CROC, and the United States' decision not to.

The United States and Australia appear to see international human rights norms pertaining to HRE as playing an important role in furthering their interests by allowing them to encourage other States to adopt practices that will enable them to become stable democracies, which makes them less threatening to the United States and Australia. This is illustrated by the Australian Government's White Paper entitled *Australian Aid: Promoting Growth and Stability* (2006)<sup>5</sup> which has a section devoted to 'Fostering Functioning and Effective States' that emphasises the Australian Government's commitment to promoting and supporting Pacific Island States that 'maintain order and stability [and] provide for the protection and advancement of human rights'.<sup>6</sup>

Both Australia and the United States see it as being in the self-interest to promote democracies which abide by the rule of law, because they view a prevalence of democratic States as critical to international peace and security. Australia and the United States perceive that their self-interests are advanced if other countries apply democratic processes and exercise good governance, and they see committing to, and complying with, international human rights treaties, including CROC, as an integral part of that. This attitude was evident in the UN General Assembly, when a motion to proclaim the World Programme for HRE was under consideration, and as discussed in Chapter 5, the United States' representative spoke about his country's commitment to human rights as a core part of its *foreign policy*, and how HRE helps to strengthen democracies.<sup>7</sup> The Australian representative also commented on the relationship between human rights education and stable democracies in which human rights are realised, and human rights abuses prevented.<sup>8</sup>

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<sup>5</sup> Accessed at: [www.ausaid.gov.au/publications/pdf/whitepaper.pdf](http://www.ausaid.gov.au/publications/pdf/whitepaper.pdf) on 8 July 2007.

<sup>6</sup> Ibid, section 5.2.

<sup>7</sup> General Assembly Fifty-Ninth session, 10 December 2004, Official Record A/59/PV.70, Mr Ghafari, 19.

<sup>8</sup> Ibid, Mr Choi, 3.

Australia's interest in supporting functioning and effective States that respect human rights is particularly focused on countries in its geographic region, and Australia has been vocal about its desire to promote practices of good governance, and to support and encourage its Pacific Island neighbours to respect human rights.<sup>9</sup> The Hon Alexander Downer, Minister for Foreign Affairs, has noted that: 'the Pacific island region ... is one of the Australian Government's major foreign policy priorities'<sup>10</sup> and the Australian Government stated that: 'Human rights education is an important part of Australia's development assistance in the region. Technical assistance and education in the area of human rights is seen as an important tool for assisting countries to strengthen their capacity to promote and protect human rights.'<sup>11</sup> Coups in Fiji and the Solomon Islands<sup>12</sup> deeply concerned the Australian Government, which perceived such activities as destabilising the region. As a result, Australia has renewed its commitment to providing increased HRE to the region, in an effort to avoid future coups. This is evident from the Government's Inquiry into 'Human Rights and Good Governance Education in the Asia Pacific Region' discussed in Chapter 6. The Government's submission to the Inquiry expressly acknowledged that: 'As a state party to the UN Decade for Human Rights Education, and the Universal Declaration of Human Rights and other major human rights instruments, Australia has accepted an obligation to provide human rights education'.<sup>13</sup> The Australian Government seems to view its commitment to international norms such as Article 29(1) of CROC as imposing responsibilities to increase HRE in *other* countries in its region. The Government has stated that: 'In the Asia Pacific, poor performing or failing states and countries suffering from conflict present an ongoing challenge ... for

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<sup>9</sup> An example is the Australian Government providing funding to the Castan Centre for Human Rights Law to provide human rights training in Burma to government officials. Numerous workshops have been conducted in Burma since 2000. Accessed at: [www.foreignminister.gov.au/releases/2002/fa065\\_02.html](http://www.foreignminister.gov.au/releases/2002/fa065_02.html) on 13 August 2007.

<sup>10</sup> Address to the Fiji Australia Business Council, Suva, Fiji, 19 August 1997, accessed at: [www.dfat.gov.au/media/speeches/foreign/1997/fiji\\_aus.html](http://www.dfat.gov.au/media/speeches/foreign/1997/fiji_aus.html) on 14 May 2007.

<sup>11</sup> The Australian Government Response to The Joint Standing Committee on Foreign Affairs, Defence and Trade Report *Improving but.... Australia's Regional Dialogue on Human Rights* June 1999, accessed at: [www.dfat.gov.au/hr/reports/jun99\\_jscfadt.html](http://www.dfat.gov.au/hr/reports/jun99_jscfadt.html) on 14 May 2007.

<sup>12</sup> Fiji has had four coups in the past 20 years, the most recent being in December 2006. The Solomon Islands had a coup in 2000, and severe civil unrest in April 2006.

<sup>13</sup> *Human Rights and Good Governance Education in the Asia Pacific Region* Report accessed at: [www.aph.gov.au/house/committee/jfadt/hrgoodgov/report/fullreport.pdf](http://www.aph.gov.au/house/committee/jfadt/hrgoodgov/report/fullreport.pdf) on 8 July 2007, paragraph 1.4.

governance and human rights education.<sup>14</sup> The Australian Government's regional initiatives relating to HRE are informed by Article 29(1) of CROC, and to highlight this, it drew the Inquiry's attention to the fact that it organised a regional workshop on the practical implementation of the Convention on the Rights of the Child.<sup>15</sup>

The lack of comprehensive domestic compliance with Article 29(1) of CROC, as highlighted in Chapters 6 and 7, coupled with Australia's increasing attention to promoting HRE in Pacific Island nations,<sup>16</sup> suggests that Australia may view committing itself to international HRE obligations as in its self-interest, in that it can use such commitment to justify pressuring countries in its region to increase their own HRE efforts. The evidence suggests that Australia uses its ratification of international instruments containing HRE norms as a way of increasing its credibility and power when it seeks to export HRE to Pacific Island countries in an effort to ensure they do not become 'failed' States that potentially destabilise the region.<sup>17</sup> Australia seems comfortable using international human rights law, such as CROC, to legitimise its regional activities, while at the same time failing to alter its domestic practices to bring them into compliance with such international obligations. This is consistent with the findings of other Australian human rights scholars who have observed that:

In expressing its support for the human rights framework, Australia gives the impression that it believes that human rights standards are only relevant for other countries.<sup>18</sup>

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<sup>14</sup> Submission from the Australian Agency for International Development and the Department of Foreign Affairs and Trade to the Inquiry into Human Rights and Good Governance Education in the Asia Pacific Region, accessed at: [www.aph.gov.au/house/committee/jfadt/HRGGoodGov/subs/sub9.pdf](http://www.aph.gov.au/house/committee/jfadt/HRGGoodGov/subs/sub9.pdf) on 8 July 2007, 1.

<sup>15</sup> Ibid, 3.

<sup>16</sup> DFAT has stated that 'The Government seeks to promote achievable good governance and human rights education outcomes in the Asia Pacific region ... through the development and delivery of the Australian aid program.' Submission by the Australian Agency for International Development and DFAT to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Human Rights and Good Governance Education in the Asia Pacific Region, November 2002, 1.

<sup>17</sup> The *Human Rights and Good Governance Education in the Asia Pacific Region* Report frequently makes references to a variety of international HRE initiatives, and specifically mentions CROC on five separate occasions.

<sup>18</sup> Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George *No Country is an Island: Australia and International Law* (2006) UNSW Press, Sydney, 65.

Thus Australia committed itself to Article 29(1) of CROC, apparently confident that it can either convince the CRC that it is giving effect to the requirements of Article 29(1) domestically, or alternatively, that it can dismiss or manage any criticism it may receive from the CRC regarding the extent of its compliance with Article 29(1). Thus, when weighing up the benefit of ratifying CROC (increased standing and authority with its neighbours when encouraging them to introduce or increase HRE within their jurisdictions) against the detriment (potential criticism by the CRC for lack of domestic compliance), the evidence suggests that Australia concludes that the benefits outweigh the detriment, and therefore ratification of CROC is in its self-interest.

Like Australia, the United States seeks to increase HRE in other countries,<sup>19</sup> yet despite this, it has not made a commitment to Article 29(1) of CROC. One possible explanation is that the United States, as the world's Superpower, can exert pressure on other States to commit to international human rights obligations without itself having to commit to them. As was demonstrated in Chapter 5, the United States participated in the drafting of CROC (although it made no specific contribution to the final text of Article 29(1)), but when it came time to ratify, a rational actor analysis would suggest that the United States calculated that it did not need to ratify CROC in order to pursue its national interest of promoting respect for children's rights in other States. As highlighted in Chapter 5, the United States has become renowned for being involved in the negotiation and drafting of human rights treaties, but not subsequently ratifying them, and the practice has been labeled an example of 'American exceptionalism'.<sup>20</sup> An illustration of American exceptionalism is the United States Department of State using CROC as a measuring stick when assessing other States' human rights practices in its annual *Country Reports on Human Rights Practices*. For example, in 2006, CROC was referenced in the Country reports relating to Burma, Iran and Egypt. Furthermore the report relating to

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<sup>19</sup> The United States Department of State in 2002 devoted an entire issue of its electronic journal, *Issues of Democracy*, to HRE. While there were some reference to HRE within the United States, the majority of the journal was devoted to HRE in developing nations, and used as case studies the provision of HRE in South Africa and Kosovo. (2002) 7(1) *Issues of Democracy*, accessed at :<http://usinfo.state.gov/journals/itdhr/0302/ijde/ijde0302.htm> on 8 July 2007.

<sup>20</sup> See for example Ignatieff, Michael (ed) *American Exceptionalism and Human Rights* (2005) Princeton University Press, Princeton, New Jersey.

Saudi Arabia specifically acknowledged that the Saudi Government is ‘teach[ing] children their rights under the UN Convention on the Rights of Children’.<sup>21</sup> Thus, the United States seems to be comfortable judging other States’ practices by reference to a treaty it has refused to ratify. It appears to be able to do this because:

As the strongest and richest country in the world, the United States can afford to safeguard its sovereignty. An America that stands aloof from various international undertakings will not find that it is thereby shut out from the rest of the world. On the contrary, we have every reason to expect that other nations, eager for access to American markets and eager for other cooperative arrangements with the United States, will often adapt themselves to American preferences.<sup>22</sup>

The United States involvement in the drafting of CROC demonstrates that it perceives it to be in its national interest to participate in the development of human rights standards (because its involvement will make it a ‘better treaty’),<sup>23</sup> but not to be measured by those standards. As was seen in Chapter 5, this general resistance by the United States to committing to international human rights laws and initiatives, applies not only to its decision not to ratify CROC, but also its refusal to participate in global HRE initiatives such as the UN Decade for HRE and the World Programme for HRE.

The data from this empirical research supports the realist theory that States’ decisions to commit, or not commit, to international human rights law are dictated by their self-interest. This is contrary to the arguments made by Professor Oona Hathaway, who doubts that realists can explain States’ behaviour, pointing out that:

It is therefore difficult for realists to explain why States would be willing to incur the costs of setting up a regime to protect human rights, surrender to that regime the power to control and monitor some aspects of their interactions with their own

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<sup>21</sup> U S Department of State Country Reports on Human Rights Practices, Saudi Arabia, 2006, accessed at: [www.state.gov/g/drl/rls/hrppt/2006/78862.htm](http://www.state.gov/g/drl/rls/hrppt/2006/78862.htm) on 16 July 2007.

<sup>22</sup> Rabkin, Jeremy in Spiro, Peter J. ‘The New Sovereigntists: American Exceptionalism and Its False Prophets’ (2000) 79(6) *Foreign Affairs* 9.

<sup>23</sup> Comment of Thomas Johnson from the U S. Department of State Office of the Legal Advisor in Cohen, Cynthia Price ‘The Role of the United States in the Drafting of the Convention on the Rights of the Child’ (2006) 20 *Emory International Law Review* 185, 188.

citizens, commit to bring themselves into line with treaty requirements, and agree to engage where necessary in sanctioning activity to bring others into compliance.<sup>24</sup>

Hathaway's reference to 'sanctioning activity' is somewhat ill-conceived, since rarely will a human rights violation result in State Parties to a treaty having to take action to 'bring others into compliance'.<sup>25</sup> Furthermore, Hathaway's assessment of States' interests is too narrowly drawn. As this research reveals, there can in fact be reasons why a State may well calculate that it is in its interest to commit to an international human rights regime. In the case of Australia and Article 29(1) of CROC, its self-interest is served by the benefit (increased influence and credibility) that it obtains at the regional level from being a Party to such an international HRE law. This benefit outweighs the minimal loss of power and control that it incurs by surrendering to UN monitoring mechanisms, such as the CRC. In the case of the United States, it has determined that its self-interests are not best served by surrendering power to the CRC to monitor its implementation of the norms set out in CROC, preferring to remain free from external scrutiny.

Thus a realist framework appears to be able to explain why Australia has committed to Article 29(1) of CROC, and the United States has not. Realists have not sought to apply their theories to compliance, and thus offer no explanation regarding States' domestic practices surrounding implementation and compliance with human rights treaties. This thesis will therefore not explore whether realism can explain Australia and the United States' domestic practices regarding Article 29(1) of CROC. In any event, realists limit their analysis to international factors influencing States' assessment of their self-interest, for example, alliances with other States, trade relationships, or aid funding, whereas it appears to be domestic factors that most impact whether a State complies with international human rights law. Given that realists ignore domestic influences when calculating self-interest, it is not appropriate to consider those factors here. However, domestic factors influencing Australia's

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<sup>24</sup> Hathaway, Oona 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935, 1946.

<sup>25</sup> Examples of States taking action in an endeavour to bring another State into compliance are limited to extreme human rights violations, such as apartheid in South Africa.

lack of full compliance with Article 29(1) of CROC are considered later in this Chapter, in particular when the theories pertaining to liberalism, transnational legal process, and domestic salience are analysed.

Realism provides some explanation for Australia and the United States' conduct pertaining to international HRE initiatives, in particular why Australia ratified CROC and the United States has not. However, realists' bias towards international influences to the exclusion of domestic factors limits the theory's usefulness when it comes to predicting domestic compliance. Thus, this theory appears to be valuable for predicting whether a State will ratify a treaty, but not whether it will comply with a treaty it has ratified. In order to make realism applicable to compliance, it needs to be supplemented by a consideration of domestic factors that influence a State's calculation of its self-interest.

### 8.3.2 *Institutionalism*

Institutionalists, like realists, believe that States' behaviour is motivated by self-interest, but in addition assert that international institutions play a role in shaping States' practices by providing a forum in which States can engage in cooperative negotiations, and as a body from which international law emanates. They argue that States commit to agreements reached in this forum as a way of fostering agreement from other States, and will comply with the agreement reached, so long as the cost of compliance is less than the cost of violation.<sup>26</sup> Does this theory provide an explanation for Australia and the United States' conduct vis-à-vis Article 29(1) of CROC?

The extended drafting process that led to the final text of CROC was unlikely to have been arranged without the auspices of the UN or some equivalent international institution. The drafting of a multilateral treaty, such as CROC, required an extraordinary level of international cooperation that would not have been possible without the structure and resources of an international body. The Convention on the Rights of the Child only eventuated because a diverse range of States – from both sides of the Cold War divide – shared a common interest

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<sup>26</sup> Keohane, Robert O. 'International Institutions: Two Approaches' (1988) 32 *International Studies Quarterly* 379, 387.

in establishing norms to protect and empower children, and because the UN provided the forum in which they could develop these convergent interests.<sup>27</sup> The self-interest that motivated Australia to participate in the negotiation and ratification of CROC has already been analysed in the previous section, but institutionalism adds a further dimension, by recognising the role that an international institution played in facilitating the realisation of Australia's self-interest through multilateral action.

The impact that international institutions have on States' behaviour varies over time according to the nature and policies of the government in power. A number of scholars suggest that Australia's relationship with international organisations, such as the UN human rights machinery, changes significantly, depending on which of the two major political parties is in power, noting that:

The Labor Party has traditionally had a greater interest in the success of international law-making institutions such as the United Nations and has been more at ease with multilateralism conducted under their auspices. The Liberal-National Coalition has generally favoured bilateral or regional agreements over those propounded by international institutions.<sup>28</sup>

The same trend appears to exist in the United States where it has been observed that the Democrat Party is more supportive of international human rights law than the Republican Party. This appears to be particularly evident on the question of the United States ratifying CROC with Moravcsik noting that: 'The classic pattern of domestic partisan contestation dating back to the Bricker amendment emerged, with more liberal, mostly Democratic, senators supporting ratification, and more conservative, largely Republican, counterparts opposing.'<sup>29</sup>

The Liberal-National Coalition was in power for the entire period during which the data (on Australia's compliance with Article 29(1) of CROC) was gathered for this thesis. However, it was the Labor Party that was in government for the

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<sup>27</sup> Barnett, Michael N. 'Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations' (1997) 49(4) *World Politics* 526, 528.

<sup>28</sup> Charlesworth, above n 18, 146.

<sup>29</sup> Moravcsik, Andrew 'Paradox of U.S. Human Rights Policy' in Ignatieff, above n 20, 181.

majority of the time that CROC was being drafted, and also when it was ratified. The above interpretation of Australian political parties' attitude to the UN is consistent with the fact that Australia viewed the UN human rights system in a positive way during the period it negotiated and committed to Article 29(1) of CROC, when there was a Labor Government in power, whereas in the last decade, when the issue has been Australia's compliance with Article 29(1) of CROC, Australia has had a Liberal-National Government that has had a negative attitude towards international human rights institutions and the laws emanating from them. Institutionalism thus appears to help explain Australia's practices around its commitment to CROC, because at that time the Australian Government was supportive of the international human rights system and international law human rights law.

Institutionalism is less helpful in explaining Australia's non-compliance with Article 29(1) of CROC, because the current Liberal-National Government does not perceive it to be in its self-interest to implement and comply with Article 29(1) of CROC, and the Committee on the Rights of the Child (CRC) is powerless to persuade the Government otherwise. A leading international law scholar has described the current Australian Government's relationship with the UN as 'combative' and accused it of failing 'to comply with its treaty obligations in good faith'.<sup>30</sup> Thus, at the present time, the ability of the CRC to influence Australia's compliance with Article 29(1) of CROC appears to be minimal, because the current Australian Government does not prioritise international human rights institutions or laws. Indeed, the Australian Government does not appear to be motivated to comply with this norm, because the cost of violation is perceived to be negligible, and because the risk of its non-compliance being discovered is minimal.<sup>31</sup> However, the Australian Government still wants to be

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<sup>30</sup> Charlesworth, Hilary 'Human Rights: Australia versus the UN' Discussion Paper 22/06, August 2006, accessed at: [http://democratic.audit.anu.edu.au/papers/20060809\\_charlesworth\\_aust\\_un.pdf](http://democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf) on 27 May 2007.

<sup>31</sup> As Professor Hathaway has noted 'Where there is little monitoring, non-compliance is not likely to be exposed.' Hathaway, above n 24., 2006. The CRC does not have the resources to closely monitor States' compliance and only gains insight into compliance levels through States' own reports and NGO shadow reports. The most recent NGO shadow report to the CRC prepared by the National Children's and Youth Law Centre and Defence for Children International (Australia) appears to respond to only the specific assertions raised in the Government's Report. Thus, with respect to Article 29(1) of CROC, the shadow report only talks about school discipline, and like the Government Combined Second and Third Report, completely fails to address the extent to which HRE in accordance with Article 29(1) is

perceived by the international community as complying with this norm, and thus in its reports to the CRC (discussed in Chapter 3) represents that it is compliant with Article 29(1). The result is the somewhat paradoxical situation where the current Federal Government appears to be resistant to the UN human rights machinery, but at the same time wants to avoid criticism from the UN treaty bodies, so prepares a report to the CRC that signifies that it is implementing Article 29(1) of CROC, and is providing HRE within Australian schools.<sup>32</sup> This behaviour has led to Australia being described as Janus-faced, ‘a nation that embraces human rights in the international sphere, but is much more cautious about the application of human rights domestically.’<sup>33</sup> Thus an international institution, such as the UN, influences Australia’s conduct in the international arena on matters such as the ratification of CROC, when its reputation as a strong supporter of human rights is on display, but is not influential when it comes to comprehensive compliance with Article 29(1) of CROC, because the ‘eyes of the world’ are no longer upon Australia, that is, it can make minimal efforts to implement and comply with Article 29(1), confident that its international reputation as an upholder of human rights will not be tarnished by such non-compliance. The CRC, appears to lack the ability to ascertain Australia’s true degree of compliance with Article 29(1), and to convince the Government that the cost of non-compliance is greater than the cost of compliance.

Institutionalism does not appear to be useful in explaining the United States’ refusal to ratify CROC, because the cost of violation used to induce States to commit to, and comply with, human rights treaties such as CROC is the potential damage to reputation that may flow from non-ratification and non-compliance. As the world’s Superpower, the United States does not appear to be overly concerned with any tarnishing of its reputation that may flow from not ratifying CROC. Indeed, scholars contend that the reputational consequences

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being provided in Australian schools. *The Non-Government Report on the Implementation of the Convention on the Rights of the Child in Australia May 2005* accessed at: [www.ncylc.org.au/croc/images/CROC\\_Report\\_for\\_Web.pdf](http://www.ncylc.org.au/croc/images/CROC_Report_for_Web.pdf) on 15 August 2007, 54-55.

<sup>32</sup> Australia’s Combined 2nd and 3<sup>rd</sup> Reports under the Convention on the Rights of the Child CRC/C/129/Add.4, 29 December 2004, paragraph 373.

<sup>33</sup> Charlesworth, above n 18, 65.

that flow from a State's conduct surrounding a human rights treaty tend to be fairly limited because of the non-reciprocal nature of such treaties.<sup>34</sup> This appears to be particularly true when it comes to the United States, which as a Superpower, seems willing to defy the human rights machinery of the UN confident that it will not suffer any consequences for such defiance.<sup>35</sup>

Thus, the ability of the UN to influence the United States' decision-making surrounding ratification of CROC appears to be extremely limited because the United States sees itself as unique.<sup>36</sup> In particular, it does not need to commit to the same international rules as other States because it already has superior protection of rights in its Constitution and Bill of Rights.<sup>37</sup> The result is that the United States opposition to committing to international human rights treaties such as CROC is not dependent on the views of the current administration. Unlike Australia, its relationship with the UN is unlikely to change significantly as the political party in charge changes. Rather, as long as the United States retains its Superpower status, and its conviction that its culture and history of protecting rights are exceptional, there is little opportunity for the human rights machinery of the UN to influence the United States' domestic human rights practices.

The above analysis suggests that institutionalism is helpful in explaining Australia's ratification of CROC. It is also helpful in explaining the United States' refusal to ratify CROC, in as much as it is difficult for an international institution to influence the ratification decision of a Superpower that is not overly swayed by reputational concerns in the international human rights area. Thus, the United States does not appear to be concerned by the fact that it and Somalia are the only States not to have ratified CROC. Institutionalism is helpful in explaining Australia's failure to fully implement and comply with Article 29(1) of CROC to the extent that a weak institution leads to weak compliance. Thus, an international institution, such as the UN, can impact on whether a State ratifies

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<sup>34</sup> Downs, George W. and Jones, Michael A. 'Reputation, Compliance and International Law' (2002) 31 *Journal of Legal Studies* 95, 112.

<sup>35</sup> Hoffman, Stanley 'American Exceptionalism: The New Version' in Ignatieff, above n 20, 229.

<sup>36</sup> Ibid, 225.

<sup>37</sup> Ibid.

CROC only if that State has a government that is supportive of international law (such as the Labor Government in Australia), and only if that State is one that is concerned with its international reputation in the area of human rights. Furthermore, Institutionalism explains States' domestic compliance practices, which appear dependent on how influential the international institution is perceived to be.

### 8.3.3 *Liberalism*

Liberals place critical importance on the type of domestic regime existing within a State as a predictor of how States will behave vis-à-vis human rights treaties. States are not perceived as unitary actors, but rather as representative institutions, constantly changing according to the preferences and powers of the individuals within the State.<sup>38</sup> Proponents of this theory assert that liberal democratic States are more likely to ratify and comply with human rights treaties because this is necessary for their political survival in the domestic arena.<sup>39</sup> Furthermore, liberal States are more likely to comply with human rights treaties that they have ratified, because they are more likely to have human rights institutions and structures that facilitate compliance, and are also more likely to have human rights activist groups that can exert pressure on their government to comply.<sup>40</sup>

While liberals are the only rational actor theorists to look at domestic factors influencing States' behaviour, they largely limit their analysis to a study of regime type; their focus is on domestic political structure and ideology.<sup>41</sup> *Prima facie* liberals would predict that Australia and the United States, both being liberal democratic States, would commit to, and comply with, international human rights laws. Yet the case study undertaken for this research reveals that,

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<sup>38</sup> Moravcsik, Andrew 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organizations* 513, 518.

<sup>39</sup> Moravcsik, Andrew 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) *International Organizations* 217.

<sup>40</sup> Hathaway, above n 24, 1954 relying on Helfer, Laurence R. and Slaughter, Anne-Marie 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273 where they made a similar argument with regard to supranational adjudication.

<sup>41</sup> Slaughter, Anne Marie 'International Law in a World of Liberal States' (1005) 6(4) *European Journal of International Law* 1, 2.

at least when it comes to the norm in Article 29(1) of CROC, this is not the case. A common feature of the political structure of the United States and Australia that may explain the United States' lack of commitment, and Australia's lack of compliance, is that they are both federations, with a clearly spelt out constitutional distribution of powers between the federal and state governments. Particularly relevant to this research is the fact that in both countries, the subject matter of Article 29(1) of CROC, namely education, falls within the jurisdiction of state rather than federal governments. As Professor Charlesworth has noted:

the international law of human rights has provided a significant challenge for Australian federalism by contesting the assumed division of legislative power between the Commonwealth and the states and weighting the federal balance in this area decisively in the Commonwealth's favour.<sup>42</sup>

Similarly, in the United States, CROC has been specifically singled out as a treaty that may upset the balance of power, with Professor Bradley commenting that this treaty:

contains a number of provisions that may be inconsistent with current U.S. family law. This inconsistency has prompted federalism concerns because family law is a subject that largely has been regulated in this country at the state rather than federal level.<sup>43</sup>

Although the Australian and United States' Governments could use their respective external affairs and treaty powers to enact legislation giving effect to the norm in Article 29(1) of CROC, for the reasons set out in chapter 6, this is not an attractive option for either the Australian or United States Federal administrations. Thus, the balance of power in federations such as Australia and the United States appears to have a chilling effect on these liberal democratic States' ability and willingness to commit to (in the case of the United States), and fully comply with (in the case of Australia), international human rights law.

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<sup>42</sup> Charlesworth, Hilary 'International Human Rights Law and Australian Federalism' Chapter 9 in Opeskin, Brian R. and Rothwell, Donald R. (eds) *International Law and Australian Federalism* (1997) Melbourne University Press, Melbourne, 280.

<sup>43</sup> Bradley, Curtis A. 'The Treaty Power and American Federalism' (1998) 97 *Michigan Law Review* 390, 402.

Liberalism stresses that domestic pressure on a government influences how that government will conduct itself vis-à-vis international human rights law. However, in the case of federations, there may well be less pressure placed on a government to ratify or comply with international human rights law because of concerns by the constituent states that the federal government will use international law to override states' rights. States' concerns about federal governments using international laws to justify giving them broader legislative powers in the human rights area have proved to be legitimate concerns. In 1993, Australian Prime Minister Paul Keating ratified the ILO Convention on Termination of Employment,<sup>44</sup> and then used this international treaty as the basis for enacting unfair dismissal laws. There was uproar by the state governments<sup>45</sup> at this perceived grab for power by the Federal Government, and one leading academic suggests that this incident was one of the main reasons Keating lost the March 1996 election,<sup>46</sup> because regardless of how worthwhile the unfair dismissal laws might have been, it was seen as an attempt to snatch power away from the states, and this was not politically acceptable in the domestic arena. Similar concerns have existed in the United States ever since the decision in *Missouri v Holland*<sup>47</sup> discussed in Chapter 6. Thus, a cornerstone of liberalism – that States receive pressure domestically to ratify and comply with international human rights laws – does not appear to hold true in federations in situations where the subject matter of the treaty is one that belongs to state rather than the federal governments. Thus, in the case of Article 29(1) of CROC, the reason for the lack of direct implementation and full compliance by the Australian Government may be a desire not to take steps to comply with an international norm that may be viewed negatively by the electorate as an encroachment on states' rights.

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<sup>44</sup> ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer (Geneva, 22 June 1982). Entered into force 23 November 1985. Entered into force in Australia 26 February 1994.

<sup>45</sup> Charlesworth, above n 18.

<sup>46</sup> McCallum, Ron 'The Australian Constitution and the Shaping of our Federal and State Labour Laws' Paper presented at the Industrial Relations Society of NSW 46<sup>th</sup> Annual Convention (13 May 2005), accessed at: [www.econ.usyd.edu.au/download.php?id=4300](http://www.econ.usyd.edu.au/download.php?id=4300), on 5 June 2007, 3.

<sup>47</sup> (1920) 252 U.S. 416. See also Bradley, above n 43.

Much has been written about the implications of federalism on international human rights law,<sup>48</sup> but none of this literature appears to be in the context of a liberalism theoretical framework for States' compliance with international human rights law. The Liberalism theory could be improved by the addition of scholarship on the influence of federalism on compliance with international human rights law. In both Australia and the United States, unless the Federal Governments want to use their external affairs/treaty power, (thereby risking damage to their relationships with the states by disrupting the balance of power and potential negative electorate fallout), they must negotiate with state governments to implement international human rights obligations. This constraint on federal power to directly implement international human rights norms is an issue that appears to influence how and why federal States commit to, and comply with, international human rights law. As previously indicated, the literature on liberalism tends to focus on comparative studies of liberal and non-liberal states. The empirical research undertaken for this thesis suggests that the liberalism theory would benefit from broadening the analysis to include comparative research into whether federated States are more or less likely to commit to, and comply with, international human rights norms than unitary states, as well as more general comparative studies between liberal States, rather than just between liberal and totalitarian States..

One of the reasons that Liberals expect liberal States to comply with international human rights norms is that such States frequently have structures that support compliance, such as national human rights institutions (NHRI).<sup>49</sup> Australia has such a body in the form of HREOC, whereas the United States has no NHRI. The empirical evidence from this research suggests that the presence of an NHRI has no discernible impact on the provision of HRE in

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<sup>48</sup> See for example Swaine, Edward T. 'Does Federalism Constrain the Treaty Power?' (2003) 103 *Columbia Law Review* 403; Tushnet, Mark 'Federalism and International Human Rights in the New Constitutional Order' (2001) 47 *Wayne Law Review* 841; Vergonis, Christian G.' The Federalism Implications of International Human Rights Law' (2002), accessed at: [www.fed-soc.org/doclib/20070325\\_vergonishumanright.pdf](http://www.fed-soc.org/doclib/20070325_vergonishumanright.pdf) on 4 June 2007; Merico-Stephens, Ana Maria 'Of Federalism, Human Rights and the Holland Caveat: Congressional Power to Implement Treaties' (2004) 25 *Michigan Journal of International Law* 265; Charlesworth, Hilary 'International Human Rights Law and Australian Federalism' in Opeskin, Brian R. and Rothwell, Donald R. (eds) *International Law and Australian Federalism* (1997) Melbourne University Press, Melbourne, 280-305; and Charlesworth, above n 18, 52-57.

<sup>49</sup> Moravcsik, above n 38.

accordance with the norm in Article 29(1) of CROC. As discussed in Chapter 6, federalism may inhibit the ability of a national statutory body to influence state controlled education, and explain the limited influence of HREOC in school based HRE in Australia. The impact that NHRIs have on compliance with international human rights treaties in federated States is an area that appears to warrant further study.

There is nothing in the research conducted for this study to indicate that liberalism can explain States' commitment and compliance behaviours regarding Article 29(1) of CROC. In particular, although Australia and the United States are both liberal democratic States it does not appear that they are being subjected to pressure from civil society or the general community to provide HRE in schools in accordance with Article 29(1) of CROC. The reason for this lack of domestic pressure appears to be the fact that both States are federations, and the subject matter of Article 29(1) falls within the jurisdiction of state rather than federal governments. Thus, it is the fact that these two States are federations that seems to most influence their ratification and compliance positions, rather than the fact that they are liberal democratic States.

#### *8.3.4 Conclusion to Rational Actor Theories*

As noted above, the rational actor theory of realism seems to help explain Australia and the United States' ratification positions regarding CROC, in that both these States' decisions on ratification appear to have been made after an assessment of their self-interest, in particular, whether committing to the norm in Article 29(1) will assist them in their efforts to encourage HRE in other States as part of their foreign policy to promote stable democracies that respect human rights. However, realism is of little assistance in explaining States' compliance practices, because it focuses only on international considerations, to the exclusion of domestic factors, which the empirical data from this study suggests play a significant role in States' compliance.

Institutionalism is helpful in explaining States' ratification practices only if three key variables exist. First the State must have a commitment to international institutions and the international human rights law that emanates from them. Second, it must be concerned about its international reputation concerning 270

human rights and believe that the UN has the capacity to negatively impact on that reputation. Third the international institution must not be perceived as weak, that is, it must have sufficient weight and credibility that it can influence State behaviour. Australia appears to be a State that is concerned about its international reputation as a strong supporter of human rights, whereas the United States, as a Superpower, appears to be oblivious to the influence of the UN human rights machinery when it comes to ratification of CROC. Institutionalism can explain Australia's lack of implementation and comprehensive compliance with Article 29(1) of CROC, to the extent that a weak institution leads to weak compliance. The CRC as a relatively weak body<sup>50</sup> is unable to influence Australia's compliance decisions, not the United States ratification decision. Thus, the empirical research undertaken for this study indicates that a strong institution may lead to commitment and compliance with international human rights treaties whereas a weak institutionalism will likely result in weak compliance, and in the case of a Superpower willing to ignore the UN human rights machinery, may also lead to non-ratification.

There is nothing in the research undertaken for this thesis to support liberalism as a theory to explain States' commitment to, and compliance with, international human rights norms. On the contrary, the fact that one of the most liberal and democratic States in the world has failed to ratify CROC calls into question the efficacy of this theory, at least insofar as it applies to a Superpower. However, the main finding to come from the application of liberalism to the empirical data from this research is that further investigation is needed into whether federated States are less likely to commit to, and comply with, international human rights norms if the subject matter of the norm is not one within the constitutional jurisdiction of the federal government. Thus, the fact that education is the responsibility of state governments in both Australia and the United States emerges as an impediment to these States' ability to commit to (in the case of the United States), and comply with (in the case of Australia), the provisions of Article 29(1) of CROC. Federalism is therefore an additional consideration that

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<sup>50</sup> For example, unlike the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, or the Committee Against Torture, the CRC has no power to hear individual complaints or to visit States and investigate the levels of compliance.

should be taken into account when theorising about States' commitment to, and compliance with, human rights treaties.

Overall, the rational actor theories are useful in explaining States' ratification decisions, but not their compliance levels. This is because self-interest appears to motivate States' commitment decisions, and the calculation of a State's interest is largely based on consideration of international factors. Realism and Institutionalism seem to be the most helpful theories when it comes to explaining Australia and the United States' choices regarding becoming a Party to CROC, while liberalism appears to lack application in federated States. The rational actor theories are all designed to explain States' commitment practices, rather than their compliance behaviour, and thus shed no light on Australia's domestic practices in relation to Article 29(1) of CROC.

#### **8.4 Do Normative Theories Explain Australia and the United States' Conduct Pertaining to Article 29(1) of CROC?**

All four normative theories examined in Chapter 2, and revisited below, to a greater or lesser degree, focus on the persuasive power of binding legal obligations. In contrast to rational actor theorists, normative theorists explain States' commitment to, and compliance with, international law, not by reference to self-interest, but by reference to the socialisation of the obligation to comply with treaty obligations. The previous section demonstrated that rational actor theories provide an incomplete explanation of Australia and the United States' conduct surrounding Article 29(1) of CROC. This section explores whether the normative models are any better at explaining Australia and the United States' ratification (and non-ratification) of CROC, and compliance, or lack thereof, with Article 29(1).

##### *8.4.1 Managerial Model*

The managerial model does not seek to explain States' decisions to ratify or not ratify a treaty, only whether States are likely to comply with a norm in a treaty that they have ratified. Since the United States has not ratified CROC, it is only Australia's conduct that will be scrutinised vis-à-vis this theory.

This theory, propounded by Abram Chayes and Antonia Handler Chayes, asserts that international enforcement mechanisms are irrelevant to whether or not States comply with their treaty obligations. They argue that States obey treaties because of the normative obligation that they have committed to – *pacta sunt servanda* – that is, the treaty is binding and must be respected in good faith.<sup>51</sup> They argue that States do not make conscious decisions to breach their treaty obligations in order to protect their self-interest, but rather fail to comply for one of three reasons, namely, because the treaty language is ambiguous, they lack the capacity to carry out the treaty obligations, or because there has been insufficient time to bring about the changes required by the treaty.<sup>52</sup>

The data analysed in Part II of this thesis demonstrates that Australia is failing to comply with Article 29(1) of CROC. Managerial theorists suggest that this may be due to Article 29(1) being ambiguous; Australia lacks the capacity to carry out the HRE obligation; or there has been insufficient time since Australia ratified CROC in 1990 to achieve compliance with Article 29(1), and each of these three explanations is considered below.

The language of Article 29(1) is very general, and as demonstrated in Chapter 3, has been interpreted differently by different actors. Indeed the CRC acknowledged this in General Comment No. 1, when it stated that: ‘The aims and values reflected in this article are stated in quite general terms and their implications are potentially very wide ranging.’<sup>53</sup> However, a lack of understanding of what Article 29(1) requires does not appear to be the reason behind Australia’s failure to give effect to this provision. Three separate factors lead to this conclusion. First, General Comment No. 1 provides extensive elaboration on the purpose of Article 29(1), what it means, and what States should do in order to implement this provision.<sup>54</sup> Thus, any ambiguity that may

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<sup>51</sup> Chayes, Abram and Chayes, Antonia Handler ‘On Compliance’ (1993) 47(2) *International Organization* 175,185.

<sup>52</sup> Chayes, Abram and Chayes, Antonia Handler *The New Sovereignty: Compliance with International Regulatory Agreements*. (1995) Harvard University Press, Cambridge.

<sup>53</sup> General Comment 1: The Aims of Education, 17 April 2001, CRC/GC/2001/1, paragraph 17.

<sup>54</sup> Ibid.

exist within the language of Article 29(1) appears to have been clarified by General Comment No. 1. The second factor is that the Government is more than capable of itself resolving any ambiguity. The Australian Government, as the one ultimately responsible for complying with Article 29(1), can decide on its preferred interpretation, and comply in accordance with that interpretation. Indeed this is encouraged by the CRC, which drafted General Comment No.1 to provide guidance and encouragement to State Parties, rather than to prescriptively direct how State Parties should comply with this Article. The third factor that points to ambiguity not being the reason behind Australia's lack of compliance is that the Federal Government has never raised this as a concern. Since ratifying CROC, the Australian Government has submitted two reports to the CRC,<sup>55</sup> and both of these reports assert that Australia is in compliance with Article 29(1), and raise no concerns about ambiguous language. Nor has the Australian Government voiced any unease about the language of Article 29(1) in any other fora. For these three reasons, it seems unlikely that ambiguity is the reason behind Australia's failure to fully comply with Article 29(1) of CROC.

The second explanation posited by the Chayes for lack of compliance with a treaty is that the State lacks the capacity to implement the treaty obligation. The Chayes use environmental treaties as an example of where capacity problems may prevent compliance. Specifically, they suggest that a treaty calling for a reduction in sulphur dioxide emissions requires a State to establish a regulatory regime that it then enforces against non-state actors. They argue that this is a complex process that is unlikely to lead to the reduction in emissions that the State agreed to.<sup>56</sup> Thus a lack of capacity to comply does not simply refer to lack of financial capacity, but may also include a dearth of scientific, technical or bureaucratic skills.<sup>57</sup> Is there a lack of capacity in Australia that justifies its non-compliance with Article 29(1) of CROC? As a wealthy developed nation with no shortage of skills and expertise in the education field, it seems unlikely that a lack of capacity would be a reason for non-compliance, particularly when, as

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<sup>55</sup> Australia's 1<sup>st</sup> Report was filed in December 1995, and in March 2003 it submitted a combined 2<sup>nd</sup> and 3<sup>rd</sup> Report.

<sup>56</sup> Chayes, above n 51,193.

<sup>57</sup> Ibid,194.

discussed in Chapter 6, Australia has sought to export its skills as an HRE provider to other States in the Asia-Pacific region. There is, however, one area in which the Australian Federal Government could be said to lack capacity; as discussed in Chapter 6, the distribution of power under the Australian Constitution means that it is the states and territories that have jurisdiction over education, not the Federal Government. Yet, as previously discussed, this has not stopped the Federal Government exercising some degree of control over education by attaching conditions to funding it provides to the states. One could speculate as to whether Australia would be in greater compliance with Article 29(1) of CROC if the Federal Government had the constitutional power to directly implement HRE in schools. However that would be pure conjecture. The facts are that the Federal Government could use its fiscal powers to entice or induce states to implement Article 29(1) of CROC in secondary schools, or its external affairs powers to give effect to this norm, but has not done so. This makes lack of capacity an unlikely justification for non-compliance, and in any event, it is not one the Australian Government has raised to explain its non-compliance. On the contrary, the Australian Government has asserted in both its reports to the CRC that it is complying with Article 29(1) of CROC.

The final reason that the Chayes propose for a State's non-compliance with a treaty obligation is what they call the 'temporal dimension'.<sup>58</sup> They assert that treaties are international instruments designed to manage problem areas over time, and therefore are not necessarily intended to bring about instantaneous changes in State behaviour. This may be true for the environmental and disarmament treaties analysed by the Chayes,<sup>59</sup> but is not the case with human rights treaties. Although there is some allowance for States to implement ESC rights only 'to the maximum extent of their available resources',<sup>60</sup> other requirements such as non-discrimination are expected to be respected

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<sup>58</sup> Ibid, 195.

<sup>59</sup> Environmental treaties with targets for reduction in emissions spanning several years, and armament reduction treaties which similarly require parties to limit or destroy weapons within a specified period of time usually spanning years.

<sup>60</sup> Article 4 of CROC.

immediately.<sup>61</sup> Thus with human rights treaties there will, at a minimum, be a requirement that the State Party has at least begun to adopt measures to implement the rights set out in the treaty. The assertion by the Chayes that changes mandated by treaties take time to accomplish,<sup>62</sup> and that this may be a justification for non-compliance does not appear to be applicable to Australia's non-compliance with Article 29(1) of CROC. The data on Australia's compliance with this norm was collected some 15 years after Australia ratified CROC. That appears to be sufficient time for a wealthy industrialised nation, such as Australia, to at least have taken visible steps towards compliance. However, as the data in Chapters 6 and 7 demonstrate, there is no evidence that the Australian Federal Government has taken significant steps towards implementing HRE in Melbourne secondary schools in accordance with Article 29(1).

The managerial model raises three possible explanations for States' non-compliance with treaty obligations, and none of these explanations appear to be applicable to Australia's situation, or can be used to justify its non-compliance with Article 29(1) of CROC. Because the Managerial theory assumes that States will comply with their treaty obligations in good faith, it has no explanation for States' non-compliance where it is not due to one of the three causes they identify, namely ambiguity in the international law obligation, lack of resources, or lack of time.<sup>63</sup> The proposition that human rights treaties will be complied with if these causes of non-compliance are not present is not supported by this research.

#### 8.4.2 Fairness Model

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<sup>61</sup> The Committee on Economic Social and Cultural Rights General Comment No.3 (1990) provides that 'while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.' Two such obligations are highlighted by the ESCR Committee, namely the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination', and the undertaking 'to take steps'. The Committee noted that 'while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned.'

<sup>62</sup> Chayes, above n 51, 195.

<sup>63</sup> Hathaway, above n 24, 1958.

Like the managerial model, the fairness model is concerned only with States' compliance with international treaties, and does not seek to explain States' practices surrounding ratification. Thus, once again the analysis of the utility of this theory is limited to Australia's implementation of, and compliance with, Article 29(1) of CROC. Thomas Franck, the leading proponent of this model, argues that the reason States comply with international law is because they perceive it to be legitimate and fair.<sup>64</sup> Franck's work was based largely on his analysis of international law in the areas of economic law (trade and investment) and environmental law. These bodies of law are fundamentally different from human rights law, because they involve regulating the distribution of limited resources among States, which is something that is not always an issue in international human rights law. It is nevertheless worthwhile to see whether the fairness model is helpful in explaining Australia's conduct surrounding the norm in Article 29(1) of CROC.

Franck asserts that there are four elements that point to a norm's legitimacy and Article 29(1) of CROC will now be measured against each of these criteria. A rule's clarity or determinacy is the first element in determining fairness relates to the language of the norm; is it expressed in understandable and unambiguous language? This is, of course, the flip-side of the Chayes' model, which cites ambiguous language as one of the reasons States fail to comply with international law. Franck asserts that the meaning of the rule must be clear, so that State Parties know what is expected of them. According to Franck, the more determinative the norm, the more legitimacy it exhibits, and the more difficult it is for a State to resist the pull towards compliance.<sup>65</sup> The question is therefore: can the norm in Article 29(1) of CROC be described as determinate? The language of Article 29(1) is not excessively rigid or overly precise. It was analysed in-depth in Chapter 3, and the conclusion reached was that the Article 29(1), when read in conjunction with General Comment No. 1 does contain a clear definition of HRE, and that this is reinforced by the definitions developed for the UN Decade for HRE and World Programme for HRE. Accordingly, it

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<sup>64</sup> Franck, Thomas *The Power of Legitimacy Among Nations* (1990) Oxford University Press, USA , 3 and 25.

<sup>65</sup> Franck, Thomas *Fairness in International Law and Institutions* (1995) Clarendon Press, Oxford, 33.

would be difficult to justify an argument that what Article 29(1) requires of States is vague or indeterminate.

The second element that is used to assess fairness is symbolic validation, that is, a law should be complied with if it is part of an established overall system of social order.<sup>66</sup> It would be difficult to argue that CROC does not have symbolic validation because it has been ratified by 193 State Parties.<sup>67</sup> It is also worth noting that Article 29 has only two reservations made against it, both of which relate to the State Parties interpreting and applying Article 29 (and a number of other Articles in CROC) in accordance with their constitutions.<sup>68</sup> Initially, three States ratified with reservations relating to Article 29, but Thailand has since withdrawn its reservation. Clearly CROC and Article 29(1) have strong symbolic validation.

The third element is its coherence within the established legal order. When a rule is seen as part of a wider system, it gains compliance pull from that larger whole.<sup>69</sup> Article 29(1) of CROC fits within the overall human rights regime, as evidenced by the similarity of Article 29(1) to Article 26 of the UDHR, Article 13 of ICESCR<sup>70</sup> and Article 5 of the UNESCO Convention on the Elimination of Discrimination in Education.<sup>71</sup> The approach to HRE adopted in Article 29(1) of CROC is consistent and coherent with the approaches to HRE in other international human rights treaties. Furthermore, the Preamble to CROC references not only the UN Charter but also the UDHR, the two International Covenants on Human Rights, the two Declarations on the Rights of the Child,<sup>72</sup> and several other declarations and rules pertaining to children. This was done in order to demonstrate that CROC fits within the existing international normative environment relating to children, and thus has authority and legitimacy. The

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<sup>66</sup> Ibid, 34.

<sup>67</sup> Accessed at: [www.ohchr.org/english/countries/ratification/11.htm](http://www.ohchr.org/english/countries/ratification/11.htm) on 17 July 2007.

<sup>68</sup> Indonesia and Turkey ratified CROC with specific reservations concerning Article 29.

<sup>69</sup> Franck, above n 65, 121.

<sup>70</sup> Opened for signature 16 December 1966, entered into force 3 January 1976.

<sup>71</sup> Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960.

<sup>72</sup> The 1924 League of Nations Declaration on the Rights of the Child and the 1959 UN Declaration on the Rights of the Child.

other element of coherence is that like must be treated alike, and the rules must be uniformly applied.<sup>73</sup> Article 29(1) does not differentiate between State Parties; they are all treated alike by this norm. Because Article 29(1) of CROC is consistent with other international human rights norms, and treats all State Parties consistently, it satisfies the coherence criterion.

The fourth element in Franck model is ‘adherence’ to the correct process which refers to the connection between the norms in a treaty and the procedural and institutional framework that supports them.<sup>74</sup> Norms should be looked at holistically, that is, they should be considered in the context of a larger system, such as the body of norms that make up international human rights law. CROC was developed in accordance with the normal procedures for creating new human rights treaties, and thus satisfies the adherence requirement.<sup>75</sup>

Article 29(1) of CROC satisfies all four of the fairness model’s criteria, and thus, according to Franck, it is manifestly fair and should have strong compliance pull on members of the international community. Yet, when tested against the empirical research, the fairness model does not stand up. According to Franck’s theory, Article 29(1) of CROC is legitimate and fair, and therefore Australia (and all other State Parties), should be voluntarily complying with it. However, while Australia asserts in its reports to the CRC that it is complying, which presumably it would not do if it perceived Article 29(1) to be illegitimate or unfair, the data analysed in the previous two chapters indicates that Australia has not in fact, implemented or complied with CROC. Thus, the most that can be said for the fairness model is that it may play some part in motivating States to want to *appear* to be complying with their international law obligations, rather than motivating them to *actually* comply. After this examination of the application of the fairness theory to empirical data, it is evident that this theory is

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<sup>73</sup> Franck, above n 65, 38.

<sup>74</sup> Ibid, 41.

<sup>75</sup> Generally international human rights treaties are developed after the General Assembly or the Commission on Human Rights (now replaced by the Human Rights Council) identifies a need for a treaty on a given topic. A working group or drafting committee will be established, made up of representatives from different States. In due course, a draft treaty is put before the General Assembly, and if adopted, will be opened for signature. The treaty will only enter into force once the required number of ratifications have been obtained; for CROC this was twenty (Article 49).

not overly useful in explaining Australia's lack of compliance with Article 29(1) of CROC.

#### *8.4.3 Transnational Legal Process Model*

This theory propounded by Koh in the 1990s, asserts that States comply with international laws once they have internalised the norm, that is, once they have incorporated it into their own value system. According to Koh, such internalisation occurs in three stages, the first of which is interaction,<sup>76</sup> and in the case of CROC, an initial interaction occurred when in 1978 Poland submitted a draft resolution to the Commission on Human Rights, proposing that the UN General Assembly adopt an international convention on the rights of the child.<sup>77</sup> Numerous subsequent interactions took place during the decade long drafting process. The effect of these interactions was to prompt the second step in Koh's model, that is, an interpretation. An interpretation is the enunciation of global norms; in this case a provision directing that children be educated about human rights. Again, Australia and the United States participated in this second stage of the process.

The third and final stage, according to Koh, is the internalisation of the norm. He contends that States involved in the interaction and interpretation stages will internalise the new norms, because through the process of engaging with other States in the development of the norm, they have come to perceive that they are obliged to comply, the norm having become part of their internal values. The United States was involved in the interaction and interpretation stages of CROC, yet has not internalised Article 29(1) of CROC, that is, it has not committed to, or complied with, that norm. However, this may be because it never intended to internalise this norm. It will be recalled that as early as 1983, a member of the United States' delegation indicated that the United States would not be ratifying CROC, and was only contributing to the drafting process so as to get the best result for other States.<sup>78</sup> Thus, it appears that the

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<sup>76</sup> Koh, Harold Hongju 'Why Do Nations Obey International Law' (1997) 106 *Yale Law Journal* 2599, 2646.

<sup>77</sup> UN Doc. E/CN.4/L.1366 (1978).

<sup>78</sup> Cohen, above n 23.

motivations behind a State's involvement in the interaction and interpretation stages will impact on whether the norm is internalised. If, like the United States, a State is participating in the first two processes solely for the benefit of others, and without any intention of itself being bound by the end product, then the interaction and interpretation stages will not lead to internalisation of the norm.

Like the United States, Australia was also involved in the interaction and interpretation stages relating to Article 29(1) of CROC, and went on to commit to this norm, but not comply with it, which suggests that it also has not internalised this norm. However, Koh identifies three different forms of internalisation, namely social, political and legal, and it may be that Australia has internalised the norm on some of these levels. Social internalisation occurs when a norm acquires so much public legitimacy that there is general adherence to it. Political internalisation occurs when a government incorporates it into its policies, and legal internalisation occurs when the norm has been formally incorporated into the domestic legal system.<sup>79</sup> <sup>80</sup>

The data analysed in Chapter 6 suggests that the norm in Article 29(1) of CROC has not been internalised at the social level in either Australia or the United States, in that the concept of human rights education does not appear to be widely known by the general public, and has not achieved broad public legitimacy. However, there are elements of political internalisation by the Australian Government (the Inquiry into Human Rights and Good Governance Education in the Asia Pacific) and the Victorian Government (the publication of the *Ideas for Human Rights Education* booklet by DET). Somewhat surprisingly, given the United States' attitude during the drafting of CROC, and its failure to commit to the norm in Article 29(1), there is also a degree of political internalisation by the United States Federal Government (the special briefing on HRE for the Congressional Human Rights Caucus), and legal internalisation by the Massachusetts Government (the enactment of the *Act Requiring Certain Instructions in the Public Schools of the Commonwealth*). Why have the United

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<sup>79</sup> Koh, above n 76, 2656-2657.

<sup>80</sup> It is noted that Koh's idea of internalisation is similar to the domestic salience theory discussed in Chapter 2, and again in section 8.3.4 in this chapter, except that it does not rely on the concept of 'cultural match' which is a key element of the domestic salience theory.

States and Australia both internalised the norm in Article 29(1) to a limited degree, even though the United States has not ratified CROC? Koh suggests that the ‘transnational legal process is not self-activating’,<sup>81</sup> and internalisation will only occur if the six ‘agents’, which he asserts are necessary for norm internalisation, are present. The first type of agent he identifies is the transnational norm entrepreneur – a committed individual who uses his/her influence to trigger internalisation by bringing worldwide attention to the issue. He cites as examples Eleanor Roosevelt, Aung San Suu Kyi, and Princess Diana.<sup>82</sup> Neither Australia nor the United States currently have any transnational norm entrepreneurs advocating for HRE in schools. Although Justice Michael Kirby of the Australian High Court won the 1998 UNESCO Prize for Human Rights Education,<sup>83</sup> it cannot be said that he has raised the profile of HRE in Australia to the point where it has become part of the social, political, or legal discourse.

The second type of agent Koh identifies is the governmental norm sponsor – a government official who uses his/her official position to promote change within their bureaucracy. Examples given are former Irish President Mary Robinson and former US President Jimmy Carter.<sup>84</sup> Massachusetts Senator Steven Tolman, whose work in introducing HRE related legislation was discussed in Chapter 6, could be considered a governmental norm sponsor. Although he has not as high a profile as the examples of governmental norm sponsor given by Koh, he used his position to as a state politician to introduce a Bill designed to facilitate HRE in schools, and has thus contributed to the legal internalisation of the norm in Article 29(1) of CROC. In Australia, there are some low level bureaucrats within the Victorian Department of Education who are members of the Victorian Human Rights Education Committee<sup>85</sup> and who advocate for increased HRE in schools. While they are not sufficiently senior to influence

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<sup>81</sup> Koh, Harold Hongju ‘Bringing International Law Home’ (1998) 35 *Houston Law Review* 623, 646.

<sup>82</sup> Ibid, 647.

<sup>83</sup> Accessed at: [http://portal.unesco.org/shs/en/ev.php-URL\\_ID=7001&URL\\_DO=DO\\_TOPIC&URL\\_SECTION =201.html#question1](http://portal.unesco.org/shs/en/ev.php-URL_ID=7001&URL_DO=DO_TOPIC&URL_SECTION =201.html#question1) on 31 May 2007.

<sup>84</sup> Koh, above n 81, 647.

<sup>85</sup> Two Victorian Department of Education staff are members of the Victorian Human Rights Education Committee and were interviewed as part of the research undertaken for this thesis.

government policy regarding HRE, they successfully managed to lobby DET to publish and distribute the *Ideas for Human Rights Education* booklet, and this, arguably, is evidence of the beginning of political internalisation of the norm in Article 29(1) of CROC. It is interesting to observe that the governmental norm sponsors in the United States and Australia are both at the state level of government rather than the Federal Government. There are two possible explanations for this. As noted before, the first is that because under the constitutions of both Australia and the United States, education is the responsibility of the states, it is more likely that if there is to be a governmental norm sponsor for HRE, it will be at the state rather than federal level. The second possible explanation is that as previously noted, Labor Governments in Australia and Democrat Governments in the United States are more engaged with the UN and international human rights law than Liberal-National coalitions or Republican Governments. Since in Australia the current Victorian Government is Labor, and the current Federal Government is a Liberal-National coalition, it makes it more likely that an Australian governmental norm sponsor will come from the state level of government.<sup>86</sup> Similarly, Senator Tolman is a Democrat, and the Democrats overwhelmingly control the House of Representatives and Senate in Massachusetts, whereas the United States President is a Republican, and, until January 2007, Congress and the Senate were controlled by the Republican Party. These factors may make it more likely that a governmental norm sponsor will come from the state level of government rather than the federal.

Transnational issue networks are the third type of agent that Koh asserts can impact on norm internalisation.<sup>87</sup> These concerned individuals discuss and generate solutions to particular issues at the global and regional levels, and facilitate interaction and debate amongst government agencies, international

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<sup>86</sup> It is of course recognised, that unlike Senator Tolman in Massachusetts, the DET employees are not representing a political party, but rather are bureaucrats serving the Victorian Government of the day.

<sup>87</sup> As discussed in Chapter 2, these are ‘networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’. Hass, Peter M. ‘Epistemic Communities and International Policy Coordination’ (1992) 46 *International Organization* 1, 3.

organisations, academics, and international and national NGOs.<sup>88</sup> They may over time ripen into organisations, such as Amnesty International or Greenpeace. The closest Australia would come to having a transnational issue network devoted to HRE is the National Human Rights Education Committee. However, as highlighted in Chapter 6, this committee has not been overly active or successful in promoting HRE within Australia. It is doubtful that it could be classified as a transnational issue network. In the United States, the NGO Human Rights Education Associates (HREA) appears to constitute a transnational issue network. As discussed in Chapter 3, HREA describes itself as ‘an international non-governmental organisation that supports human rights learning; the training of activists and professionals; the development of educational materials and programming; and community-building through on-line technologies.’<sup>89</sup> A significant proportion of HREA’s focus is promoting HRE globally, rather than domestically within the United States,<sup>90</sup> and it appears to fit within Koh’s definition of a transnational issue network. However, the data collected in Boston for this research suggests, that although HREA is physically located in Boston, this has not had a measurable influence on the internalisation of the international norm pertaining to HRE in this city. It almost appears that HREA’s work is so focused on human rights education in other parts of the world, that it is not impacting on the internalisation of HRE within the United States. This suggests that for norm internalisation to occur, it may be more useful to have a *national* issue network, rather than a *transnational* issue network.

The fourth type of agent are interpretative communities and law-declaring fora, which Koh describes as the public and private arenas in which the above three agents perform, and include treaty bodies, courts, legislatures and NGOs.<sup>91</sup> They can be international or domestic, and work to define, elaborate and test the definition of a particular norm. With respect to Article 29(1) of CROC, the

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<sup>88</sup> Koh, above n 81, 648.

<sup>89</sup> Accessed at: [www.hrea.org/abouthrea.html](http://www.hrea.org/abouthrea.html) on 31 May 2007.

<sup>90</sup> For example recent activities undertaken by HRE as reported on its web page include the executive director visiting Darfur; training for young human rights defenders in the Middle East and North Africa; and training on the European System of Human Rights.

<sup>91</sup> Koh, above n 81, 649.

interpretative community and law-declaring fora include the CRC, human rights NGOs, children's rights NGOs, HREOC, children's ombudsmen or commissioners in some Australian jurisdictions, and perhaps teachers' associations or education unions interested in HRE. These different organisations are able to engage in interactive dialogue, so as to create a shared meaning of the norm in Article 29(1) of CROC. The CRC's publication of General Comment No. 1 is an example of an international law-declaring forum articulating its understanding of this norm. On the domestic front, the only evidence of law-declaring fora relating to Article 29(1) of CROC is the Massachusetts Legislature, when in 1998, it enacted the *Act Requiring Certain Instructions in the Public Schools of the Commonwealth*. As was illustrated in Chapter 6, there have been no other HRE pronouncements by any legislatures or courts in Australia or the United States. Domestic interpretative communities, made up of NGOs and national human rights institutions appear to be more prevalent than the law-declaring fora. However, as discussed in Chapter 3, there appears to be a lack of consensus on what HRE means, which suggests that the interpretative communities in these jurisdictions are not overly effective at defining, elaborating and testing HRE, which indicates that these entities may not be having a positive impact on norm internalisation.

The fifth type of agent that Koh asserts is relevant to internalisation of an international norm is what he calls bureaucratic compliance procedures. These government structures and processes assist in achieving compliance with the norm by the State.<sup>92</sup> The data analysed in Chapter 6 established that neither the Australian nor United States Governments have any internal structures in place to guarantee habitual compliance with Article 29(1) of CROC. Such a structure might be an in-house HRE adviser who has a mandate to ensure that the government complies with the internalised international human rights norm.<sup>93</sup> This research found no evidence of internal domestic standards or mechanisms that government leaders could consult when making decisions about HRE, signalling the absence of bureaucratic compliance procedures.

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<sup>92</sup> Ibid, 651.

<sup>93</sup> Ibid.

The final agent that Koh says is relevant to norm internalisation is issue linkages. This refers to the idea that international legal obligations tend to be closely linked, so that when a government fails to comply with one international norm, it is likely to lead to non-compliance with other international norms. To avoid such a cascading effect, Koh suggests that nations' bureaucracies press governmental leaders to adhere to policies of compliance over non-compliance.<sup>94</sup> This does not appear to be applicable to Australia or the United States. The United States, not having ratified CROC, is not under any legal obligation to implement HRE in schools, thus reference to non-compliance by the United States with this norm is inappropriate. While there may be NGOs, and even bureaucrats, pressing the Government to ratify CROC, there is no evidence to suggest that these entities or persons are asserting that the Government must comply with Article 29(1) of CROC in order to avoid non-compliance with other international norms. In Australia, it could be argued that non-compliance with Article 29(1) of CROC is linked to non-compliance with other articles in CROC, including, for example, Article 42, which requires the Government to make the principles of CROC widely known, and Article 28, which requires that discipline in schools be administered in a manner consistent with the child's human dignity, which the CRC has interpreted as meaning that corporal punishment is incompatible with CROC.<sup>95</sup> Corporal punishment has not been banned in all schools in all Australian jurisdictions.<sup>96</sup> Furthermore, The Federal Health Minister, Tony Abbott, has suggested that corporal punishment could be appropriate for some discipline problems in schools.<sup>97</sup> However, while Australia might be failing to comply with a number of provisions in CROC relating to education, it is unlikely that the Australian Government's non-

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<sup>94</sup> Ibid, 653.

<sup>95</sup> General Comment N° 8 The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (2006) 2 March 2007, CRC/C/GC/8.

<sup>96</sup> New South Wales and the Australian Capital Territory are the only jurisdictions that have banned corporal punishment in all schools. In Victoria, legislation banning corporal punishment applies to government schools only.

<sup>97</sup> ABC News, 18 June 2007, accessed at: <http://abc.net.au/news/stories/2007/06/18/1954359.htm> on 17 July 2007.

compliance with Article 29(1) is going to ‘lead … into vicious cycles of treaty violations.’<sup>98</sup>

Overall the transnational legal process model does seem to provide some explanation for Australia and the United States’ practices regarding the norm in Article 29(1) of CROC. While both States were involved in the interaction and interpretation stages of the model, they have not internalised the norm. Koh would say this is to be expected, because of the absence of the majority of the six agents that he asserts are necessary for internalisation of a norm. Furthermore, to the extent that the norm has been internalised (on the political level in Victoria, and the legal level in Massachusetts) this is because of the presence of governmental norm sponsors in these jurisdictions. However, it is not possible to establish from the empirical research undertaken for this study, whether there would be greater internalisation of the norm in Article 29(1) of CROC in Australia and the United States if they had transnational norm entrepreneurs, transnational (or perhaps national) issue networks, more active interpretative communities and law-declaring fora, bureaucratic compliance procedures, and issue linkages.

It has been noted that the transnational legal process model ‘fills a logical gap’<sup>99</sup> left by other normative theorists. It certainly is helpful in providing greater insight into the process of norm internalisation. However, it would be useful if this theory could be developed further to explain not just the ‘how’ of norm internalisation, but also the *why*. That is, what leads to the presence or absence of each of the six agents, identified as being essential elements to norm internalisation? The next theory to be considered, domestic salience appears to be able to answer this question by identifying other factors influencing State practices, including the cultural match of the norm. Thus, the transnational legal process model provides some very important pieces of the jigsaw puzzle, but by no means does it complete the picture.

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<sup>98</sup> Koh, above n 81, 653.

<sup>99</sup> Hathaway, above n 24, 1960.

#### 8.4.4 Domestic Salience

Domestic Salience theorists contend that whether an international treaty is likely to be ratified or complied with is dependent on domestic, rather than international factors, in particular whether a norm is a good cultural match, that is, does it resonate with ‘widely held domestic understandings, beliefs, and obligations.’<sup>100</sup> Thus, the question that needs to be considered is: ‘is human rights education, as articulated in Article 29(1) of CROC, congruent with the understandings, beliefs and obligations of the Australian and United States’ populations?’ According to Cortell and Davis, the way to determine whether a norm is domestically salient is to apply three measures. The first of these is whether the norm has entered political discourse such that it begins to be relied upon to justify or support a position. There is some evidence that HRE has entered the political discourse in both States. In Australia, this is demonstrated by two distinct activities. The first is the establishment of national and Victorian HRE committees, and, as noted in Chapter 6, these bodies are engaged in dialogue about HRE with both the Victorian and Federal Governments. The second example of HRE entering the political discourse is the Federal Government’s Inquiry into Good Governance and Human Rights Education in the Asia Pacific Region, although as discussed in Chapter 6, this was related to HRE as a foreign policy issue rather than a domestic concern. These two activities indicate that HRE has entered the political discourse in Australia, but only in a limited way, because Article 29(1) of CROC is not being relied upon to justify or support, a position. In the United States, HRE appears to be part of the political discourse but only as a matter of foreign policy, not as a domestic issue. Thus, the NGOs based in the United States that are working in HRE tend to focus the majority of their activities overseas.<sup>101</sup> Furthermore, the only Federal Government activity in HRE, was the one-day special briefing organised by the Congressional Human Rights Caucus that likewise concentrated on HRE as a foreign policy concern.

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<sup>100</sup> Cortell, Andrew P. and Davis, James W. ‘Understanding the Domestic Impact of International Norms: A Research Agenda’ (2000) 2 *International Studies Review* 65, 73.

<sup>101</sup> For example HREA, PDHRE and International Human Rights Education Consortium.

The second measure Cortell and Davis identify as an indicator of a norm's domestic salience is whether it has led to changes in domestic institutions, or the enactment of new laws that would suggest that HRE has entered the political discourse in a significant way.<sup>102</sup> As discussed in the preceding analysis of the transnational legal process model, Massachusetts is the only jurisdiction to have enacted legislation directly related to HRE in schools.<sup>103</sup> The Victorian Government has enacted the *Charter of Human Rights and Responsibilities Act 2006*, s 41(d) of which directs the Equal Opportunity and Human Rights Commission to provide education about human rights and the Charter, but is not specifically aimed at schools. These two legislative enactments may suggest that the norm in Article 29(1) of CROC is domestically salient according to Cortell and Davis' second measure, however, the fact that these two enactments are isolated measures probably means that HRE has not significantly entered the political discourse.

The third and final measure of domestic salience proposed by Cortell and Davis is whether the norm has provoked any changes in government policy. The analysis in Chapter 6 demonstrated that within Australia, HREOC has undertaken HRE activities (the development of materials for schools) as one of its primary functions, and the Victorian DET has also developed and distributed HRE resources to schools.<sup>104</sup> Similarly, in the United States, the Massachusetts Department of Education has produced the *Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues*. These three initiatives suggest that HRE is beginning to influence policy considerations of some of the governments in this study.

Cortell and Davis use these three measures to rate a norm's domestic salience as high, moderate or low. Applying this rating system to the HRE situation in Australia and the United States, it appears that the norm in Article 29(1) of CROC has a high degree of domestic salience in both States because it has

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<sup>102</sup> Cortell, above n 100, 70.

<sup>103</sup> *An Act Requiring Certain Instructions in the Public Schools of the Commonwealth (1998)*.

<sup>104</sup> HREOC's work relates to the Youth Challenges Modules and the Victorian Department of Education's work relates to the *Ideas for Human Rights* booklet.

entered the political discourse, albeit in the United States only as a matter of foreign policy, it has been the subject of legislative enactment (in Massachusetts), and it has been the subject of apparent policy changes, particularly within the state-based Departments of Education. However, these efforts appear to be *ad hoc* rather than part of a strategic initiative to promote HRE by any of the Governments, which suggests that the rating should be moderate rather than high. It is suggested that Cortell and Davis' theory needs to be modified somewhat to factor in whether the initiatives being measured are part of a consistent pattern of behaviour related to the norm under review, or *ad hoc* changes, as appear to be the case with both the legislative and policy changes relating to HRE in Massachusetts and Victoria. If there have only been *ad hoc* events, resulting, for example, from an individual's particular passion,<sup>105</sup> such as Senator Steven Tolman's push for new laws in Massachusetts, rather than Government policy, then this should be reflected in a lower rating.

In any event, neither a high nor moderate rating seems to be consistent with the salience of this norm within broader society, particularly in the United States. The language of human rights education is not part of the general vocabulary of American teachers, as evidenced by the surveys and interviews with Boston teachers analysed in the previous chapter. Indeed, the very term 'human rights' is not widely used in a domestic context, and Americans have been described as 'functionally illiterate about human rights',<sup>106</sup> which seems to suggest that a norm relating to human rights education would have a low domestic salience. This dichotomy between the norm's rating on Cortell and Davis' scale, and the norm's salience within the wider community appears to be because Cortell and Davis largely use government activity to measure a norm's domestic salience, rather than broader community awareness or activity.

This is in contrast to Hawkins, who, it will be recalled, measured a norm's domestic salience according to 'the degree to which social groups publicly

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<sup>105</sup> What Koh calls a governmental norm sponsor in his transnational legal process model.

<sup>106</sup> Flowers, Nancy 'Human Rights Education in the USA' (2002) 7(1) *Issues of Democracy*, accessed at: <http://usinfo.state.gov/journals/itdhr/0302/ijde/flowers.htm> on 16 May 2007.

articulate and endorse those norms in their discourse.<sup>107</sup> Thus Hawkins asserts that a norm is not domestically salient if ‘only a few brave individuals endorse human rights norms’;<sup>108</sup> medium, if some prominent groups voice their support for human rights, but other social groups still support repression and authoritarian rule; and highly domestically salient if a broad array of social groups endorse human rights norms.<sup>109</sup> Applying Hawkins’ measure to this research, it appears the norm in Article 29(1) of CROC is moderately salient in Australia and has low salience in the United States. This is because in neither jurisdiction is HRE endorsed by a broad array of social groups. In Australia, it is promoted by some NGOs and churches, as the membership of the VHREC demonstrates,<sup>110</sup> and there does not appear to be vocal opposition to the idea of HRE in schools. In the United States, HRE appears to be part of the public discourse only to a limited degree, predominantly via NGOs, but as a foreign policy concern rather than domestic issue, hence the low salience rating.

It is thus clear that the salience of the norm in Article 29(1) of CROC is rated differently according to whether the measure developed by Cortell and Davis is used, or the measure proposed by Hawkins. This is not surprising, given that they are essentially measuring different things – the extent to which a government has embraced a norm, and the extent to which society has embraced a norm. Interestingly neither Cortell and Davis, nor Hawkins specifically factored in the role that a Bill of Rights plays in the domestic salience of an international human rights norm. It is suggested that the presence or absence of such an instrument may well impact on the domestic salience of a norm. As was illustrated in the previous chapter, the concept of education about rights was much more pronounced in Boston schools than in Melbourne schools because the United States Bill of Rights was a core part of the curriculum. However, a Bill of Rights that does not contain the full gamut of human rights will not necessarily make an international norm more salient, as

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<sup>107</sup> Hawkins, above n 1, 9.

<sup>108</sup> Ibid, 10.

<sup>109</sup> Ibid.

<sup>110</sup> The VHREC is chaired by a representative of the Uniting Church, and its members are representatives of trade unions, principals and teachers associations, the Law Institute of Victoria, and various university faculties (both education and law).

the date from this study demonstrates. An ESC right, such as the right in Article 29(1), may still have low salience if a Bill of Rights includes only civil and political rights. However, if a Bill of Rights includes ESC rights, such as the South African Constitution, then it is more likely that a norm, such as that in Article 29(1) of CROC, will have high domestic salience.

Chiam built on the work of Cortell, Davis and Hawkins by agreeing that when it comes to ratification and compliance, the domestic salience of a norm is significant, but she also suggested two additional factors, namely the provenance of the international norm, and the policy priorities of the government, which she says are both relevant to a State's practices. This research found that these two factors appeared to be relevant to Australia and the United States' positions regarding Article 29(1) of CROC. Chiam theorised that the Tobacco Convention that she analysed was readily supported by the Australian Government because it was framed as a health initiative and emanated from the World Health Organization, rather than a human rights initiative, coming from the UN. By analogy, the Australian Federal Government may not be overly supportive of the norm in Article 29(1) of CROC precisely because it is a human rights norm emanating from the UN system. Thus, the current Australian Government is said to mistrust international institutions when it comes to human rights laws.<sup>111</sup> At first glance, this does not appear to be consistent with Australia's active support for recent UN HRE initiatives, such as the Decade for HRE and World Programme for HRE. However, as others have noted, Australia's practice seems to be to actively support UN Human rights endeavours at the international level, but to be less enthusiastic about implementing and complying with them domestically.<sup>112</sup> Unlike the United States, Australia appears to still be committed to being perceived by the international community as a supporter of the UN human rights machinery.<sup>113</sup> In the case of Article 29(1) of CROC, the provenance of the norm does not appear to have negatively impacted on Australia's ratification of CROC, but may have

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<sup>111</sup> Charlesworth, above n 18, 66.

<sup>112</sup> Ibid, 65.

<sup>113</sup> Hoffmann, Stanley 'American Exceptionalism: The New Version' in Ignatieff, above n 20, 229.

impacted on its compliance. With the United States, the provenance of the norm may be part of the reason for its refusal to commit to CROC, but as already discussed, it is domestic factors that appear to most influence whether the United States ratifies a human rights treaty.

The second factor which Chiam suggests is relevant to whether a State ratifies and complies with a treaty is whether it is congruent with a government's policy priorities.<sup>114</sup> This appears to be another way of saying that governments are guided by self-interest, that is, they will only pursue activities which they have calculated will help further their strategic aims. However, where this differs from the self-interest focus of the rational actor theories, is that it is looking at self-interest in the domestic context, rather than international arena. In other words, is the substantive content of the norm in Article 29(1) consistent with the policy priorities of the Australian and United States' Governments? Do these Governments see implementing HRE as fitting with their aims and objectives? The answer appears to be no for both States. Neither Government has given any indication that HRE is on their radar, let alone a priority. For example, United States President George W. Bush's 2007 State of the Union address, which outlines the President's objectives for the year, mentioned education only in the context of the *No Child Left Behind Act*.<sup>115</sup> The fact that HRE is not a government policy priority in the United States or Australia indicates that committing to, and complying with, Article 29(1) of CROC is not perceived to be in the Government's self-interest, making it unlikely that the norm will be implemented, even if it is domestically salient.

Overall, the domestic salience theory appears to be helpful in explaining Australia and the United States' practices regarding the norm in Article 29(1) of CROC. Low or Moderate domestic salience of the norm as evidenced by government activities in the area of HRE, are reflected in low levels of implementation and compliance. Furthermore, the provenance of the norm, and the extent to which it fits with government policy priorities, also seem to help

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<sup>114</sup> Chiam, Madelaine 'Government Decision-Making and International Law: Australia and the Framework Convention on Tobacco Control' (2003) 24 *Adelaide Law Review* 217, 239.

<sup>115</sup> Accessed at: [www.whitehouse.gov/news/releases/2007/01/20070123-2.html](http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html) on 18 August 2007.

explain Australia and the United States' apparent disinterest in giving effect to the educational objectives set out in Article 29(1) of CROC.

#### *8.4.5 Conclusion to Normative Theories*

The normative theories tend to focus on explaining States' compliance with international law, rather than States' decisions to ratify or not ratify a treaty, and Chiam was the only one to attempt to explain ratification, using the theory of domestic salience. As a result, the normative theories are of limited usefulness in explaining Australia's decision to ratify CROC and the United States' decision not to ratify.

When it came to explaining States' compliance, only two of the normative theories proved useful in understanding the non-compliance with Article 29(1) of CROC documented in the previous two chapters. The managerial model proved unhelpful in explaining Australia's failure to fully implement and comply with Article 29(1) because the three factors identified as causes for non-compliance were not present in this research. That is, there is no ambiguity in Article 29(1) of CROC,<sup>116</sup> and Australia has the capacity, and has had sufficient time, to comply with this norm. The Fairness model similarly provided little insight into Australia's practices surrounding compliance with Article 29(1) of CROC, because Article 29(1) of CROC satisfied Franck's four measures of a norm's legitimacy, and should therefore be perceived by States as manifestly fair, and thus have strong compliance pull. Yet the empirical research reported in the previous two chapters indicates that Australia and the United States are not promoting HRE in accordance with this norm. Given that Article 29(1) is a fair and legitimate norm, these States should be voluntarily giving effect to this provision, and Franck's model can provide no explanation for why that is not occurring.

In contrast to the managerial and fairness models, the transnational legal process model and domestic salience theory both proved useful in explaining Australia and the United States' conduct regarding providing HRE in secondary schools in accordance with Article 29(1) of CROC. In particular, the

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<sup>116</sup> The general language of Article 29(1) is clarified by General Comment No. 1.

transnational legal process model and the domestic salience theory appear to complement each other, in that Koh's model explains why Australia and the United States' participation in the interaction and interpretation of Article 29(1) of CROC in the international arena has not led to complete internalisation of the norm in the domestic arena (because the six agents that trigger internalisation are not all present), and moderate to low domestic salience explains why these six agents are not present. Only by combining these two normative theories can we discover a possible explanation for Australia and the United States' practices regarding the norm in Article 29(1) of CROC.

### **8.5 Does the Hybrid Model Explain Australia and the United States' Conduct Pertaining to Article 29(1) of CROC?**

Hafner-Burton and Tsutsui suggest that there should be no expectation of improved human rights practices because a State has ratified a human rights treaty, since States are aware of the weak enforcement mechanisms associated with human rights treaties, and therefore ratify them as a symbolic gesture to indicate that they are not a deviant State.<sup>117</sup> These theorists would therefore expect the United States to ratify CROC because it is aware of the limited capacity of the CRC to enforce this treaty and because it does not want to appear to be a deviant State. The United States' status as the only Superpower appears to shield it from any harm that may flow from the label of 'deviant State' being applied to it, and, as previously discussed, factors other than this kind of reputation risk, appear to weigh more heavily when it comes to its decision whether to ratify CROC. Although this theory does not appear to be helpful in explaining the United States non-ratification of CROC, can it nevertheless explain why Australia did ratify this treaty? Was Australia motivated to ratify CROC so as to not appear to be a deviant State? Australia is concerned about its international reputation in the area of human rights and thus a desire not to be seen as a deviant actor factored into its decision-making regarding ratifying CROC. However, other factors were also influential including a desire to see other States, particularly in the Asia Pacific region, improve their human rights

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<sup>117</sup> Hafner-Burton, Emilie M. and Tsutsui, Kiyoteru 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) *American Journal of Sociology* 1373, 1383.

practices, including in the area of children's rights and HRE (as discussed in section 8.3.1 above). As JSCOT observed 'Australia has also been outspoken in championing the Convention, and has lobbied for its signature and ratification by all states of the United Nations'.<sup>118</sup> Thus, it appears that Australia ratified CROC because it wanted to encourage other States to commit to this treaty.

While this theory does not seem to be able to entirely explain the decision-making surrounding ratification of CROC by Australia and the United States, can it nevertheless help explain Australia and the United States' practices around implementing and complying with the norm in Article 29(1) of CROC? The answer appears to be no. According to Hafner-Burton and Tsutsui the most important factor influencing whether a State will comply with an international human rights norm is whether a State has strong NGOs with links to international civil society that can place pressure on governments to improve human rights practices.<sup>119</sup> Both Australia and the United States have strong civil societies<sup>120</sup> with established links to international civil society, which, according to Hafner-Burton and Tsutsui, should mean that regardless of ratification of CROC (because they do not think ratification and compliance are linked), one would expect to see the norms in CROC being implemented in both States. They anticipate that, given the presence of well established human rights NGOs focused on HRE, there would be general compliance with the norm in Article 29(1) of CROC. The empirical data from this research indicates that NGOs can be influential in increasing HRE, as seen by their role in the publication of the *Ideas for Human Rights Education* booklet, but this was not the result of links with international civil society. Rather, a grass roots movement was ably to push for an HRE initiative at the state government level. It was not motivated by a

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<sup>118</sup> Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child - 17th Report*, Tabled in Parliament 28 August 1998, Para 1.54. Note, however, that there is no documented evidence that Australia has lobbied the United States to ratify CROC.

<sup>119</sup> Hafner-Burton, above n 117, 1386.

<sup>120</sup> Both countries have numerous Amnesty International branches. In addition the United States has the headquarters of Human Rights Watch, and several NGOs devoted to HRE including HREA and PDHRE. Australia has a strong network of NGOs and related organisations. Relevant to HRE are the National Human Rights Education Committee, the Victorian Human Rights Education Committee and the Centre for Human Rights Education at Curtin University of Technology in Western Australia. Relevant to children's rights are Defence for Children International, National Children's and Youth Law Centre, and Save the Children, to name a few.

desire to increase Australia's compliance with Article 29(1) of CROC, but rather by a desire to increase HRE in Victorian schools. Thus, the NGO activity occurred notwithstanding Australia's international obligation to educate children about human rights, rather than because of it. In any event, Victoria was the only one of the four jurisdictions studied that showed any sign of significant domestic NGO activity in HRE.

A possible explanation for Hafner-Burton and Tsutsui's theory not holding true for this research is the nature of the right being examined. The empirical study on which they based their theory involved civil and political rights, and this thesis explores compliance with an ESC right. It is suggested that the impact that domestic NGOs and international pressure from civil society has on States observance of their international obligations is likely to be greater for civil and political rights than for ESC rights. This is because, notwithstanding assertions that all human rights are equal and indivisible,<sup>121</sup> there remains a hierarchy in the way rights are perceived, particularly in Western countries. Examples of this in Australia include that the ICCPR has been declared a relevant instrument under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), but ICESCR has not, and that the two domestic Bills of Rights in Australia include only civil and political rights.<sup>122</sup> The prime example of this differentiation in the United States is the fact the ICCPR has been ratified, and ICESCR has not, and indeed nor have other treaties containing ESC rights, such as CEDAW, and of course, CROC. It is not just governments that prioritise civil and political rights over ESC rights; it was not until 2003 that Amnesty International, one of the world's largest human rights NGOs, decided to broaden its mandate to include ESC rights, focusing until then on civil and political rights.<sup>123</sup> Even now, its 2006 report on Australia refers only to civil and political rights, and is completely silent on ESC rights.<sup>124</sup> Thus, Hafner-Burton and Tsutsui's theory,

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<sup>121</sup> See for example 1993 Vienna Declaration and Programme of Action, A/CONF.157/23, para 5.

<sup>122</sup> *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

<sup>123</sup> Accessed at: [www.amnestyusa.org/activist\\_toolkit/amnestynaction/esc\\_rights](http://www.amnestyusa.org/activist_toolkit/amnestynaction/esc_rights) on 17 April, 2006.

<sup>124</sup> Amnesty International's report on Australia refers to the fact that Indigenous people continue to make up a disproportionate percentage of the prison population; criticises the policy of mandatory detention of asylum-seekers; and expresses concern that new counterterrorism measures could have a negative impact on fundamental human rights. Accessed at: [www.amnesty.org.au/\\_\\_data/assets/pdf\\_file/30939/Australia.pdf](http://www.amnesty.org.au/__data/assets/pdf_file/30939/Australia.pdf) on 2 June 2007.

relying as it does on international pressure from NGOs to explain States' human rights behaviour seems ill-suited to ESC right relating to HRE.

Overall, the Hafner-Burton and Tsutsui hybrid model does little to explain Australia and the United States' ratification decisions regarding CROC, nor their compliance levels with the norm in Article 29(1). This theory may be useful in rationalising States' practices regarding commitment to, and compliance with, civil and political rights, but its application to the ESC right under consideration in this doctrinal research is limited.

### **8.6 Evaluating the Overall Utility of Existing Theories for Explaining Australia and the United States' Behaviour vis-à-vis Compliance with Article 29(1) of CROC**

This chapter subjected eight leading theories on why States commit to, and comply with, international human rights laws to empirical analysis, by applying them to the practices of Australia and the United States vis-à-vis the norm in Article 29(1) of CROC. The somewhat surprising result was that none of the theories was able to fully explain the behaviour of these two States. Three of the theories (managerial model; fairness model; and Hafner-Burton and Tsutsui's hybrid model) offered little insight into the practices of Australia and the United States surrounding the norm in Article 29(1) of CROC.

The rational actor theories proved more helpful than the normative theories in explaining Australia and the United States' decision-making concerning commitment to this norm, because self-interest appears to have been the main factor influencing both States' choices to ratify or not ratify CROC. Of the rational actor theories, realism was the most helpful, while institutionalism was useful in explaining Australia's ratification choice, because Australia appears to want to be perceived by the international community as a supporter of human rights, and the UN human rights machinery facilitates this. Institutionalism does not appear to be relevant when it comes to the United States, which as the world's only Superpower, appears to be beyond the influence of the UN when it comes to international human rights norms, particularly ESC rights, such as the one in Article 29(1) of CROC, because it does not see a commitment to these

as being in its national interests. Liberalism was the least useful of the rational actor theories because, although it factors in domestic influences, which the other two rational actor theories do not, it does not recognise that federated democratic States may be subject to different influences than unitary democratic States, and this is an area in which this theory appears to need further development.

When it came to predicting compliance with Article 29(1) of CROC, the normative theories proved more valuable. In particular the two theories that focus on domestic considerations (transnational legal process and domestic salience) were the only ones that provided insight not only into why Australia and the United States are not providing HRE of the kind mandated in Article 29(1) of CROC, but also what steps could be taken to increase their compliance with this norm. In particular, the identification of norm entrepreneurs, the development of national (rather than transnational issue networks), more interpretative communities, and the establishment of bureaucratic compliance relating to HRE are likely to increase the internalisation of the norm in Article 29(1) of CROC, and lead to greater compliance. A high level of domestic salience of the norm in Article 29(1) is likely to encourage the enhancement of the six agents identified by Koh. However, it is unclear how to directly influence the saliency of a norm. Having a government that is supportive of international human rights law, and a norm that is congruent with a government's policy priorities is likely to accelerate domestic saliency. Furthermore, a domestic Bill of Rights that is harmonious with the norm in question may also increase the domestic salience of the norm. It is too early to tell whether s 41 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which calls for education about human rights, will improve the domestic salience of Article 29(1) of CROC, but this research suggests that it is likely.

The majority of the theories analysed in this thesis look to international causes when endeavouring to understand States' practices around committing to complying with international norms. However, this research suggests that while international factors are a significant force influencing States' ratification decisions, they appear to become much less significant when it comes to

compliance, where domestic factors are the more important influence. Only the transnational legal process and domestic salience theories consider domestic issues when accounting for States' behaviour, and it is these two theories that together can explain Australia and the United States resistance to implementing the HRE set out in Article 29(1) of CROC.

What none of the theories adequately address is the significant impact that federation can have on whether a democratic State ratifies and complies with an international human rights treaty. Even if committing to, and complying with, a human rights norm is in a State's self-interest, and the norm accords with a government's policy priorities, it may not be ratified, or may be ratified but not implemented if the State concerned is a federation, and the federal government lacks the constitutional power to legislate in relation to the subject matter of the norm. If the Australian and United States Federal Governments do not consider it appropriate to use their external affairs/treaty power, then they can only achieve compliance by negotiating with the states. Realistically, this is going to be easier to achieve in Australia that has only six states, than the United States which has fifty. Federalism is an issue that all compliance theories need to take account of if the theories are to apply to federated States.

Taken as a whole, the empirical evidence regarding Australia and the United States' patterns of behaviour appear to suggest that neither Australia's ratification of CROC, nor the United States' non-ratification has had a measurable impact on the levels of conformity with the HRE norm in Article 29(1). That is there is no evidence that Australia, as a State Party to CROC, is providing HRE in secondary schools to a greater degree than is the United States as a non-State party. This is consistent with the findings of the large scale quantitative studies analysed in Chapter 1 which concluded that commitment to human rights treaties had no statistically significant effect on States' human rights practices.

The analysis in this chapter demonstrates that the practices of States surrounding commitment to, and compliance with, international human rights law are complex, and no one theory can adequately explain Australia and the

United States conduct surrounding HRE.<sup>125</sup> However, Australia and the United States' practices surrounding commitment to, implementation of, and compliance with, Article 29(1) of CROC may be explained by merging aspects of the rational actor theories from the discipline of international relations with the normative theories from the discipline of international law. Being only a modest qualitative study of two States practices surrounding a single norm, it is not possible to make broad theoretical propositions about what factors generally influence States to commit to, and comply with, international human rights treaty obligations. However, it is suggested that by combining parts of realism, institutionalism, transnational legal process and domestic salience theories, it may be possible to develop more sophisticated tools that can more effectively answer the questions: why do States commit to international human rights law? and what factors most influence compliance with international human rights treaties in federated States?

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<sup>125</sup> This is consistent with conclusions reached by other scholars after conducting large scale quantitative studies. For example Professor Hathaway commented that 'although each theory can account for some of the results, none either individually or collectively can explain' the impact of human rights treaties on States' human rights practices. Hathaway, above n 24, 1988.

## **CHAPTER 9 – THE END OF THE JOURNEY**

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- 9.1      Introduction**
- 9.2      Summary of Findings**
- 9.3      Wider Significance of the Study**
- 9.4      Conclusion**

*Scholars of international norms need to engage theories of domestic politics, and to design research that involves comparative case studies.<sup>1</sup>*

## 9.1 Introduction

By using a comparative case study of Australia and the United States' practices surrounding Article 29(1) of CROC to analyse what domestic factors influence States' compliance with international norms, this thesis has contributed to addressing the two concerns expressed above. This research, while focusing on just two States and a single human rights norm, adds to the understanding of why States ratify, or fail to ratify, international human rights treaties and why they comply, or fail to comply, with international human rights norms. The aim of this thesis was to provide insight, based on empirical research, into what factors influence States' decision-making regarding ratification and what factors impact on whether they subsequently make genuine efforts to bring their domestic practices into conformity with a norm which they have been involved with internationally, even if they have not ultimately committed themselves to that norm. Thus, the research was designed to determine not only whether ratification of an international human rights treaty makes a difference to States' practices, but also to identify what factors influence States' compliance practices. Human rights education was chosen as the lens through which to conduct this inquiry because of a concern that children are not being educated about human rights as part of their schooling.

In this final chapter, the significant results are summarised through a recapping of the main findings of this research. This is followed by a discussion of the wider significance of this study for rational actor and normative theories on treaty commitment and compliance.

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<sup>1</sup> Hawkins, Darren 'The Domestic Impact of International Human Rights Norms' Paper presented at the 42<sup>nd</sup> Annual Convention of the International Studies Association, Chicago, Illinois, 20-24 February 2001, accessed at [www.isanet.org/archive/hawkins.html](http://www.isanet.org/archive/hawkins.html) on 7 May 2007, 33.

## 9.2 Summary of Findings

As a socio-legal study, this research was grounded in an analysis of the legal obligations of States to comply with Article 29(1) of CROC and the interpretation and implementation of HRE by teachers. It was preceded by a number of large-scale quantitative studies relating to whether ratification of a human rights treaty can be used to predict whether a State will improve its human rights practices. The majority of these studies, reviewed in Chapter 1, found that there was no link between ratification of a human rights treaty and improved human rights practices. The modest qualitative study undertaken for this thesis supports those findings, by concluding that the fact that Australia has committed to Article 29(1) of CROC and the United States has not, is largely irrelevant to these Governments' domestic practices concerning HRE, and has no discernable impact on the nature and extent of HRE being provided in secondary schools.

Chapters 3 and 7 read together indicate a discrepancy between how the United Nations human rights mechanisms have defined HRE in Article 29(1) of CROC and General Comment No.1, and how governments, NGOs and teachers understand that term. For example, although the Committee on the Rights of the Child (CRC) has clearly set out that Article 29(1) is to be interpreted broadly and that it includes the full gamut of rights, including ESC rights, this is not how some of the key stakeholders in HRE interpret the term. Federal governments tend to view HRE in narrow terms, not informed by, or based on, the definitions of this concept emanating from the UN, and are inclined to limit their understanding of HRE to civil and political rights in the context of civics and citizenship education. Only state governments appear to have a broad understanding of HRE that is in keeping with Article 29(1). This is evidenced by the Victorian Government's *Ideas for Human Rights Education* booklet and the Massachusetts Government's legislation directing the Department of Education to develop guidelines for teachers on using human rights education materials. The Victorian Government's initiative seems to have been prompted by the Department of Education's close association and collaboration with the Victorian Human Rights Education Committee, a group of volunteers dedicated to increasing HRE in Victorian schools. The Massachusetts'

initiative was the result of a single politician's deep personal commitment to a particular aspect of HRE, namely the Armenian genocide. Thus, it was not Article 29(1) of CROC or any other international HRE programs that induced these two state governments to take steps to increase HRE in schools, and the fact that their efforts resulted in increased compliance with Article 29(1) of CROC was an unintended consequence of their endeavours.

Teachers' understanding of the term HRE varied according to the State they came from. Thus Boston teachers tended to have a narrower perception of HRE than Melbourne teachers. However, this did not appear to be because Australia has ratified CROC and the United States has not. Rather it seemed to be linked to the fact that the United States has a Bill of Rights. The United States Bill of Rights is well entrenched in American society and forms a core part of the curriculum. The result is that teachers' understanding of HRE is informed by the limited rights set out in this domestic instrument rather than a broader articulation of rights in an international instrument to which the United States is not a party.

Not only is a Bill of Rights influential when it comes to a teacher's understanding of HRE but it is also critical to the nature and extent of HRE provided in schools. The Bill of Rights has the effect of increasing HRE in schools in Boston by providing teachers with a domestic instrument on which to base their teaching of rights, but at the same time limits the content of HRE by restricting the education to the few rights set out in the Bill of Rights and by focusing the HRE on exclusively national issues to the exclusion of global human rights issues as recommended in General Comment No. 1.

Chapter 4 set out the methodological framework employed in this study, and these research methods uncovered much detail about the nature and status of HRE in secondary schools in Melbourne and Boston. The use of surveys and interviews revealed what is happening with HRE within government education departments, NGOs and schools, and illuminated the apparent discrepancy between what is mandated in international law and what is actually occurring at the domestic level.

The extent to which Australia and the United States appear to be committed to HRE in the international arena was analysed in Chapter 5. This was done in order to determine whether there was any correlation between a State's commitment to a norm in the international arena and its commitment to that same norm within its sovereign jurisdiction. The findings set out in Chapter 5 reveal that both States appear to be concerned about presenting themselves as supporters of, and committed to, international initiatives designed to increase HRE. Thus both States participated in the drafting of Article 29(1) of CROC, although Australia made a more significant contribution to the final text of this norm. Both States to a greater or less degree were also vocal promoters of proposals to proclaim the UN Decade for HRE and subsequent World Programme, albeit with the apparent understanding that these initiatives were for *other* States. While Australia did formally participate in these programs, it appears to have done so with the intention of presenting itself to the international community as a strong supporter of HRE, rather than with the intention of actually undertaking the recommended steps to increase HRE within Australia. The United States did not involve itself in these enterprises beyond supporting the initial proclamations.

The findings relating to Australia and the United States' commitment to HRE in the domestic arena, presented in Chapter 6, indicated a significant divergence from the apparent enthusiasm for HRE demonstrated by these States in international circles. There were a paucity of national HRE initiatives undertaken by either of the Federal Governments, and two of the activities that were analysed specifically focused on HRE as a *foreign policy* issue.<sup>2</sup>

A surprising finding of this research was that a national human rights institution such as HREOC does not seem to have a discernable impact on HRE in schools. Thus while HREOC has developed HRE resources for schools, there does not appear to be a significant use of these materials by teachers. This may be due to a number of factors including the absence of HRE in the state-mandated curriculum

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<sup>2</sup> Australia's Inquiry into Good Governance and Human Rights Education in the Asia Pacific, and the United States Congressional Human Rights Caucus on Human Rights Education in Theory and Practice.

making it difficult for teachers to incorporate HREOC's resources, the low profile of HREOC in the education sector, and/or the constitutional distribution of power which ensures that state governments have primary jurisdiction over education with the result that, to the extent teachers look to government for direction on the resources they should be using, it is state-based bodies, such as the Victorian Department of Education that they turn to, rather than Federal statutory bodies such as HREOC.

Overall neither of the States analysed in this study had undertaken the steps recommended in the CRC's General Comment No. 5 for complying with the rights in CROC. In particular there were no efforts to prepare a National Plan of Action for Children,<sup>3</sup> collect baseline data,<sup>4</sup> provide teachers with training about CROC,<sup>5</sup> embed HRE in the school curriculum,<sup>6</sup> and cooperatively engage with civil society about HRE.<sup>7</sup> It is not surprising that the United States, not being a Party to CROC, has not acted on the recommendations in General Comment No. 5, but it could be anticipated that Australia might have undertaken at least some of the suggested measures.

A distinct difference between the responsibilities of the two Federal Governments was the obligation on Australia to periodically report to the CRC on the steps it has taken to comply with Article 29(1) of CROC. The two reports that Australia has submitted are vastly different. The first, prepared when a Labor Government was in power is lengthy and detailed. The combined second and third report, prepared when the Liberal-National Coalition was in power, is significantly briefer when it comes to compliance with Article 29(1). This disparity in reporting supports the understanding of Charlesworth and others that Labor governments are more supportive of the UN and international human rights law than Liberal-National

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<sup>3</sup> General Comment No. 5, paragraph 32.

<sup>4</sup> Ibid, paragraph 48.

<sup>5</sup> Ibid, paragraph 53.

<sup>6</sup> Ibid, paragraph 68.

<sup>7</sup> Ibid, paragraph 58.

governments.<sup>8</sup> The fact that both reports contain representations that Australia is complying with Article 29(1) of CROC is evidence of the fact that both political parties recognise the importance of being seen internationally to be a strong supporter of human rights.<sup>9</sup>

The data analysed in Chapter 6 revealed that the HRE journey from convention to classroom encounters a significant obstacle in federalism. The fact that it is the national governments that have responsibility for making international commitments relating to HRE, but state governments that have responsibility for education makes implementation and compliance with international HRE norms more difficult.

Chapter 6 also highlighted the impact that the constitutional framework for committing to international treaties has on a States' decision-making around ratification. The fact that the Australian Executive could ratify CROC without obtaining prior consent of Parliament, and without ratification having any significant domestic ramifications (because Australia operates under the monist system), enabled Australia to quickly ratify this treaty. The United States, on the other hand, requires the consent of two thirds of the Senate prior to ratification, and this has a chilling effect on its ability to commit to CROC. Furthermore the fact that it is a dualist jurisdiction, and the treaty therefore becomes part of United States law upon ratification, is also an impediment to ratification of CROC, but one that can be overcome by declaring the treaty to be non-self-executing.

The low levels of HRE in secondary schools in Melbourne and Boston, as presented in Chapter 7, was consistent with a lack of domestic commitment to HRE by governments. Overall the data suggested that whether or not a State had ratified CROC had little impact on the nature and extent of HRE in secondary schools. The HRE that was occurring in both jurisdictions was *ad hoc* and

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<sup>8</sup> Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George *No Country is an Island: Australia and International Law* (2006) UNSW Press, Sydney, 146.

<sup>9</sup> Ibid, 65.

dependent on the motivation of individual teachers. Furthermore, the HRE that was provided was generally not based on, or informed by, international human rights instruments, and there was a high degree of ignorance regarding international laws relating to HRE generally, and Article 29(1) of CROC, specifically. A number of impediments to HRE were identified including the lack of teacher training in HRE, the ‘crowded curriculum’, and lack of government direction to incorporate HRE as evidenced by its relative invisibility in the curriculum frameworks. Despite these impediments there was evidence of a strong grass roots movement for HRE from individuals personally committed to human rights education. This ‘bottom up’ push for HRE has lead to changes in HRE policies and practices at the state government level, demonstrating that the journey of HRE from convention to classroom is not a one-way street, but rather a process that operates in two directions and is influenced by many forces along the way.

### **9.3 Wider Significance of the Study**

While this research has provided insight into the impact of Article 29(1) of CROC on Australia and the United States’ practices surrounding HRE at both the government level and within the education sector, it also has wider relevance in terms of understanding which theories best explain States’ practices and can predict compliance levels vis-à-vis international human rights treaties. In particular, it appears that different theories are necessary to explain States’ decisions regarding ratification, and their practices regarding compliance. The rational actor theories that rely on States’ self-interest appear to best explain decisions to ratify, while the normative theories best explain States’ compliance levels. This suggests that those seeking to increase ratification of, and compliance with, international human rights treaties need to be mindful of the different factors that influence these two very different activities by States. The findings of this research broadly support earlier studies which concluded that there is very little linkage between States’ ratification of a human rights treaty and their compliance with international human rights law. This is because the forces which shape States’ behaviours at each of these junctures are completely different. However, by understanding the distinct factors that influence States’ behaviours in the international and domestic arenas, it

may be possible to merge aspects of the theories of neo-realism, institutionalism, transnational legal process and domestic salience, and by doing so come up with an integrated theory that explains not only what compels States to commit to an international human rights norm, but also what motivates them to subsequently implement and comply with that norm.

The findings of this research regarding the role that Bills of Rights play in HRE, has significance for the current debates about whether Australia should adopt a national Bill of Rights,<sup>10</sup> and whether Australian state and territory governments should enact human rights legislation.<sup>11</sup> Proponents of Bills of Rights should be aware that such legislation may result in more education about rights in schools, as it has in the United States, but it may also simultaneously limit the scope of that education to only civil and political rights, being the only rights currently in Australian domestic Bills of Rights.<sup>12</sup> Thus, domestic Bills of Rights will not necessarily result in comprehensive compliance with Article 29(1) of CROC.

There is still much work to be done in exploring how to increase HRE in schools as well as how to increase compliance with international human rights treaties. Further empirical investigations could build on this modest qualitative study, by exploring whether the findings of this research are relevant to developing States' compliance with international HRE norms. For the reasons outlined in Chapter 4, this research was limited to two economically developed States with established federal democracies. It would be beneficial to conduct research into the nature and extent of HRE in developing States to ascertain whether there is a discernable difference. For example, do developing States have a greater emphasis on ESC rights in their HRE, or is HRE less prevalent because of a lack of financial resources? It would also be worthwhile for research to be conducted into the

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<sup>10</sup> See for example the campaign by New Matilda for an Australian Bill of Rights at: [www.humanrightsact.com.au](http://www.humanrightsact.com.au) accessed on 4 August 2007.

<sup>11</sup> While the ACT and Victoria have human Rights Acts, other States are still considering enacting such legislation. Tasmania and Western Australia have both invited submissions on this issue. Accessed at: [www.humanrightsact.com.au/index.php?option=com\\_content&task=view&id=60&Itemid=28](http://www.humanrightsact.com.au/index.php?option=com_content&task=view&id=60&Itemid=28) on 4 August 2007.

<sup>12</sup> *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities 2006* (Vic).

journey of HRE from convention to classroom in States that are not federations to see whether implementation and compliance with Article 29(1) of CROC is different in unitary States.

#### 9.4 Conclusion

T S Eliot wrote that ‘between the idea and the reality, between the motion and the act, falls the shadow’.<sup>13</sup> This accurately describes the implementation of Article 29(1) of CROC in the two States examined in this thesis, for there is indeed a very long shadow between the idea of human rights education as set out in Article 29(1), and the reality of HRE in schools. The socio-legal approach adopted for this research exposed the disjuncture between education as mandated in an international convention, and education as delivered in classrooms in Melbourne and Boston. This research has hopefully increased understanding of the impediments to HRE that occur along the journey from development of a norm within an international organisation, to its implementation within school classrooms. It has also hopefully increased understanding of the different factors that influence whether a State will commit to an international norm, and whether it will comply with it domestically, and highlighted the utility of rational actor theories for explaining international practices and normative theories for explaining domestic practices. This thesis has demonstrated the need for further work on theoretical models that can explain *both* commitment to, and compliance with, international human rights treaties.

The findings of this research are depressing to the extent that the long journey between convention and classroom has still to be navigated, and the aspirations of the drafters of Article 29(1) of CROC have yet to be realised, at least within the jurisdictions examined for this case study. However, the findings are also encouraging to the extent they illustrate that local movements are positively impacting on domestic HRE practices at the state government level, and can stimulate HRE initiatives, where international efforts have failed to do so.

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<sup>13</sup> T S Eliot *The Hollow Men* 1925.

Furthermore, by identifying the main obstacles to implementation of HRE, and contributing to the further development of theoretical models on States' commitment and compliance, this research may play a small part in bridging the gap between international convention and local classroom.

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# Appendix

1

# **Appendix 1**

## **Human Rights Education Survey**

Name: \_\_\_\_\_ Position: \_\_\_\_\_

School: \_\_\_\_\_

1. In your own words, what do you understand is meant by the term 'human rights education'?

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### **PART A – YOUR EXPERIENCE OF HUMAN RIGHTS EDUCATION**

2. Have you received any training in how to teach human rights? Yes No  
If 'Yes', please describe what the training encompassed, how long it lasted and who provided it.

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3. Do you teach (or have you in the past taught) human rights in any of your classes? Yes No  
If 'Yes' please provide details of the classes (including subject and year level)

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4. If you answered yes to question 3, please provide details of the resources you use, or have used, to teach human rights including books, articles, films, posters, internet sites, resource kits, invited speakers eg from Amnesty International etc...

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5. Taking each subject you have listed in your response to question 3, please describe in general terms the content and nature of the human rights that you teach or have taught.

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6. Do you examine students on the human rights component of subjects you teach?  
Yes                  No  
If 'Yes', please describe the manner of assessment.

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## PART B – HUMAN RIGHTS EDUCATION IN YOUR SCHOOL

7. Does your school's charter or mission statement include a statement about its values and beliefs in relation to human rights?                  Yes                  No  
*If yes, please attach a copy*

8. To the best of your knowledge, does your school have a policy regarding human rights education? (*Please circle your choice*) Yes      No      Don't know
9. To the best of your knowledge, does your school provide human rights education? (*Please circle your choice*)
- (a) No      (*Please go to question 10*)
  - (b) Yes – on an *ad hoc* basis (eg to mark significant events or occasions such as Human Rights Day)    (*Please go to question 11*)
  - (c) Yes – it is integrated into the curriculum (*Please go to question 12*)

10. If you chose 9(a), please describe why you think this is?

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(*Please go directly to question 16*)

11. If you chose 9(b), can you please:

- (i) describe generally the human rights education at your school; and
- (ii) to the best of your knowledge explain why and how it was introduced.

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12. If you chose 9(c), please nominate in what year levels human rights are taught at your school? (*Please circle as many year levels as are applicable*)

Year 7

Year 10

Year 8

Year 11

Year 9

Year 12

13. To the best of your knowledge, in which year level(s) is the most time spent on human rights?

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14. Please list all subjects taught at your school which, to the best of your knowledge, include human rights education:-

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15. To the best of your knowledge, are there opportunities for students to apply their human rights knowledge, skills or values in the school community? Yes No  
*(If 'yes', please provide details)*

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16. Generally speaking, do you consider the amount of human rights education offered at your school is adequate? Yes No Don't know

17. If you answered 'No' to question 16, what do you perceive to be the obstacles to human rights education at your school?

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18. Can you identify any aspects/areas of human rights education which you believe could be improved or usefully introduced at your school?

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### **PART C – CONCLUDING QUESTIONS**

19. Would you be willing to participate in a follow up interview about human rights education? Yes No

If 'Yes', please provide your email address or other contact details:

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20. Is there anything else you would like to say about human rights education at your school or your experience of teaching human rights?

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Would you like to receive a report on the outcomes of this survey? Yes No

**Thank you for taking the time to complete this survey.**

**Please forward your response and any attachments to:**

**Paula Gerber  
Law School  
University of Melbourne  
Vic, 3010**

**Or you may email it to: p.gerber@unimelb.edu.au**

# Appendix

2

## **Appendix 2**

### **Interview Guide for Teachers**

Explain project

Explain the purpose of the interview (to gain greater insight into the extent and nature of their experience with human rights education)

Get consent form signed

1. How long have you been a teacher?
2. How long have you taught at ## school?
3. Where did you do your teacher training?
4. Do you recall whether your teacher training included anything about human rights education? If so, elaborate.
5. Do you recall whether you were taught about human rights when you were at school? If so, elaborate.
6. **Questions specific to individual teacher based on survey responses.**  
In your survey you talked about human rights education being “*about attitudes to others at age specific times which broaden their concepts not only of rights but of responsibilities.*” Can you elaborate on this for me?
7. **Questions specific to individual teacher based on survey responses**  
You indicated on your survey that “*it is impossible to teach these subjects without exploring human rights*” Could you elaborate on this for me?
8. What do you see your role as an educator being?
9. Can you tell me how you go about teaching human rights?

10. Do activities play a part in your human rights lessons?
11. Can you give some examples of how you have taught human rights?
12. Do you tend to use positive (respect for human rights) or negative (violation of human rights) depictions?
13. Do you tend to focus on global or local issues?
14. Do you tend to use historical or contemporary events and practices?
15. Do you tend to refer to the UN or international laws/treaties much in your teaching of human rights?
16. Are you familiar with the Discovering Democracy Kit? If yes, do you think it fits within your understanding of human rights education?
17. Have you used this kit? How did you find it? What are your overall impressions of it?
18. Do you think the CSF II (Melb) helps, hinders or is neutral when it comes to the teaching of Human Rights? If it helps or hinders, can you give some examples?
19. If the CSF was to be reviewed and amended, what changes would you like to see, if any, relating to human rights education?
20. How important is the CSF II to your day to day teaching practices? How often would you refer to it during the course of a school term?
21. To what extent do you think a teacher's own interests affect the curriculum presented in the classroom?

22. Do you think human rights is a difficult topic for teachers to teach? Why?
23. What problems, if any, have you encountered in teaching human rights?
24. What do you see as the purpose of teaching human rights?
25. Some people say that teaching students about human rights is too political and value laden and should therefore be avoided. What would you say to them?
26. Do you think that teaching human rights potentially exposes teachers to accusations of bias or indoctrination?
27. Do you think generally that teachers have the skills to teach human rights?
28. Using a scale from 0 (none) to 10 (a great deal), how much knowledge do you think you have about human rights?
29. Are you aware of any training that is available for teachers about how to teach human rights?
30. If there was such training available, would you be interested in attending a training session?
31. Can you estimate how many hours a school term are spent on human rights education? I am talking here about the school as a whole.

32. How much of your weekly teaching time is spent on what you would classify as HRE?
  
33. Relative to all the other subject areas that must be covered, how important do you rank human rights education?
  
34. Which subject(s) do you consider lend themselves to most easily incorporating human rights education?
  
35. What type of assistance would you most appreciate in helping you to teach human rights?
  
36. Have you had any experience with human rights education at other schools you have worked at? If yes, provide details.
  
37. Have you been able to form any view on how widespread you think HRE is in secondary schools in Melbourne?
  
38. **Question specific to individual teacher based on survey responses**  
You said in your survey that "*Prescribing anything is not the way to go. It should be an organic part of the whole?*" Can you elaborate for me how you would like to see this happen with respect to human rights education?
  
39. Would you say that you feel supported by the school in your teaching of human rights?
  
40. Do you think the government (federal or state) has a commitment to human rights education?

41. Can I get you to have a read of Article 29 from the UN Convention on the rights of the child? (*handed to interviewee*) Are you familiar with this provision?
42. What do you think of the sentiment that is being expressed here?
43. Do you think what you are teaching is what the UN has mandated here?
44. Do you think the language used in this article is clear, unambiguous and easy to understand?
45. Some people say that it is not appropriate that teachers have responsibility for educating children in this way. What do you say to that?
46. Are you aware of the UN Decade for Human Rights Education? If yes, what can you tell me about it?
47. Do you know any other teachers, either at your school or elsewhere who you think might be interested in participating in this research into HRE?
48. Any other information you would like to share about human rights education?

# Appendix

3

## **Appendix 3**

### **Teachers' Survey Definitions of HRE**

#### **Boston**

1. Human rights education means to teach students those social, political and cultural realities that in the history of humankind have helped us better and more fully understand what human rights are, how people have fought for and realized those, and the barriers and challenges that still remain.
2. Human rights is a very general term to me, it conveys the rights of any US citizen to practice his/her religion, choose any job (if qualified) a right to a reasonable comfortable standard of living – the right to pursue an education- the right to live where he/she chooses, etc. Basically – equal opportunity for all.
3. 'Human Rights Education' seeks to inform students about the problems various cultures have in understanding the values and thought processes of other cultures. It addresses questions of ethics, international policy, and the extent to which the world's governments tolerate HR abuses. Finally, it confronts the basic issue of HR: that different cultures have different views on the value of a human's life.
4. I am not familiar with this term or this type of education. I would assume it might be similar to social justice or social responsibility in the classroom or perhaps similar to teaching tolerance programs.
5. Human Rights Education (HRE) is a vehicle through which nations, states as well as governmental systems are informed and held accountable for violations against and/or of and for, the ethical and moral rights of people. In addition, HRE is a standards bearer that advises governing bodies of their responsibility for the socio-economic development, health conditions, and standard conditions that promote and emphasize cooperation and good will locally and globally.
6. Through content and actions, demonstrating that all humans are equal and deserving of respect.

7. Human Rights Education is the implicit and explicit teaching of children to respect and abide by basic rules that allow all students to feel safe and to be the best possible people both in their classroom and in the greater community.
8. Helping students gain awareness and understanding of the problems confronted by various minorities in history and in the world today. I try to teach them to have compassion for those who encounter discrimination.
9. To me “human rights education” means fostering in students the attitude that all peoples deserve certain basic rights including the right to live a dignified life, with the ability to express opinions freely without fear of reprisal, and with the necessities of life.
10. To me “human rights education” involves teaching students about the issues of social justice and equity in this country, as well as globally.
11. That humans have the right to live their lives without such a wide disparity of equality based on where they live. Teaching children to have empathy and to support the need for raising the quality of life of others.
12. - having students define what rights they believe are universal rights  
- understanding human rights around the world, where there are or have been abuses of these rights, and past and present efforts to ensure human rights.
13. I would consider human rights education to mean teaching people about human rights violations throughout history and throughout the world. I would define a human rights violation as any instance in which a group of people are singled out and attacked (may include imprisonment, torture, killing, genocide etc.) or just generally denied basic rights (such as freedom of religion) because they do not agree with or in some way go against those in power. For instance, I recently taught my World History II 10<sup>th</sup> graders about the human rights violations committed on the Congolese people during King Leopold of Belgium's reign (late 1800s-early 1900s).

A responsible teaching of human rights violations would also need to include information on how persecuted groups/individuals have fought back, and how the world community responds to these violations. I think students should also be exposed to the work of Amnesty International.

14. I guess education about human rights struggles around the world and perhaps actual events and issues surrounding correct or incorrect application of those rights.
15. Human rights education informs and empowers people. It increases consciousness around what basic human rights are, and it increases awareness about times when those rights are violated. It is a social change curriculum.
16. Rudyard Kipling once said: "All the people like us are we, and everyone else is they." One of the most important things about studying human rights education is the investigation of a person's identity and the degree to which many people place emphasis on it. It's important for students to not only understand what kinds of human rights violations have occurred in this world, but to also ask the question why this kind of animosity towards another group of people exists. This involves a thorough investigation of the evolution of various cultural identities. In the process of doing this, students will also carry out a self-analysis of their own identities.
17. Human rights education means the students are introduced to the idea that all people have basic rights that should not be violated. Students should be able to describe these rights, find examples of violations of human rights and explain how these rights can be protected.
18. As human beings we are entitled to certain "inalienable" rights. Our Declaration of Independence includes among them life, liberty, and the pursuit of happiness. When we are denied these, it may be considered a violation of human rights. Political persecution, involuntary servitude etc... would be two examples of human rights violations.

## **Melbourne**

1. For me HRE is about learning about how people in the world live and why they live the way they do – it is about understanding the political, economic, social and cultural structures – how they are grouped and how they are manipulated and used for and against people. HRE is an important basis for anyone to see that there are possibilities for change – we just have to all realise that even our ignoring of people's plights contributes to it and that we are all players and can make a difference if we are active and critical thinkers. The bottom line is that HRE is about learning to empower people to help redress ills of our societies.
2. Making all students aware that every person on earth is entitled to basic human rights, that no-one should be disadvantaged in these rights on the basis of race, colour, creed etc...
3. Education about:
  - Justice, equality before the law, transparent legal processes.
  - Stereotypes, generalisations, racism, sexism, religions, bigotry etc
  - Current events, government(s) decisions and policies.
4. To be aware of what is happening in our school/suburb/city/state/world etc. To discuss in an open forum these issues. To address and identify issues that we define as being related to the equality of mankind.
5. Systematic and compulsory teaching of rights that allow all human beings dignity and respect.
6. Study of and promoting awareness of the rights of all individuals. Awareness of human rights breaches and how people can help defend human rights.
7. Raising awareness and developing understanding of human rights. Exploring issues and case studies which may lead to more informed and active – more responsive outlook.

8. Teaching/learning of the aspects of human rights in a formal sense.
9. The teaching of human rights is not confined to teaching students about documents which are supposed to give rights to individuals but about attitudes to others at age specific times which broaden their concepts not only of rights but responsibilities. These ideas should be explored and discussed so that a personal philosophy of inclusiveness should be developed.
10.
  - History of human rights
  - What are human rights
  - Human rights translated into action
  - World situation
  - Australian situation
  - What we need to/can do
  - Organisations eg Amnesty
11. This is a tricky concept to teach because it has a values dimension - it is difficult to reach consensus on what core rights should be. In my own teaching, I stress the fact that while there are human rights [eg: the UN Declaration], how widely these are actually observed is another thing. Rather than 'preach' about HR's, I tend to pick up on the more contentious aspects of the concept - I think kids find that much more interesting.

I do not see that my role as an educator is to run a pro-HR indoctrination campaign - kids need to be challenged, not talked at.

Human Rights [although a very worthy concept] can take on a very PC feel, and kids are generally very un-PC I find.
12. To learn about treating people with respect and compassion on a physical and emotional level within the immediate/local and international areas.
13. Education about people's rights, in particular, in relation to the matters covered in the UN Universal Declaration of Human Rights, covering such topics as individual freedoms, democratic rights etc.

14. Deliberately teaching the concepts of human rights not just accidentally including the ideas.

15. Assisting students to think about the ways in which people are constrained, harmed by others particularly political systems etc.

16. Encouraging students to be aware of their rights and responsibilities as global citizens.

Encouraging students to be aware of human rights abuses that have occurred in the past and are currently occurring.

17. (1) Human rights education is what happens to students and staff in everyday interactions.

(2) Human rights education is a planned curriculum investigating the development and implementation of human rights around the world.

18. How we expect to be treated and how we would like to be treated by other people and organisations.

How we expect and would like to treat other people. How we expect and would like organisations to treat other people.

Similarities and differences between people

19. Education which involves respect and equal opportunities for oneself and others

20. - Teaching students the importance of human rights (UNDHR) and discussing issues around the world where HR are respected and abused

- Equipping students with strategies/tools to fight for the preservation/defend H.R.

21. Teaching students about what human rights are as defined by the UN Declarations, case studies, texts, videos, activities, projects, presentations.

22. Students learning about various human rights abuses and developing an understanding of what rights are:

For example - Refugee issues

- Civil rights movement in the U.S.
- Slavery
- Human rights abuses around the world ie countries that are not part of the United Nations Declaration for Human Rights.

23. I understand the term to mean that students are educated in fairness and justice. All human beings should be treated in a just and fair way and have equal opportunity to the things that life can offer them. Human rights education is about this and whether this exists or not and exploring the reason why.
24. Teaching about the rights of citizens. Social equality, freedom of speech etc as is guaranteed under the United Nations Charter.
25. Educating students as to what is just, fair and equitable. Helping students to define what is 'morally right' and to accept and celebrate 'differences' rather than see them as threatening or 'wrong'. To make them see that they may need to be active / take a stand to support others' rights.
26. Education which extends the viewpoint and horizons of students.  
Education which engages students in the recognition of values other than those they are familiar with.  
Rights – in Australia & 3<sup>rd</sup> world and the declaration of human rights – Universal.  
Education which challenges student's own values directly and research which opens horizons.
27. Education in our schools & via the media on the rights as laid down by the United Nations Declaration of Human Rights. Students need to become involved.

28. I understand “human rights” education to be facilitating an understanding and reflection by students and staff on the basic principles of the Geneva Convention Human Rights paper. It is important for students to understand how discrimination for various reasons is a step towards infringing human rights.
29.                  - tolerance  
                  - acceptance  
                  - valuing diversity  
                  - appropriate behaviours
30. Human rights education is concerned with teaching students about the basic rights, entitlements which are due to all human beings according to the 1948 UN Charter. It is also about defining how we value people and the basic pre-requisites for human dignity... ie human rights.

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