

001925

**THE UNIVERSITY OF ADELAIDE
FLINDERS UNIVERSITY
CONFERENCE ON INTERNATIONAL LAW - THE CHALLENGE OF
CONFLICT
FRIDAY 27 FEBRUARY 2004
CONFERENCE DINNER**

TAKE HEART - INTERNATIONAL LAW COMES, EVER COMES

The Hon Justice Michael Kirby AC CMG

THE UNIVERSITY OF ADELAIDE
FLINDERS UNIVERSITY
CONFERENCE ON INTERNATIONAL LAW - THE CHALLENGE OF
CONFLICT
FRIDAY 27 FEBRUARY 2004
CONFERENCE DINNER

TAKE HEART - INTERNATIONAL LAW COMES, EVER COMES

The Hon Justice Michael Kirby AC CMG*

HOPE AMIDST THE GLOOM

In December 2003, I found myself in India. In West Bengal to be exact. I was taking part in a series of meetings concerned with the AIDS epidemic. As I left for home, my hosts pressed a book into my hands¹. It contained poems of Rabindranath Tagore, translated from Bengali into English by the poet himself.

* Justice of the High Court of Australia. One-time President of the International Commission of Jurists and Special Representative of the Secretary-General for Human Rights in Cambodia.

¹ R Tagore, *Gitanjali - Song Offerings*.

One of the poems² caught my eye. It is not enough to read it. It must be said aloud. Does it speak of love? Of the onrush of problems, like HIV? Or is it a metaphor for the advent of a better world?

" Have you not heard his silent steps? He comes, comes, ever comes.

Every moment and every age, every day and every night he comes, comes, ever comes.

Many a song have I sung in many a mood of mind, but all their notes have always proclaimed,

'He comes, comes, ever comes.'

In the fragrant days of sunny April through the forests path he comes, comes, ever comes.

In the rainy gloom of July nights on the thundering chariot of clouds he comes, comes, ever comes."

My thesis is that it is so with international law. Even in times of discouragement and despair, we can take great heart. The future is on the side of human progress and international law. It comes, comes, ever comes. But we are not released from the obligation, in every proper way, to contribute to its arrival.

² No 45, p 43.

FEELINGS OF DISCOURAGEMENT

In some ways these are sombre times for international law. In his speech to the Centre for International and Public Law at the Australian National University in January 2004, Ambassador John Dauth opened his remarks gloomily³;

"To say 2003 was a bad year for the United Nations is undoubtedly a significant under-statement. We in the international community who still broadly support the UN, are a long way from the euphoria of late 2001, when, in the immediate aftermath of the appalling terrorist attacks ... the Security Council reacted decisively with Resolutions 1368 and 1373, established the Counter-Terrorism Committee and, with the undivided support of the Council, authorised the removal of the Taliban in Afghanistan. The emblem of those measures of activity was the Nobel Peace Prize, shared between the Organisation and the Secretary-General, Kofi Annan. 2003, by comparison, has been racked with divisions over Iraq ... This sad period in the Council's history was a major contributor in 2003 to the dented image of the organisation as a whole".

To similar effect was a speech given in February 2004 at Indiana University by Professor Ivan Shearer. Speaking to a mainly American audience, he described the growing mood of unilateralism that had caused some jurists to describe the present age as "the end of a great experiment" in collective security established by the

³ J Dauth, "The UN in 2003: Letter from New York", unpublished address, Canberra, 29 January 2004, 1. Ambassador Dauth is the Permanent Representative of Australia to the United Nations in New York.

United Nations *Charter*⁴. In his lecture titled "In Fear of International Law"⁵, Ivan Shearer is blunt about it⁶:

"It has been evident that at many points international law has been ignored or pushed to the sidelines by the governments of the United States and - to a lesser extent - of Australia. ... [T]his is not only wrong, but unnecessary, since the objectives we strive to attain may be made compatible with international law. Our security is made stronger if we can bring the rest of the international community with us, and show that we are prepared to live by the same rules as all ... [I]nternational law is a necessary curb and restraint on the exercise of power and [it] ... should be recognised more widely as such, not only at the executive level but also at the judicial and legislative level".

Taking up a similar theme, but with reference to developments in the Australian governmental system, Professor Hilary Charlesworth and her colleagues, in a recent essay in the *Sydney Law Review*⁷ described what they call "Deep anxieties: Australia and the international legal order". They note the increasing internationalisation of many aspects of Australian life. But they observe that "international law has become a charged and politicised

⁴ M J Glennon, "Why the Security Council Failed" 82 *Foreign Affairs* 16 (May/June 2003), 1.

⁵ George P Smith Lecture, Indiana University School of Law, Bloomington, unpublished, 2 February 2004.

⁶ *Ibid*, manuscript, 32, 33.

⁷ (2003) 25 *Sydney Law Review* 423. By Professor Hilary Charlesworth, Madelaine Chiam, Devika Hovell and Professor George Williams.

field in Australia [often portrayed] as an intrusion from 'outside' into our self-contained and carefully bounded legal system"⁸.

The authors of this article suggest that the perception of international law "as a source of un-Australian, fanciful and chaotic norms" is connected to the "politics of Australian fundamentalism - the 'shrinking society' described by Ghassan Hage"⁹. According to this description, Australia is "a worrying, defensive society - in which anxieties about our own individual positions are projected into the nation. Nationalism has thus become characterised by a focus on the politics of preserving our borders from outsiders"¹⁰. As Hage puts it, "The defensive society ... suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worrying citizens and a paranoid nationalism"¹¹. International law is rejected as having no relevance to domestic law precisely because it represents the voice of outsiders. It is ever the danger of people who live on islands - even those as big as Australia - that they feel the need, from time to time, to pull up the drawbridge. For such people, international law, like the wogs of old, begins at Calais - or in our case Dili or Bali.

⁸ (2003) 25 *Sydney Law Review* 423 at 424.

⁹ G Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society* (2003). See Charlesworth *et al* (2003) 25 *Sydney Law Review* 423 at 425.

¹⁰ G Hage, *id*, 47.

¹¹ *Id*, 77.

The contemporary feeling of discouragement over international law is traced in the Charlesworth paper by reference to the debates leading up to Australia's ratification of the statute of the International Criminal Court (strongly supported by the Foreign Minister and the then Federal Attorney-General but attacked by others)¹². It is followed through the responses of the Australian Government to decisions of the United Nations Human Rights Committee¹³ (upon which Professor Shearer serves) through the responses of successive governments, Labor and Coalition to the High Court's decision in *Teoh v Minister for Immigration and Ethnic Affairs*¹⁴. And into the utilisation of international law in the domestic decisions of our national courts¹⁵.

The highly critical view about what is left of *Teoh*, as stated by the High Court of Australia in its new composition in *Re Minister*

¹² (2003) 25 *Sydney Law Review* 423 at 434.

¹³ *A v Australia* (No 560/1993), 3 April 1997, UN Doc CCPR/C/59/D/560/1993, noted (2003) 25 *Sydney Law Review* 423 at 436-437; cf D Hovell, "The Sovereignty Stratagem - Australia's Response to UN Human Rights Treaty Bodies" (2003) 28 *Alternative Law Journal* 297.

¹⁴ (1995) 183 CLR 273.

¹⁵ Charlesworth *et al* (2003) 25 *Sydney Law Review* 423 at 452-454.

for *Immigration and Multicultural Affairs; Ex parte Lam*¹⁶, is portrayed as a far cry from the halcyon days of Justice Brennan's embrace in *Mabo v Queensland [No 2]*¹⁷ of the international law of human rights - as a legitimate influence on the development of the common law of Australia. The importance of that approach was that it provided the key that unlocked the door to permit-examination of past common law authority in Australia. It was the international law against racial discrimination that encouraged the High Court to over-rule the former doctrines on the extinguishment of indigenous title to land in this country. But, for the critics, that is precisely what was wrong with this invocation of international law¹⁸.

A later, similar talk by Professor Charlesworth at the centenary conference of the High Court in October 2003¹⁹, attracted the usual rantings of media polemicists, with their infantile views of a modern democracy and of its judicial process.

¹⁶ (2003) 77 ALJR 699 esp at 714 [83] per McHugh and Gummow JJ and 725 [145] per Callinan J. See *ibid* (2003) 25 *Sydney Law Review* 423 at 450.

¹⁷ (1992) 175 CLR 1 at 42.

¹⁸ J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 1. First published (2003) 47 *Quadrant*, 9.

¹⁹ H Charlesworth, "Human Rights, International Standards and the Protection of Minorities", unpublished paper for the centenary conference of the High Court of Australia, 11 October 2003 (to be published in conference papers, forthcoming).

But do all these developments combine to suggest an international and national setback for international law? Particularly, do they indicate a retreat from multilateral solutions to world problems and from the advance of global human rights in the place of the brute power, cruelty and oppression of the past?

HUMAN RIGHTS MACHINERY

Whilst disappointing and worrying developments have certainly occurred in the political organs of the United Nations, important advances continue to be made in the agencies of the Organisation. It is here that I have seen, and participated in, activities that promote the aspirations of universal human rights in highly practical ways and shore up their defences. They happen within mechanisms established to promote and protect universal human rights in accordance with the norms of international law²⁰. In the three years prior to my appointment to the High Court of Australia, it was here that I came face to face with the United Nations human rights system at work.

Between 1993 and 1996 I served as Special Representative of the Secretary-General for Human Rights in Cambodia. I found

²⁰ Z Kedzia, "United Nations Mechanisms to Promote and Protect Human Rights" in J Symonides, *Human Rights: International Protection, Monitoring, Enforcement* (UNESCO, 2003), 3.

myself one of nearly thirty such Special Rapporteurs and Special Representatives. We reported to the Secretary-General and the Commission on Human Rights. My office derived from a provision in the 1991 *Paris Peace Agreements* by which the United Nations brought peace to Cambodia after decades of war, revolution, genocide, invasion and resistance²¹. My mission was to encourage Cambodian adherence to United Nations human rights treaties; to advise on the conformity of Cambodian law and practices with the obligations of those treaties; and to promote discussion and awareness of the international law of human rights amongst politicians, officials, the media and civil society organisations. And to report to the Organisation on compliance, and non-compliance, twice a year.

I had no blue helmets at my disposal to sanction criticisms of non-compliance. All but two of the military force of UNTAC had withdrawn by the time of my arrival. There were, of course, failures. But there were also many successes²². The Office of Human Rights in Phnom Penh provided enormous technical assistance to the government and people of Cambodia; and still does. When things became particularly difficult, I involved the

²¹ *Yearbook of the United Nations* (1993) Vol 47, pp 360-381, 932-933; cf M D Kirby, "Cambodia: The Struggle for Human Rights" in M D Kirby, *Through the World's Eye* (2000, Federation), 24.

²² Kirby, *ibid*, 31.

Under-Secretary-General of the United Nations (Mr (now Sir) Marrack Goulding) in a visit to add to my persuasions. Later still, the first High Commissioner for Human Rights (Mr Jose Ayala Lasso) joined me in a mission and brought his influence to bear. The sanction of reports to the Commission can be significant. Cambodia made progress during my time²³. Not without ongoing problems and setbacks, my successors as Special Representative, Thomas Hammarberg and Peter Leuprecht have continued this important work of translating the grand language of human treaties into practical reality on the ground. The Human Rights Office in Cambodia, headed by Margo Picken - a past Director of Interrights - works creatively and energetically to fulfil the noble goals of the United Nations.

As I sat in the Human Rights Commission in 1996, waiting for the call to present my last report, I saw the Special Rapporteur on the Sudan bring to account, in a way totally impossible at home, the oppressive government of that country. Here, truly, I witnessed the building blocks of a world order that will ultimately render tyrants accountable to humanity. There are countless other elements to the building of the New World Order. We should remember them when we feel despair.

²³ *Yearbook of the United Nations* 9(1994) Vol 48 pp 445-450, 1057-1058; *Yearbook of the United Nations* (1995) Vol 49, pp 466-469; esp 712-715; *Yearbook of the United Nations* (1996) Vol 50, pp 588-591.

Amidst the failures of the United Nations' political arms, we need to remember the important, and often useful but unsung, work of countless officials of the United Nations and its agencies - helping to solve particular disputes. Helping to identify common problems and the ways to address them. If there were time, I could tell you of the outstanding officers of the United Nations in Cambodia. Of Daniel Prémont, quietly working with the government and officials to build judicial independence, to abolish military and civil service immunity from courts, to defend the political opposition and to promote freedom of expression. I could tell of Christoph Péschoux, who went into dangerous areas to respond to complaints about interference with the rights of ethnic minorities and who helped to organised land mine clearance and investigation of individual complaints. He was in Baghdad last year when the third High Commissioner for Human Rights, Sergio Vieira de Mello and other brave workers for international law were killed in the service of the world community. I could tell of Francesca Marotta who helped in the promotion of women's rights and who joined me to put HIV/AIDS on the agenda of government, with valuable consequences a decade later in the steady fall in infection rates. I could tell of Heng Ham Kheng who, with other Cambodian officers, overcame centuries of hostility to the Vietnamese minority to support the work of the United Nations to make human rights a reality in a country where a tenth of the population had died in genocide. This is not theory. This is highly practical work.

So this is international law in action at the grass roots. It is not perfect. But without it, the world and its people, especially the disadvantaged, would be much worse off. I have seen this aspect of international law and universal human rights with my own eyes. I feel an obligation to remind you of it. And to tell you that it is going on in many dangerous corners of the globe.

In my time, I have witnessed international law at work in the field through the eyes of the International Labor Organisation²⁴, through the United Nations Development Programme²⁵, the World Health Organisation²⁶, UNESCO²⁷, the OECD²⁸ and the Commonwealth Secretariat²⁹. Whenever I get discouraged about the role of international law, and international agencies, I think of the highly useful work done through these and like bodies - intergovernmental and non-governmental.

²⁴ As a member of the International Labor Organisation Fact-Finding and Conciliation Commission on Freedom of Association, Inquiry into South Africa (1991-1992).

²⁵ As co-chair of the Malawi Constitutional Conference, 1994.

²⁶ As a member of the Global Commission on AIDS 1988-1992.

²⁷ As chairman and rapporteur of the UNESCO Expert Group on the Rights of Peoples, 1988-1991.

²⁸ As chairman of Expert Groups on Privacy (1978-1980) and Data Security (1992-1993).

²⁹ As a participant in the International Colloquia on the Domestic Application of International Human Rights Norms (1988-1993).

In recent years I have been serving on two of them where I have witnessed attention to topical issues of the world we live in. In the International Bioethics of UNESCO (IBC), we have begun the essential response of humanity to the challenges presented to our species by the developments of the Human Genome Project and the amazing symbiosis between information technology and the new biology.

Under delegation of the General Conference of UNESCO, the IBC is preparing a programme for an international response to a range of bioethical concerns going beyond its earlier *Universal Declaration on the Human Genome and Human Rights*³⁰. This is not simply another United Nations document. One of the chief concerns of the IBC relates to the operation of the World Trade Organisation's TRIPS Agreement³¹, with its consequences for domestic law on

³⁰ Adopted by the General Conference of UNESCO, 29th Session, 1997.

³¹ World Trade Organisation, Agreement on Trade Related Aspects of Intellectual Property Rights of 1994 (2001) *Australian Treaty Series* 1995, No 8. See also International Bioethics Committee of UNESCO, Report of the IBC on *Ethics, Intellectual Property and Genomics* (SHS-503/01/CIB/8/2 Rev., Paris, 10 January 2002); cf R Cook-Degan, *The Gene Wars: Science, Politics and the Human Genome*, New York, Norton (1995), 28; P Drahos and J Braithwaite, "Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context" (2002) 20 *Wisconsin International Law Journal* 451; Nuffield Council on Bioethics, *The Ethics of Patenting DNA: A Discussion Paper* (2002).

intellectual property protection in respect of genomic discoveries³². Ensuring that these discoveries are fairly available to all humanity and that genomic progress responds to the needs of the developing world is truly a major issue of justice for international law. It is a potential source of future conflict unless we can nip that conflict in the bud³³.

The other body on which I now serve is a panel established by UNAIDS. It has been created to advise that inter-agency organisation on human rights issues of the epidemic. At present, it is in the midst of considering an urgent strategy to tackle the spread of HIV in developing countries. This was rightly noted by Ambassador Dauth as one of the failures of the United Nations in recent years³⁴.

The new Director-General of the World Health Organisation, together with UNAIDS, is promoting the so-called 3x5 Initiative. With new and beneficial antiretroviral drugs (ARVs), now to be available at low cost in the developing world, this initiative envisages the rapid provision of medication to three million recipients by 2005.

³² M D Kirby, "Intellectual Property and the Human Genome" (2001) 12 *Australian Intellectual Property Journal* 61.

³³ UNESCO, International Bioethics Committee, Report of the IBC on *Ethics, Intellectual Property and Genomics*, (2002), above n 30.

³⁴ Dauth, above n 3, 2.

If you have ever seen the life transforming impact of ARVs on people with an advanced condition of HIV or AIDS, you know how critical it is to bring the human right of access to health to millions of people in poorer countries.

This can only be done by stepping up HIV testing. The UNAIDS panel is advising on ways that testing can safely be introduced according to a formula that ensures the *utility* of testing (by the access to ARVs) and *protection* from stigma and discrimination. In both of these components of the global strategy, most of the countries of the developing world are sorely in need of help. This is not theory. This is the practical provision of the means to ensure the most basic of human rights - the right to life and to essential healthcare.

The AIDS pandemic is an area where law can actually play a supportive role, as we have found in Australia. In mid-February 2004, on the visit to Australia by Dr Richard Feachem, Executive Director of the Global Fund on HIV, Malaria and Tuberculosis, the Australian government announced a commitment to the Fund of \$US10 million over three years. In the struggle against HIV in our region and the world, as well as at home, Australians, their government and its agencies (especially AUSAID) have played an admirable role over decades. International law, and the principles of universal human rights, help to sustain that role. The UNAIDS panel works closely with the Office of the High Commissioner for Human

Rights. International human rights law underpins the strategy of UNAIDS and of WHO in this struggle. The effort rarely attracts media headlines. Those who thrive in disaster and conflict are not interested. But it is an instance of international law and human rights at work to solve problems, to save lives and to protect human dignity.

IN THE COURTS

When we turn from the international agencies to the courts, the position is by no means bleak.

Every September at the Yale Law School, I participate in a global conference on constitutionalism. Another participant is Judge Luzius Wildhaber, President of the European Court of Human Rights. His court now exercises jurisdiction from Ireland in the west to the Pacific Coast of the Russian Federation in the east. The jurisprudence of the European Court is increasingly felt in the country that is the source of our own legal system, the United Kingdom. It helps promote principled decisions that are increasingly noticed in our own academic and judicial writings.

As Professor Charlesworth and her colleagues point out, by reference to decisions of the High Court of Australia going back to

*Jumbunna Coal Mines NL v Victoria Coal Miners' Association*³⁵; *Chow Hung Ching v The King*³⁶; *Dietrich v The Queen*³⁷; *Mabo (No 2)*³⁸ and *Teoh*³⁹, there is nothing heretical in the acknowledgment by our courts of the existence and force of international law. So far as it is not inconsistent with legal rules enacted by statutes or finally declared by courts of high authority, judges of our tradition have long utilised universally recognised principles of international law to inform themselves in the performance of their own municipal duties⁴⁰.

This is all that the *Bangalore Principles on the Domestic Application of International Human Rights Norms* proposed⁴¹. They are not heretical, even if some Australian judges continue to think

³⁵ (1908) 6 CLR 309 at 363. See below.

³⁶ (1948) 77 CLR 449 at 478.

³⁷ (1992) 177 CLR 292 at 305, 359-360.

³⁸ (1992) 175 CLR 1 at 42.

³⁹ (1995) 183 CLR 273.

⁴⁰ *Chow Hung Ching v The King* (1948) 77 CLR 449 at 462 per Latham CJ, 470-471 per Dixon J. See also *Chung Chi Cheung v The King* [1939] AC 160 at 167-168; cf *Thai-Europe Tapioca Service v Government of Pakistan* [1975] 1 WLR 1485; *R v Bow Street Metropolitan Stipendiary Magistrate (No 3)* [1999] 1 AC 147 at 197, 200, 215, 218, 241, 276-278, 288.

⁴¹ A Lester, "The Judicial Protection of Human Rights in the Commonwealth" (2003) 8 *Law and Justice* (India), 15. The revised *Bangalore Principles* are set out in this article at 21-24.

them so⁴². Nor is it inappropriate, or even particularly novel, for our courts to construe legislation, so far as they properly can, in favour of a meaning that conforms to international law rather than one which does not⁴³.

In the important recent decision of the High Court of Australia *Plaintiff S 157/2002 v The Commonwealth*⁴⁴, which reasserted the operation of the constitutional writs in the face of "privative clause" provisions in the *Migration Act* addressed to refugee decisions, Chief Justice Gleeson put succinctly a principle long established by the law of this nation⁴⁵:

"[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international conventions, in cases of ambiguity, a court should favour a construction which accords with Australia's obligations"⁴⁶.

⁴² *Western Australia v Ward* (2002) 76 ALJR 1098 at 1297; 191 ALR 1 at 273 [956] per Callinan J. See Charlesworth *et al* (2003) 25 *Sydney Law Review* 423 at 457.

⁴³ *Teoh* (1995) 183 CLR 273 at 287-288 per Mason CJ and Deane J; *AMS v AIF* (1999) 199 CLR 160 at 180 per Gleeson CJ, McHugh and Gummow JJ. See also *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 304 per Gummow J.

⁴⁴ (2002) 211 CLR 476.

⁴⁵ (2003) 211 CLR 476 at 492 [29]; cf A M Gleeson, "Global Influences on the Australian Judiciary" (2002) 22 *Australian Bar Review* 1 at 4; D Shanahan, "Chief Justice's quiet struggle", *Weekend Australian*, 27 December 2003, 2.

⁴⁶ *Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

There are many other decisions that state a wider principle which the Chief Justice, and the High Court have reaffirmed. Courts do not impute to the legislature an intention to abrogate, or curtail, fundamental rights or freedoms unless that intention is clearly manifested by unmistakable and ambiguous language⁴⁷. Nowadays, this rule may be illuminated by the experience of international law. The rule has been applied in many recent court decisions in Australia⁴⁸. It is defensive of the rules of international law expressing universal human rights. The rules of international law often coincide with the rules of the common law of Australia, even where international law has not been expressly incorporated.

The real controversy in Australia, as Professor Charlesworth and her colleagues correctly note, has concerned the extent to which, in constitutional interpretation, our courts may have regard to international law, specifically the international law of human rights, in resolving any ambiguities in the constitutional text⁴⁹.

⁴⁷ (2002) 211 CLR 476 at 492 [30].

⁴⁸ eg *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 43 [11], 49 [43], 57-58 [93]-[94], 65-66 [132]; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 133-137 [160]-[181].

⁴⁹ Charlesworth *et al* (2003) 25 *Sydney Law Review* 423 at 461-463.

In a number of cases I have suggested that they may⁵⁰. Contrary views have been voiced by other members of the High Court of Australia⁵¹. In Canada⁵², South Africa⁵³ and other countries of our legal tradition, it is common for international law, particularly the international law of human rights, to be invoked to assist in the

⁵⁰ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 380-381 [68]; *Austin v The Commonwealth* (2003) 77 ALJR 491 at 543-544 [257].

⁵¹ *AMS v AIF* (1999) 199 CLR 160 at 180 referring to *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 74, 75, 78, 79.

⁵² See eg *Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 349 per Dickson CJ; *United States v Cotrioni* [1989] 1 SCR 1469 at 1486; *Sleight Communications Inc v Davidson* [1989] 1 FCR 1038 at 1056; *The Queen v Ewanchuk* [1999] 1 SCR 330 at 365 [73]; *United States v Burns* [2001] 1 SCR 283 at 286 [8]; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at [46]; *United States v Shulman* [2001] 1 SCR 616 at 635-636 [41]-[42] per Arbour J considered *Pasini v United Mexican States* (2002) 209 CLR 246 at 274-279 [78]-[95]; cf A F Bayefsky, "International Human Rights in Canadian Courts" in B Conforti and F Francioni (eds) *Enforcing International Human Rights in Domestic Courts* (1997) 195 at 296; R St J MacDonald, "The Relationship Between International and Domestic Law in Canada" in R St J Macdonald et al (eds), *Canadian Perspectives on International Law and Organisation*, 88; L C Green, *International Law: A Canadian Perspective* (2nd ed, 1988), 85; "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" in E P Belobaba and E Gertner, *The New Constitution and the Charter of Rights* (Butterworths, 1982) 287.

⁵³ *S v Makwanyane* 1995 (3) SA 391 [37]-[39]; *S v Williams* 1995 (3) SA 632 [22]; *Ferreira v Levin* 1996 (1) SA 984 [72]; *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 [3]; cf J Dugard, "International Human Rights" in D van Wyk et al, *Rights and Constitutionalism: The New South Africa Legal Order* (Juta, 1994), 171 at 193.

task of constitutional interpretation. That great Canadian judge, Chief Justice Dickson, put it this way⁵⁴:

"The content of Canada's international obligations is, in my view, an important *indicia* of the meaning of 'full benefit of the Charter's protection'. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".

Increasingly in most final courts of the world, it has been considered increasingly appropriate to extend the dialogue between international law and constitutional law, recognising the fact that, in this century, the two must live and work together. Yet, against this global movement, two great courts have, until now, steadfastly resisted: the High Court of Australia and the Supreme Court of the United States. Now I bring the good news that the Supreme Court of the United States appears to be joining the courts of the rest of humanity.

An early indication of the new approach in the contemporary court can be found in 1997 in Justice Stephen Breyer's dissenting opinion in *Printz v The United States*⁵⁵. He said:

⁵⁴ *Re Public Service Employees' Relations Act* [1987] 1 SCR 313.

⁵⁵ 521 US 898 at 921 n 11, 977 (1997).

"Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own ... But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem - in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity".

Even amongst those Justices considered generally unfavourable to this attention to international norms, there has been some movement in the United States. Thus Chief Justice Rehnquist, in extra-judicial writing a few years before *Printz*, noted that for more than a century the Supreme Court of the United States had not looked beyond its own courts because unconvinced that precedents elsewhere would be of much help. However, Chief Justice Rehnquist acknowledged⁵⁶:

"But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process".

Variations upon this theme can be noted over the past decade, particularly in speeches and extra-judicial statements of Justices O'Connor, Kennedy, Ginsburg and Breyer.

⁵⁶ W H Rehnquist, "Constitutional Courts - Comparative Remarks" (1989) reprinted in P Kirchhof and D P Connors (eds) *Germany and Its Basic Law: Past, Present and Future - A German-American Symposium* (1993), 411 at 412 quoted in Harold Hongju Koh, "International Law as Part of Our Law" (2004) 98 *American Journal of International Law* 2 at 6-7 ("Koh").

Then came the 2002 Term of the Supreme Court. History may record it as an important turning point in constitutional doctrine in the United States. The issue was presented in *Atkins v Virginia*⁵⁷. That was a case involving the question whether it was contrary to the provisions of the Eighth Amendment of the United States Constitution, forbidding cruel and unusual punishments, to execute a convicted prisoner with established mental retardation. In an extended footnote to the opinion of Justice Stevens, for the Court, he referred to the *amici curiae* briefs, including those demonstrating that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"⁵⁸.

This reference to international experience and law elicited a dissent from Chief Justice Rehnquist urging that the Court "limit ... our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practises of sentencing juries in America"⁵⁹. More vigorously, Justice Scalia denounced the majority invocation of the views of the "world community" and their reference to the brief of the European

⁵⁷ 536 US - (2002); 70 USLW 4585.

⁵⁸ 536 US - (2002); 70 USLW 4585 at 4589, fn 21.

⁵⁹ 536 US - (2002); 70 USLW 4585 at 4591.

Union, stating that it deserved "the Prize for the Court's Most Feeble Effort to fabricate national consensus"⁶⁰. He declared the opinions of the "world community" irrelevant because their "notions of justice are (thankfully) not always those of our people"⁶¹. Resonances of Australian judicial nationalism may be recognised in this dissent.

Far from deflecting the new majority in *Atkins*, the members pursued their endeavours and even gathered up new adherents. In the 2003 Term, Justice Ruth Bader Ginsburg, who had been with me in India when the *Bangalore Principles* of 1988 were drawn up⁶², asked a pertinent question during oral argument in an affirmative action case concerned with constitutional law. She said⁶³:

"[W]e're part of world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa and they have all approved this kind of, they call it positive discrimination ... [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?"

⁶⁰ 536 US - (2002); 70 USLW 4585 at 4598 (Scalia J, with whom Thomas J joined).

⁶¹ 536 US - (2002); 70 USLW 4585 at 4598.

⁶² M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1992) 18 *Commonwealth Law Bulletin* 1306.

⁶³ Quoted from transcript, Koh, 8; Transcript of oral argument at 24. *Gratz v Bollinger* 123 S Ct 2411 (2003) (No 02-516), available in 2003 US Trans Lexis 27.

In her concurring opinion in the case, *Grutter v Bollinger*⁶⁴, Justice Ginsburg answered her own question affirmatively. Joined by Justice Breyer, she said that:

"[T]he Court's observation that race-conscious programs 'must have a logical end point' accords with the international understanding of ... affirmative action".

She cited the text and annex of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which was ratified by the United States in 1994⁶⁵. International law comes, comes, ever comes.

Three days after *Grutter*, with a larger majority, in *Lawrence v Texas*⁶⁶, the Supreme Court of the United States invalidated a State law providing criminal punishment for consensual adult homosexual conduct in private. Not only did the Court overrule its 1986 decision in *Bowers v Hardwick*⁶⁷. It stated that *Bowers* had been wrong when decided⁶⁸. Most importantly, in the text of the opinion of

⁶⁴ 539 US - (2003); 123 S Ct 2325 at 2347.

⁶⁵ 539 US - (2003); 123 S Ct 2325 at 2347.

⁶⁶ 539 US - (2003); 123 S Ct 2435 at 2472.

⁶⁷ 478 US 186 (1986).

⁶⁸ 539 US - (2003); 123 S Ct 2235 at 1484.

Justice Kennedy (for the Court); not in a footnote this time, the Supreme Court majority cited the decisions of the European Court of Human Rights in *Dudgeon v The United Kingdom*⁶⁹, which had been decided five years before *Bowers* but not mentioned in argument or in the decision of the earlier Supreme Court case. Justice Kennedy wrote⁷⁰:

"To the extent *Bowers* relied on values we share with a wider civilisation, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v The United Kingdom* ..., *Modinos v Cyprus* ... [and] *Norris v Ireland*. ... Other countries too have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct ... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent".

Justice Kennedy went on to refer to the pages of an *amicus* brief filed by Ms Mary Robinson, then United Nations High Commissioner for Human Rights. It was on those pages that the brief described the decision of the United Nations Human Rights Committee in *Toonen v Australia*⁷¹. Moreover, it explained how the

⁶⁹ (1981) 4 EHRR 149.

⁷⁰ 539 US - (2003); 123 S Ct 1435 at 1483. See Koh, above n 54, 8-9.

⁷¹ *Toonen v Australia*, Communication No 488/1992, UN doc.CCPR/C/50/D/488/1992 (1994). See Koh, above n 54, 9.

Australian Federal Parliament had enacted a law to implement the Committee's interpretation of the *International Covenant on Civil and Political Rights*⁷².

Professor Harold Hongju Koh, of Yale University, has described constitutional doctrine in the United States as it stands at this time. His description is relevant to Australia, the only difference being the currently dominant opinion⁷³:

"... [T]he last Supreme Court Term confirms that two distinct approaches now uncomfortably coexist within our Supreme Court's global jurisprudence⁷⁴. The first is a 'nationalist jurisprudence', exemplified by the opinions of Justices Scalia and Clarence Thomas⁷⁵. That jurisprudence is characterised by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives. This line of cases largely refuses to look beyond US national interests when assessing the legality of extra-territorial action. ... [It] dismiss[es] treaty or customary international law rules as meaningful constraints upon US actions. ... When advised of foreign legal precedents, these decisions have treated them as

⁷² *Human Rights (Sexual Conduct) Act 1994* (Cth).

⁷³ Koh, above n 54, 10. I acknowledge my debt to Professor Harold Hongju Koh's 2004 article for many of these points.

⁷⁴ This analysis builds on earlier discussion in Harold Hongju Koh, "On American Exceptionalism" 55 *Stanford Law Review* 1479 at 1513-1515 (2003); Harold Hongju Koh, "International Business Transactions in United States Courts" 261 *Recueil des Cours* 13, 226-234 (1996).

⁷⁵ Despite his occasional extrajudicial writings, according to Professor Koh, in his Court opinions Chief Justice Rehnquist "remains firmly in the nationalist camp".

irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty"⁷⁶.

A second, more venerable strand of 'transnationalist jurisprudence', now being carried forward by Justices Breyer and Ginsburg⁷⁷ began with Justice ... Jay and Justice ... Marshall, 'who were familiar' with the law of nations and 'comfortable navigating by it'"⁷⁸.

In later years, this school was carried forward by Justice Gray [and others] ... [T]hese Justices [do not] distinguish sharply between the relevance of foreign and international law, recognising that one prominent feature of a globalising world is the emergence of transnational law, particularly in the area of human rights, which merges the national and the international⁷⁹.

As a judge of a final court, I naturally watch this American judicial contest with close attention. As an adherent to transnationalist jurisprudence, I take heart from what is happening, virtually everywhere and now in the apex court of the United States. I believe it to be natural and inevitable. It is spurred on by elements of politics, economics, technology even possibly the

⁷⁶ See eg *Foster v Florida* 537 US 990, 990n (2002) (Thomas J, concurring in denial of *certiorari*) ["[T]his Court ... should not impose foreign moods, fads or fashions on Americans"].

⁷⁷ According to Professor Koh, Justices Stevens and Souter are also regular members of the transnationalist camp. Through their extra-judicial statements and opinions in the past Terms, Justices Anthony Kennedy and Sandra Day O'Connor "have also increasingly demonstrated transnationalist leanings".

⁷⁸ A cross-reference to H A Blackmun, "The Supreme Court and the Law of Nations" 104 *Yale Law Journal* 39 at 49 (1994). For elaboration of this theme see Harold Hongju Koh, "Justice Blackmun and the World Out There" 104 *Yale Law Journal* 23 at 28-31 (1994) (collecting cases).

⁷⁹ Compare Harold Hongju Koh "The Globalisation of Freedom" 26 *Yale Journal of International Law* 305 at 306 (2001).

evolution of our species. Putting it quite bluntly, without international law and its institutions the evolution of humanity is most seriously endangered.

As an Australian lawyer, I know that transnationalist jurisprudence has a venerable strand in Australia too⁸⁰. As a member of a minority (and which of us is not?), and because of my own sexuality, I am sensitive to the battleground in which the issue came to the fore in *Lawrence*. Just as, earlier, it did in the *Toonen* case before the United Nations Human Rights Committee. In both venues one can see the backward looking and the forward looking. In both, one can see the difference between those who reason against discrimination towards homosexuals in terms of *privacy* norms (as Justice Kennedy did) and those who reason in terms of fundamental notions of *equality* (as Justice O'Connor did)⁸¹. In Australia, these issues remain to be resolved⁸².

⁸⁰ Dating back at least to the opinion of O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 where he said: "Every statute is to be so interpreted and applied, so far as its language permits, as not to be inconsistent with the comity of nations or with the established rules of international law"; cf A F Mason, "The Tension Between Legislative Supremacy and Judicial Review" (2003) 77 ALJ 803 at 808-809.

⁸¹ 539 US - (2003); 123 S Ct 2325.

⁸² *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112; cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [45] per McHugh J.

However, we can all take heart from Justice Kennedy's conclusion⁸³:

"Had those who drew and ratified [the Constitution] known the components of liberty in its manifest possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom".

COURTS EXERCISING INTERNATIONAL JURISDICTION

Following one of the few truly original ideas in their Constitution⁸⁴, Australian lawyers are familiar with the notion that State courts may be vested with federal jurisdiction by valid federal law. The reverse cannot occur⁸⁵. However, the experiment in exercising other jurisdictions has been successful. It has ensured that federal law permeates every corner of this continental country.

Now we are seeing a development at the international level which, in some ways, bears comparison. National courts are no longer exclusively vehicles for national law. Increasingly, they are

⁸³ *Lawrence v Texas* 539 US - (2003); 123 S Ct 1435 at 1483.

⁸⁴ Constitution, s 77(ii).

⁸⁵ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; cf *Gould v Brown* (1998) 193 CLR 346.

giving effect to the norms of international law, including the universal principles of human rights. They do this most clearly where national law incorporates treaty provisions into local law⁸⁶. They do it in countries where the Constitution gives explicit local significance to international law or, in terms, directs attention to its provisions⁸⁷. In limited circumstances, they have long done so (and may still do) in respect of crimes of universal jurisdiction⁸⁸.

Now we are seeing a broader and deeper movement for the reconciliation of the systems of national and international law, including national constitutional laws. A municipal tribunal, applying international law, is no longer merely an organ of its national legal system. Instead, as Professor Ian Brownlie suggests, it exercises a kind of "international jurisdiction"⁸⁹. It becomes, in a sense, an organ of the international judiciary. This point is also made by Justice La Forest of the Supreme Court of Canada who said: "Our

⁸⁶ eg *Migration Act* 1958 (Cth), s 36 incorporating by reference the Refugees Convention 1951 with its amending Protocol.

⁸⁷ As in the references to international law in the Indian Constitution, s 51(c) and the South African Constitution, s 59(1)(b).

⁸⁸ M D Kirby, "Universal Jurisdiction and Judicial Reluctance: A New 'Fourteen Points'" in S Macedo (ed), *Universal Jurisdiction - National Courts and the Prosecution of Serious Crimes Under International Law*, Uni of Pennsylvania, 2004 at 240.

⁸⁹ cf I Brownlie, *Principles of Public International Law* (5th ed, Clarendon, 1998), 584, 708.

courts - and many other national courts - are truly becoming international courts in many areas involving the rule of law"⁹⁰

A past Secretary-General of the Commonwealth of Nations put it well⁹¹:

"At Bangalore, a pebble was cast into the waters of the common law. ... [T]he ripples it created will reach into the farthest corners of the Commonwealth."

Now, we bring this idea for the twenty-first century even beyond our legal tradition to the courts and lawyers of the entire world.

OTHER INDICATIONS OF HOPE

According to the ancients, when Pandora's Box was opened, all the virtues escaped save that of hope. Hope remained, because it

⁹⁰ See G V La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *Canadian Year Book* 89 at 100. See also *The Queen v Finta* [1994] 1 SCR 701 at 774 where La Forest J remarked that a Canadian judge's interpretation of international law 'bears some force internationally' citing art 38 of the Statute of the International Court of Justice. See G van Ert, *Using International Law in Canadian Courts* (Kluwer, 2002), 46.

⁹¹ S Ramphal, Introduction by the Secretary-General to *Developing Human Rights Jurisprudence: The Domestic Application of Human Rights Norms* (1988), p viii noted in Lester, above n 39, 25.

was at the bottom⁹². We can find that hope, even in the gloomy times of global terrorism, of dangers of nuclear proliferation and of the institutional failings in the United Nations.

As to the latter, the Secretary-General has created a panel that includes Australia's former Foreign Minister, Gareth Evans, to propose institutional changes⁹³. We can see how the great powers quickly rediscover the indispensable utility of the United Nations. Pre-emptive unilateralism is not a doctrine well suited to the long haul of modern international relations. Despite its failings, the United Nations is essential and ultimately indispensable. True, some of its officers are time-servers. However, that is true of any large organisation. In my experience, most of its leaders are noble and dedicated servants of humanity.

This is plainly the case with the Secretary-General. It is also true of the new High Commissioner for Human Rights designate (Madame Justice Louis Arbour). She combines in her person the prudence of the first High Commissioner; the imagination and commitment of the second; and the courage and experience of the third. It is also true of Professor Ivan Shearer in his work on the

⁹² cf *Zumpano v Montagnese* [1997] 2 VR 525 at 528 per Brooking JA.

⁹³ J Dauth, above n 3, p 3.

Human Rights Committee. It is true of the scholars of international law who spread its boundaries which continue to expand.

People sometimes ask me if I am ever discouraged by judicial dissent⁹⁴. Sometimes, of course, I am. But on the great issue of the reconciliation of national and international law in the courts, I am not discouraged in the slightest. I know, without doubt, that the reconciliation of international and national law will continue. The process is inevitable. It is already happening. Australia will not be exempt.

" Have you heard his silent steps?

He comes, comes, ever comes.

Every moment and every age, every day and every night

He comes, comes, ever comes"⁹⁵.

⁹⁴ As to hostility to my approach see K Walker, "The Intersection of International Law and Australian Constitutional Law" in J S Jones and J Macmillan (eds) *Public Law Intersections*, Centre for International and Public Law, ANU, 2001, 97.

⁹⁵ Tagore, above n 1.