

AUSTRALIAN AND NEW ZEALAND SOCIETY OF
INTERNATIONAL LAW

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JOINT MEETING, SYDNEY, AUSTRALIA

OPENING SESSION MONDAY 26 JUNE 2000

INTERNATIONAL LAW - DOWN IN THE ENGINE ROOM

The Hon Justice Michael Kirby AC CMG

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THE LUCKY ONES

We are the lucky ones. To this generation much is given. The lawyers and judges of today are living through a remarkable *rapprochement* between international and municipal law¹. Some have suggested that the process involves a dangerous liaison².

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¹ D Z Cass, "Traversing the Divide: International Law and Australian Constitutional Law" (1998) 20 *Adelaide L Rev* 73 at 79.

² cf H Charlesworth, "Dangerous Liaisons: Globalisation and Australian Public Law" (1998) 20 *Adelaide Law Review* 57.

Some fear the corrupting influence and seduction of the plain folks of municipal law by the fascinating interloper from outside³. But my thesis is that the development is one natural to the social, intellectual and technological features of the age we live in. It is necessary to the resolution of the problems of the planet we inhabit. It is beneficial to the rule of law, the maintenance of peace and security and the defence of human rights in every land. This is why we are the lucky ones, for we have the chance to see the future and to contribute to it in a way that no previous generation of lawyers could do.

Australia's wealthiest man (if we now omit our erstwhile citizen but frequent visitor Rupert Murdoch) is another media owner, Mr Kerry Packer. When he almost died of a heart attack a few years ago, he went through a near death experience. Upon his recovery he declared that he had been to the other side and that there was "nothing there". This was uncharacteristically ungenerous of him, given the heroic efforts of the surgeons and the confident prayers of the Sisters at St Vincent's Hospital at Sydney where he was nursed back to health. I too have been to the other side of international law. I am here today to tell you that there is a lot there. It is all happening at once. If it does not quite measure up to one's aspiration of

³ *Ibid*, at 57.

heaven: nor is it properly described as hell (except for the occasional bureaucratic experiences).

I have no competence to speak about the great disputes of politics which capture the headlines and preoccupy the political organs of the international and regional institutions of an interdependent world. Nor do I intend to speak about the growing significance of the International Court of Justice⁴ or even of the International Criminal Tribunals and the proposed Court that have responded to special problems in recent years. Instead, I want to take you down into the engineroom of international law. Down to the international agencies and municipal courts in which, today, lawyers and judges have special opportunities to contribute to the growth and influence of international law in practice. This is where I have seen the other side. It is where one finds not a few angels and secular saints who have a deep commitment to building a new world order that upholds international peace and security in an environment of economic equity and with respect for universal human rights.

⁴ S M Schwebel, "The Impact of the International Court of Justice" in *Boutros Boutros-Ghali, Amicorum Discipulorumque Liber* (1998), 663.

Because a great change has happened in my lifetime, it has happened in yours. It is happening today, and it will gather pace, in the lifetimes of the young lawyers now graduating from law schools in Australia, New Zealand, the United States and far beyond. To give you some idea of the range and variety of activities that are occurring in the engineroom of international law, let me illustrate my thesis with some examples from my own life. I am sure that many who read and hear these remarks could offer similar stories. I will deal first with some experiences in international agencies which have convinced me that international law and practice is now a highly practical and useful subject. Then I will take you into my courtroom in Australia where international legal questions arise all the time and with increasing importance and urgency.

THE AGENCIES

For me, it all began when I was appointed chairman of the Australian Law Reform Commission twenty-five years ago. Soon afterwards, the Commission was required by the Federal Attorney-General to prepare a report for the Australian Parliament on privacy protection. This task coincided with the establishment by the Organisation for Economic Cooperation and Development (OECD) of an Expert Group to develop guidelines on privacy protection in the context of transborder data flows. That was an unusual task for the OECD. Looking back, we can see it as an early portent of the increasing moves in recent years of that hard-nosed combination, the OECD, the World Bank, the International Money Fund (IMF) and

the World Trade Organisation into areas of governance without which economic advancement will be a hollow achievement, if it is attainable at all⁵.

I was elected chairman of the OECD group. We prepared our guidelines⁶. They were adopted by the Council of the OECD. They were as much designed to prevent the economic inefficiency of disparate municipal regulation of the new information technology as to defend fundamental human rights. Eventually most OECD countries, including Australia and New Zealand, accepted the guidelines. In this country (as in New Zealand) they provided the basis for privacy principles incorporated in privacy protection legislation⁷. Through the Law Reform Commission, I was able to see the highly practical way in which a legal project at an international level could assist and influence municipal law-making. After that, I could never accept that international law - even soft law - was a matter for scholars and theorists alone. In countries as far apart as Japan, the Netherlands and Australia, the deliberations of

⁵ J Kelsey, "Global Economic Policy-making: A New Constitutionalism?" (1999) *Otago L Rev* 535 at 539.

⁶ OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, Paris, 1980. cf "Privacy in Cyberspace" in M D Kirby, *Through the World's Eye* (2000), Ch 5, 52.

⁷ *Privacy Act*, 1988 (Cth), s 14. By the operation of s 5 each Principle is treated as if it were a section of the Act.

our group in Paris had a real, practical and beneficial effect on local law and international cooperation.

In the manner of these things, one engagement leads to another. Soon after the OECD work was completed I took part in the general conference of UNESCO, also in Paris. That organisation was in the bitter throes of what became the withdrawal of the United States and the United Kingdom, the former alas not yet repaired. Strangely enough, one of the given reasons for the United States withdrawal was the insistence of Director-General M'bow that UNESCO should continue the exploration of the meaning in the common first articles to the *International Covenant on Civil and Political Rights* the *International Covenant on Economic, Social and Cultural Rights* which promise the self-determination of peoples. Who were a "people" for this purpose?

It always seemed to me particularly odd that the United States should have opposed the exploration of this idea, given the famous opening words of the *Declaration of Independence*. But the United States quit UNESCO and, to its great credit, that organisation went on with the exploration of the issue of self-determination. I was appointed to the group and ultimately elected as rapporteur and chairman. Our task was to examine who were a "people" entitled to this promised right. It was, and is, a highly controversial topic. It is uncongenial to many nation states. It is even unwelcome to some people in Australia. But who can doubt, looking at the real causes of conflict in the world today, that this is one of the great issues of

international law - from East Timor to Aceh; from Burma to Tibet; from Palestine to Kosovo; from Corsica to Ulster; from the Falklands to Nunavut; and most recently from Fiji, Bougainville, West Irian and Solomon Islands to Aboriginal Australia. This is an issue that circles the earth and goes to the heart of most contemporary dangers to international peace and security. It concerns the rights of peoples but also the human rights of the individuals who make up those peoples.

The UNESCO expert group completed its task. It identified four elements necessary to constitute a "people" for international law purposes⁸. It is a misfortune that many who are unaware of the body of international law on this subject mistake self-determination for total national independence. That is a possible but not a necessary attribute of self-determination. This is a message from international law that needs to be learned in many countries.

By the time the work of the UNESCO groups was completed the HIV/AIDS pandemic was upon the world. I then met one of the truly noble participants in the building of international law - a United

⁸ UNESCO, International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples (1985-91) (Final Report SHS-85/Conf.613/10). See also UNESCO, Report of the International Conference of Experts, Barcelona 21-27 November 1998, "The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention" (1999).

States doctor who called me to serve on the World Health Organisation Global Commission on AIDS. This was Dr Jonathan Mann who tragically lost his life in 1998 *en route* to Geneva for a meeting on HIV vaccines. The Global Commission established principles for the management of the HIV epidemic, now being pursued by that unique inter-agency body, UNAIDS. Implementing the guidelines has been by no means easy, given the cultural impediments that exist in various countries. It has fallen on some of the participating agencies, such as the United Nations Development Programme (UNDP) to attempt to persuade governments and bureaucracies in affected countries to adopt the bold strategies that will help reduce the spread of the virus. Significantly, those countries which have done so (including Australia) have seen the graph of sero-conversions to HIV plateau and even fall. Those countries which have not (particularly in sub-Saharan Africa and parts of Asia) have witnessed rapid escalation in the spread of the virus.

Even that secular saint, Nelson Mandela of South Africa , could not bring himself to support effectively the UNAIDS strategy. His successor, President M'beke, seems to be embracing denial and unorthodox medical theories, for example that HIV is not the cause of AIDS. An international meeting in Durban in a month's time may

give a new beginning to international strategies in southern Africa designed to tackle this affliction of the human family. UNAIDS guidelines⁹ worked out in 1997 at meetings held in concert with the United Nations Centre for Human Rights which I have chaired, provide reflections of consensus amongst the most informed public health and epidemiological experts in the world. The guidelines afford a stimulus to the recalcitrant or the ignorant leaders and officials of nation states. This is not international law in the traditional sense. But the influence of such guidelines, carried into municipal bureaucracies by WHO and UNAIDS experts, fired with a zeal to prevent the ravages of AIDS, can sometimes have a direct local impact far greater than high-sounding treaties. This is international cooperation and principle turned to the vital effort to save human lives. Without international law and international agencies it would just be a dream.

In two other specialised agencies of the United Nations I have witnessed the practical helping hand that can sometimes be offered to domestic law-making. In 1991-92 I participated with two other judges in the International Labour Organisation (ILO) Fact-Finding and Conciliation Commission on Freedom of Association. Our particular task, just before the achievement of constitutional change,

⁹ UNAIDS/Centre for Human Rights *Guidelines on Implementation of HIV/AIDS Strategies* (Geneva, 1997).

was to examine the labour laws of South Africa and to advise on the standards they had to attain in order to conform to ILO Conventions. Having walked out of the ILO rather than be expelled during the apartheid years, South Africa's labour laws had fallen into serious disrepair. South Africa was keen to repair its relationship with international legal norms¹⁰. The ILO mission examined closely the letter and practice of the South African law. Its report, delivered to the de Klerk government was subsequently acted upon by the Mandela government. A new *Labour Relations Act* was adopted, complying with ILO standards¹¹.

In 1994, UNDP arranged my participation in a number of meetings leading up to the constitutional conference in Malawi. It was that conference which agreed on the text of constitutional changes designed to usher in a multi-party democracy in the place of the one-party rule of President Hastings Banda. After a referendum and elections, a peaceful change of government was accomplished in Malawi. I pay tribute to the fine officers of UNDP and other agencies who facilitated this remarkable change in Malawi

¹⁰ cf A Stemmett, "The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law" (1999) *The International Lawyer* at 47.

¹¹ International Labour Organisation, Report on the Mission to South Africa (1992).

and in other lands. This was truly a translation of the universal principles of human rights into action in a particular country. I do not believe that it could have happened without the skills of United Nations agencies which I saw in operation at first hand.

In more recent years I have been privileged to take part in the International Bioethics Committee of UNESCO. That body has been grappling with some of the most difficult legal and ethical questions confronting humanity. I refer to the quandaries presented by genomic science and the development of the Human Genome Project. The UNESCO Committee in 1998 adopted the *Universal Declaration of Human Rights and the Human Genome*. This contains a number of basic norms aimed to provide a framework for a global response to legal and ethical questions relevant to the entire human species¹². It is possible that in due course this Universal Declaration will lead on to a treaty, as others in the past have done. The point to be made is that an international agency, calling on diverse expertise and viewpoints from different religions and cultures, is seeking to design an effective universal response. The difficulties of securing such a response in a world of so many different starting points and where large investments and differing

¹² *Universal Declaration on Human Rights and the Human Genome* (1998). cf "The Human Genome" in M D Kirby, *Through the World's Eye* (2000), Ch 4, 41.

national intellectual property regimes apply, is not to be underestimated.

Within the last few weeks I was called to Vienna by the United Nations Office for Drug Control and Crime Prevention. Under the aegis of that agency, a Global Programme Against Corruption has been established. Several international agencies, including the OECD, the World Bank, the IMF and the World Trade Organisation, have been concerning themselves with the problem of corruption and its insidious effect on municipal governmental institutions. A judicial group on strengthening judicial integrity has now been established in Vienna working directly to the United Nations office there.

This group comprises four Chief Justices from Asia and four from Africa. At present, all of them are from countries of the common law tradition. The intention, in due course, is to establish similar groups in Latin America, Central and Eastern Europe, the former Soviet Union and perhaps elsewhere. The task is to draw up strategies, including a universal minimum code of judicial conduct. Wisely, the Vienna agency is leaving the task to the judges themselves, supported by research and other staff, as well as by informed non-governmental organisations, such as Transparency International in London and the Centre for the Independence of Judges and Lawyers within the International Commission of Jurists in Geneva.

In due course it may be expected that the Vienna Group will draw up judicial guidelines. These will afford a framework for action by United Nations agencies and member countries. Whether these guidelines may lead to treaty obligations or be given effect as conditional requirements imposed by the OECD, the World Bank, the IMF or the World Trade Organisation, remains to be seen. Effective international law cannot be dismissed. Pursuant to an OECD Convention, long arm legislation has been enacted both in the United States and Australia, to render it a crime for nationals of those countries to engage overseas in corruption of foreign officials. The point to be made is that, once again, an issue of common concern has attracted a universal response under and outside the aegis of the United Nations. The sharing of research and knowledge and the pooling of ideas will contribute to global standards and hopefully effective action, not just papers and talk.

I tell these stories not to enlarge my own role in any of these multifarious activities. My role has been relatively minor. Instead, it is told to illustrate, by reference to some activities with which I am familiar, the rapid advance of international initiatives, many of them relevant to law. What, only forty years ago, was basically the concern and responsibility of the nation states has increasingly become an issue for international cooperation, the development of universal guidelines, the involvement of people and their organisations and, sometimes, international law. These developments continue to gather pace. We are only witnessing the

opening phase of them. But we were privileged, in effect, to be there at the creation.

POLICING UNIVERSAL HUMAN RIGHTS

One of the most remarkable developments of international law in recent decades has been the growing impact of international human rights treaties on municipal law and practice. I have observed this at three levels. I want to mention each.

The Special Rapporteurs and Special Representatives

Between 1993 and 1996 I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. That function arose in the aftermath of the successful completion of the UNTAC phase, as a requirement agreed between Cambodia and members of the international community and given effect in the Paris Peace Accords¹³. Twice a year, in Geneva in April and in New York in November, it was my duty to report on the state of human rights in Cambodia to the Commission on Human Rights and to the General Assembly. I was one of about thirty United

¹³ The 1991 Paris Peace Agreements are referred to and the work of the author as Special Representative explained in "Cambodia: The Struggle for Human Rights" in M D Kirby, *Through the World's Eye* (2000), Ch 3, 24.

Nations Special Representatives and Special Rapporteurs. I saw at first-hand the operations of the Centre for Human Rights. I worked closely with the High Commissioner for Human Rights. The criteria for my visits and reports were not intuitive beliefs of my own about civilised standards. They were the principles laid down in the international treaties which together establish the basic framework of international human rights law.

Despite various difficulties, I have no doubt that my work and that of the United Nations Office of Human Rights in Cambodia, stimulated, cajoled and encouraged domestic law and practice in that country to conform with the international treaty obligations which Cambodia increasingly accepted. In a land that had been racked by revolution, war, genocide and invasion, there was a deep thirst for guidance and support. I wish that time permitted me to tell you of the noble servants of the United Nations with whom I worked during those years. Of "Shorty" Coleman, an Australian soldier supervising landmine clearance. Of Christoph Peschoux, human rights officer, who investigated dangerous cases of abuse of power. Of Basil Fernando, who instituted programmes for training prison officers and police. Of Ms Kek Galebru who helped establish non-governmental organisations to assert and uphold the rights of women.

Let no one say that the United Nations is made up of time servers. I have seen with my own eyes the dedicated and idealistic servants of international human rights law, often working in most trying and even dangerous situations. That work goes on. Many of

the Special Rapporteurs of the United Nations have suffered retaliation for their actions, including the Special Rapporteur on the Independence of the Judiciary (Dato' Param Kumaraswamy) whose case was recently taken to the International Court of Justice¹⁴. The bureaucracy of the United Nations is often trying. The frustrations and rejections are sometimes dispiriting. But let no one say that it is all talk. At least in the case of Cambodia, there was action. Even for more oppressive nation states, it is a salutary requirement of international institutions and practice today that the autocrats and their representatives must come before the bar of the United Nations and answer to charges of infractions of international human rights law. There is progress in that fact alone.

The ICCPR First Optional Protocol

My second illustration brings little credit on me. Soon after it was announced that Australia would sign the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR) (thereby rendering itself accountable to the United Nations Human Rights Committee on the communication of an individual), I was asked whether the gay and lesbian reform group in Tasmania should

¹⁴ International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commissioner on Human Rights*, (United Nations v Malaysia), Advisory Opinion (1999), ICJ Reports 62.

mount a complaint to the United Nations concerning the Tasmanian criminal laws against adult homosexual conduct between males¹⁵. I am ashamed to say that I advised against such a communication. The intended complainant, Nicholas Toonen, had not been charged with an offence under the Tasmanian laws. He had not exhausted domestic remedies because no domestic process had been taken against him. I told him that his complaint was doomed to fail. In fact, the Human Rights Committee upheld Mr Toonen's complaint against Australia¹⁶. In the ultimate result, the Australian Federal Parliament enacted a statute over-riding the Tasmanian laws¹⁷. Those laws were repealed and replaced by the non-discriminatory provisions now in force. Now, nowhere in Australia is there any law imposing criminal sanctions on people for adult private sexual conduct, although there are still serious inconsistencies in the treatment of who is an adult for this purpose.

¹⁵ Criminal Code (Tas), ss 122 and 123.

¹⁶ *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No 3) reproduced in H J Steiner and P Alston, *International Human Rights in Context* (1996), 545. See also "Same-Sex Relationships", Ch 6 in M D Kirby, *Through the World's Eye*, (2000), Ch 6, 64 at 67.

¹⁷ *Human Rights (Sexual Conduct) Act* 1994 (Cth). See also *Croome v Tasmania* (1997) 191 CLR 119.

The lessons of the *Toonen* Case are many¹⁸. For my immediate purposes, they show once again the practical operation of international human rights law, at least in a country such as Australia which has signed the First Optional Protocol to the ICCPR and is a good international citizen. As we do not have a general constitutional Bill of Rights in Australia and as there is no regional human rights court or commission for Asia or the Pacific, the importance of the ICCPR could not be over-stated. Indeed, the significance of the *Toonen* decision runs far from Tasmania and Australia which, ultimately, would have corrected their legal aberration on homosexual offences. It brings hope to people in countries where individuals are still oppressed by reason of their sexuality¹⁹. Because I am homosexual myself, I understand that oppression; indeed it helps me to understand all oppressions based on irrational and irrelevant grounds. I applaud the fact that two Australians, Nicholas Toonen and Rodney Croome, politely ignored my advice and pressed on with their communication, invoking international law. They teach once again, as Martin Luther King Jr

¹⁸ E. Evatt, "National Implementation - The Cutting Edge of International Human Rights Law", ANU Centre for International and Public Law, *Law and Policy Paper* No 12, 24.

¹⁹ See eg *Report of the Special Representative on Iran*, UN Doc E/CN.4/1991/35 para 59-60 recording how homosexual people are executed in the Islamic Republic of Iran based on the Islamic Shariat. See extract in H J Steiner and P Alston, *International Human Rights in Context* (1996) 411 at 415.

and other leaders of the American freedom movement did, the importance of courage and obstinate adherence to principle in the face of apparent difficulties²⁰.

I do not pretend that the *Toonen* decision, and its reasoning, has passed without criticism in Australia or elsewhere. For example, some have seen it as an unwarranted and premature intrusion into Australia's domestic concerns and federal arrangements. Some of the other view have considered that it did not go far enough. Thus, it has been suggested that it is fundamentally erroneous to rest the human rights response to oppression on the ground of sexuality on notions of privacy rather than on notions of full equality. This has been seen, by some observers, as little more than the "freedom" of a closeted human identity and one which tolerates the very public violence and discrimination suffered by many homosexual citizens when they move out of the privacy of the kind that ICCPR protects²¹.

²⁰ See initiatives of Amnesty International, P Baehr, (1994) 12 *Neths QHR* 5 in Steiner and Alston, above 482 at 485.

²¹ W Morgan, "Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 14 *Aust Yearbook of International Law* 277; W Morgan, "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 *Melbourne University Law Rev* 740; P Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Rev* 177 at 185.

If one were to look to the growth areas for the application of fresh thinking about international human rights norms in the decades immediately ahead, they would, I suggest, include two. One would be sexuality. Already essays are appearing on whether the right to same-sex marriages, for example, can be derived from international law²². One judge of Australia's highest court has suggested that the "marriage power" appearing in the Australian Constitution²³, although originally denoting only marriage between a man and a woman for life may, in today's society, be read more broadly to include a federal legislative power to enact laws with respect to same-sex unions²⁴. Having the constitutional power is one thing. Having the political will is, of course, another.

The second growth area is surely in the field of drug use and drug dependence. I suspect that in twenty years we will look back on the current municipal and international response to the problems presented by drugs of addiction with something like the shame that now attends, or ought to attend, the way municipal law dealt (and in

²² E H Sadtler, "A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?" 40 *Virginia J of International Law* 405 (1999).

²³ Australian Constitution, s 51(xxxi).

²⁴ *Re Wakim; Ex parte McNally* (1999) 73 ALJR 639 at 850 [45] per McHugh J.

some places, including in the United States, still deals) with human sexuality.

Bangalore Principles on Domestic Application of International Law

A most important development has occurred in Australia in the use that is being made of international human rights norms. It is a development new in a country which has hitherto adhered strictly to the "dualist" notion: that the norms of international law do not become part of the domestic law unless made so by the municipal lawmaker²⁵. The development to which I refer is sometimes described by reference to the Bangalore Principles²⁶. These were adopted at a conference mainly attended by Commonwealth judges in Bangalore, India in 1988. The only "outsider" was Ruth Bader Ginsburg, then on the eve of her appointment to the United States Supreme Court. The Bangalore Principles acknowledge the dualist rule. International law is not in most countries, as such, part of domestic law. But in respect of international human rights norms,

²⁵ R Higgins, "The Role of National Courts in the International Legal Process" in *Problems and Process: International Law and How we Use It* (1994), Ch 12, 205; T Buergenthal, "Modern Constitutions and Human Rights Treaties" 36 *Columbia Journal of Transnational Law* 211 at 213 (1997).

²⁶ cf Bangalore Principles (1988) 62 *Aust LJ* 531; (1988) 14 *Commonwealth Law Bulletin* 1196; Judicial Colloquium April 1989, Harare, Zimbabwe, on Domestic Application of International Human Rights Norms (1989) 63 *Aust LJ* 497.

the Bangalore Principles accept that judges of the common law tradition may properly utilise such international rules in construing an ambiguous statute or in filling the gaps in the precedents of the common law.

In a former judicial post, I frequently invoked the Bangalore Principles, sometimes with, and sometimes without, the support of judicial colleagues²⁷. An important breakthrough occurred in Australian thinking on this subject in the *Mabo* decision which, for the first time, upheld the rights of indigenous peoples in Australia to title in land with which they could prove long association²⁸. One strand in the reasoning which led the majority of the High Court of Australia to reversing past judicial holdings and upholding that claim, was the serious breach that would otherwise arise in respect of Australia's international human rights obligations. Justice F G Brennan, who wrote the leading opinion in the *Mabo Case*²⁹, said:

"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the

²⁷ *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262. cf M D Kirby "The Australian use of international human rights norms: from Bangalore to Balliol, a view from The Antipodes" (1993) 16 *University of New South Wales Law Journal*, 363.

²⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²⁹ (1992) 175 CLR 1 at 42.

common law, especially when international law declares the existence of universal human rights. A common law doctrine founded in unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule".

The Court in *Mabo* acknowledged the impact which "the powerful influence of the Covenant" would increasingly come to play upon Australia's common law. This appreciation obliges a shift in the understanding of the dualist principle. In the past, it has ordinarily been voiced in terms that municipal law must await incorporation of international law by the municipal legislature. Now, in a common law country, it should, I think, be accepted that the judiciary also has a role, albeit in the minor key, to shape, express and develop the law. In the exercise of that role, the judiciary of the common law tradition may, in appropriate cases, play a part in moulding the common law to universal principles expressed in international human rights law. In doing so, they should not simply incorporate a treaty *holus bolus* "by the back door"³⁰. However, the legitimate role of judicial elaboration using international law as an influence upon municipal common law is now increasingly understood and decreasingly controversial. This process will, I have no doubt, continue to gather pace.

³⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J. cf J Bouwhuis, "International Law by the Back Door?" (1998) 72 *Aust LJ* 794.

In my reasons in a couple of decisions in the High Court of Australia, I have suggested that the Bangalore Principles might be appropriate for incorporation into reasoning about the meaning of the Australian Constitution itself³¹. I have suggested that the Court "should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that it would involve a departure from such rights"³². In elaborating this view I have suggested³³:

"Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity ... The Australian Constitution ... speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community".

³¹ cf E-U Petersmann, "How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society" 20 *Michigan Journal of International Law* 1 (1998); J C Yoo, "Globalism and the Constitution: Treaties, Non Self-Execution and the Original Understanding", 99 *Columbia Law Review* 1955.

³² *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417. cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 655-657.

³³ *Kartinyeri* (1998) 195 CLR 337 at 418 [166]-[167] citing *South West Africa Cases* (2nd phase) [1966] ICJR 3 at 293; cf E-U Petersmann, "How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society" 20 *Michigan Journal of International Law* 1 (1998).

I believe that in due course this opinion will be vindicated. The *rapprochement* between municipal laws (including constitutional laws) and international law will gather pace as the twenty-first century progresses.

It has to be acknowledged that views of the kind which I have mentioned have attracted criticisms, especially from those who adhere to the "originalist" school of constitutional interpretation³⁴, which I regard this as a form of legal ancestor worship³⁵. Two other Australian developments should also be stated. One is the introduction of a Bill designed to overcome a decision of the High Court and to render, as part of Australian federal law, the rule that "entering into an international treaty is not reason for raising any expectation that government decision-making will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic law"³⁶.

³⁴ G Craven, "The High Court of Australia: A Study in the Abuse of Power" (Alfred Deakin Lecture Trust, Melbourne, 1997), 33 noted H Charlesworth, "Dangerous Liaisons: Globalisation and Australian Public Law" (1998) 20 *Adelaide L Rev* 57 at 65.

³⁵ M D Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne Uni L Rev* 1. cf *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648 at 669-673 [110]-[129].

³⁶ Administrative Decisions (Effect of International Instruments) Bill (1999) (Cth).

The second development is the institution by the Australian government of a review of Australia's participation in six United Nations committees which oversee human rights treaties³⁷. This review has followed, in point of time, criticism of Australia in the Committee on the Elimination of All Forms of Racial Discrimination in respect *inter alia* of mandatory sentencing laws that were partly copied from the United States. The work of the United Nations human rights committees has been defended by the President of the Australian Human Rights and Equal Opportunity Commission³⁸. The outcome of the review is not yet known.

So far as domestic application of international law by the judges is concerned, Hilary Charlesworth has said, accurately I believe, that the suggested "threat of international law to the Australian legal system is much exaggerated"³⁹. She has described the highest court as being "very cautious in its embrace of international law; it has kept its gloves and hat on at all times"⁴⁰. If, occasionally, I have lifted my hat to pay passing respect to

³⁷ "UN urges Howard to review state jail laws", *Sunday Telegraph*, 26 March 2000 at 19.

³⁸ A Tay, "Walk Tall in a Wicked World", *Sydney Morning Herald*, 26 March 2000 at 17.

³⁹ H Charlesworth, "Dangerous Liaisons: Globalisation and Australian Public Law" (1998) 20 *Adelaide L Rev* 57 at 66.

⁴⁰ *Ibid*, at 66.

international law it is (I hope you will understand) because my experience over twenty years has brought me into close familiarity with the operations of international law and international institutions - especially in the field of human rights. That operation is by no means alien to lawyers of the Anglo-American tradition. The influence of such lawyers upon the texts and jurisprudence, from the beginnings of Mrs Roosevelt's *Universal Declaration of Human Rights* up to the present time, has been profound. In a sense, as Judge Buerghenthal said in 1997⁴¹:

"It is ironic that western countries which have a cultural and geopolitical interest in global respect for human rights, have lately come to apply brakes to the domestic application of international norms. By way of contrast, some States which have suffered from past dictatorial regimes have played an important role in encouraging the adoption of domestic constitutional mechanisms that strengthen the power of the independent judiciary to enforce international human rights guarantees in conflict with national law and to implement the rulings of international tribunals".

CONCLUSIONS

In these remarks I have concentrated mainly on the international law of human rights. But no sitting of the High Court of Australia now passes without some relevant international legal principle being invoked as an aspect of a domestic legal problem.

⁴¹ Buerghenthal, above, 212-213.

Many cases come before the Court concerning the *Refugees Convention* which, in Australia, has been incorporated into municipal law in respect of the definition of "refugees"⁴². Beyond this, important questions are regularly presented to the courts concerning extradition law⁴³, the *Convention on the Civil Aspects of International Child Abduction*⁴⁴, the international intellectual property protection regimes⁴⁵, various conventions of the International Labor Organisation to which Australia is a party⁴⁶, the *Hague Rules* and the *Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*⁴⁷, and the *Closer Economic Relations*

⁴² See eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Ethnic Affairs v G* (1998) 191 CLR 559; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. cf C Ward, "A" v Minister for Immigration and Ethnic Affairs: Principles of Interpretation Applicable to Legislation Adopting Treaties" (1998) 26 *Federal Law Rev* 207; P Matthew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Rev* 177.

⁴³ *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528; *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 193 CLR 128.

⁴⁴ *De'L v Director General (Department of Community Services)* (1996) 187 CLR 640.

⁴⁵ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1998) 191 CLR 140; *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158; *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648.

⁴⁶ *Victoria v The Commonwealth* (1996) 187 CLR 416; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

⁴⁷ *Great China Metal v Malaysia Shipping* (1998) 196 CLR 161.

*Treaty between Australia and New Zealand*⁴⁸. Most of these cases are collected each year by Professor Donald Rothwell in the splendid *Year Book of International Law* produced by the Australian and New Zealand Society. Each year this chapter grows larger.

Even if municipal judges today in countries such as Australia, New Zealand and the United States were personally disinclined to lift their eyes to the burgeoning growth of international law, their ordinary judicial duties will increasingly confront them with the realities that come with global transport, interactive technology and international problems. International law is no longer a realm of princes, diplomats and nations. The global economy and the global village have brought international law into the courtrooms at every level.

These developments will continue and indeed will gather pace. They will require greater imagination and open-mindedness on the part of judges and lawyers. The element of parochial self-satisfaction and the sense of superiority has never been far from the legal traditions of the common law. Now lawyers of that tradition must live in the reality of a world in which international law has a very large and growing part to play.

⁴⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

That is why this conference is both symbolic and timely. It is symbolic because it brings some of the most distinguished lawyers from the northern hemisphere to Australasia to share insights and understanding. Australia and New Zealand are good international citizens. They have a fine tradition of intellectual participation in the field of international law. This conference is timely because, as I have demonstrated, many things are happening in this part of the world to render international law of great relevance. We are the lucky ones. We have the chance to witness, and to contribute to, changes of the most profound legal significance. Let future generations say of international law at this moment that it was blessed with creative intellects who saw the tectonic shift occurring and recognised what they saw.