LAW, LIKE THE OLYMPICS, IS NOW INTERNATIONAL - BUT WILL AUSTRALIA WIN GOLD?*

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OLYMPIC AFTERGLOW

Who cares about international law? Specifically, who cares about the international law of human rights? I do. You do, or should. Members of every minority (and there are a lot of them) do. Millions of people overseas do. That makes a lot of people who care about human rights. And universal human rights are now a major focus of international law.

Even those who pretend that they do not care, change their spots immediately when their own human rights, or those of people close to them, are threatened. If it were not so sad, it would be amusing to see how rapidly some people, with a hard-line attitude about the "war on drugs", alter their perceptions when suddenly they find that a person who has been contributing to the billion dollar industry in illegal drugs, is a son or a daughter or a spouse or other close friend. Then, at last, they may come to see the issue as one of human rights. If it is an issue of human rights, it involves international law for human rights which are universal.

I offer these remarks in the warm afterglow of the successful Sydney Olympic Games. I did not actually attend the events. But like millions of Australians, I watched the competitors on television, pressing themselves to, and beyond, the limits of human ability. I sat on the edge of my seat as Cathy Freeman made her run. I did not expect to be moved by it at all. The one thing I always agreed about with Justice Meagher, in the New South Wales Court of Appeal, was disdain for sport. But as I watched, I came to realise a universal truth. Sport can unite people in peaceful competition, plumb the depths of human abilities, test the nobility and courage of the human spirit and emphasise things that we can all understand, simply because we are humans.

Similar themes lie at the heart of human rights. Searching for values that we hold in common. Realising that there are some universal rights, despite all the differences that race, religion, gender, history, sexuality and other differentials give rise to.

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In the Olympic ceremonies, there was something for everybody. Certainly something for everybody in Australia. The symbols of our country and its best aspirations were reinforced. At the opening, women alone carried the torch in the final lap. All of them were champions. An indigenous Australian champion lit the Olympic flame. The names of our competitors (including some medal winners) illustrated the great variety of the ethnic communities of contemporary Australia. The Olympics will be followed this week by the Paralympic Games, with their celebration of the fact that "disability" is not necessary an appropriate word where various forms of human impairment are concerned.

In the closing ceremony of the Olympics there were the comedians taking the mickey out of pretension, the sentimental tunesmiths and musical stirrers. And at the end of the parade, in imitation of the Sydney Gay and Lesbian Mardi Gras, the "divas" and other drag queens. None of these symbols would have been thinkable in the Australia of the Melbourne Olympics of 1956. They show how far Australia has advanced in 44 years.

Symbols come comparatively cheaply. Substance, not sentiment, is what ultimately matters. Yet symbols can help to shape popular thinking. They can also help focus Australia's attention, at a moment of prime concentration, on the unfinished agenda for human rights. The human rights of women. Of indigenous peoples. Of ethnic minorities. Of the young and old. Of people with impairments. Of gays, lesbians, bisexuals and trans-gendered people. And we should see all of these issues in a global context. Australians should continue to strive for gold in the race for human rights.

After a century of our federal Constitution, we can look at ourselves and, without too much self-satisfaction, accept that our laws and institutions are in better shape than those of many countries. Better than Fiji or Indonesia or East Timor or the Solomons. Much better than Burma, Yugoslavia, Iraq. Yet comparing our laws and institutions with countries beset by military coups and autocratic destabilisation, is scarcely a reason for prolonged self-praise.

In the second century of federation, Australians must preserve and extend their quest for freedom. We must do better in our national commitment to uphold the human rights of all. Inevitably this means that we must become aware of the worldwide movement for human rights upheld by international law and international institutions. There is an Australian tendency to be suspicious of international law, indeed of foreigners. It does not matter which government is in office. It probably has to do with our history. It is a typical attitude of people living on an island. In this Mayo Lecture, I want to explain why I do not share this attitude. From the background of my own experiences in international bodies and as an Australian judge, I want to give the reasons why I see the growth of international law as generally a beneficial, indeed inevitable, development. I have seen the future. I feel obliged to share the knowledge of what I have seen.

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 all.[1]

I was elected chairman of the OECD group. We prepared our guidelines.[2] 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, accepted the guidelines. In this country they provided the basis for privacy principles incorporated in privacy protection legislation.[3] Through the Law Reform Commission, I was able to witness 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 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. An expert group of UNESCO was exploring the meaning of 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?

I was appointed to the group and ultimately elected as rapporteur and chairman. The issue we explored 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

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

2 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.

3 *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.

world today, that this is one of the great issues of international law - from East Timor to Acheh; 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 purposes.[4] 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 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 to 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, whilst President, bring himself to support effectively the UNAIDS strategy. His successor, President M'beke, appeared at one stage to be embracing denial and unorthodox medical theories, for example that HIV is not the cause of AIDS. UNAIDS guidelines[5] 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

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4 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).

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

not international law in the traditional sense. The influence of such guidelines however, 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, 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 norms.[6] 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 standards.[7]

In 1994, UNDP arranged my participation in a number of meetings leading up to a 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 met the fine officers of UNDP and other agencies who facilitated this remarkable change in Malawi 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. Similar skills are at work today in East Timor, Kosovo and Cyprus.

In more recent years I have been privileged to take part in the International Bioethics Committee (IBC) of UNESCO. A meeting of that body in Quito, Ecuador will be held shortly. The IBC 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

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6 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.

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

response to legal and ethical questions relevant to the entire human species.[8] 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 national intellectual property regimes apply, is not to be under-estimated.

In April 2000 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 with the United Nations office there.

The Global Programme Against Corruption is comprised of 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 this 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 guidelines. These will afford a framework for action by United Nations agencies and member countries. Whether these guidelines lead to treaty obligations or are 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 Sates 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. It has been relatively minor. Instead, it is told to illustrate, by reference to some activities with which I am familiar, the rapid advance of

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8 *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.

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. All citizens, but especially lawyers, should be aware of them.

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 Accords.[9] 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 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.

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

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[9] 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.

Cumaraswamy) whose case was recently taken to the International Court of Justice.[10] 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 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 to 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 mount a complaint to the United Nations concerning the Tasmanian criminal laws against adult homosexual conduct between males.[11] 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 Australia.[12] In the ultimate result, the Australian Federal Parliament enacted a statute over-riding the Tasmanian laws.[13] 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.

The lessons of the *Toonen Case* are many.[14] 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

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10 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.

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

12 *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.

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

14 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.

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 sexuality.[15] Because I am homosexual myself, I understand that oppression; indeed it helps me to understand all 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 the importance of courage and obstinate adherence to principle in the face of apparently overwhelming difficulties.[16]

The *Toonen* decision, and its reasoning, has passed without criticism in Australia. 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 mistaken 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 protects.[17]

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, in the legal literature, essays are appearing on whether the right to same-sex marriages, for example, can be derived from international law.[18] One judge of the High Court, Justice McHugh, has suggested that the "marriage power" appearing in the Australian Constitution,[19] although originally denoting only marriage between a man and a woman for life may, in today's society, be

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15 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.

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

17 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.

18 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).

19 Australian Constitution, s 51(xxxi).

read more broadly to include a federal legislative power to enact laws with respect to same-sex unions.[20] 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. This was the subject of a previous Mayo Lecture by Justice Jones on the subject: "Towards a National Solution for the Drug Problem Problem". I suspect that in twenty years we will look back on the current national 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 local laws dealt (and in some places still deals) with human sexuality.

Bangalore Principles on Domestic Application of International Law

A third and most important development has occurred in Australia in the use that is being made of international human rights law. 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 lawmaker.[21] The development to which I refer is sometimes described by reference to the Bangalore Principles.[22]

The Bangalore Principles were adopted at a conference mainly attended by Commonwealth judges in Bangalore, India in 1988. 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, 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 my former judicial post with the New South Wales Court of Appeal, I frequently invoked the Bangalore Principles, sometimes with, and sometimes without, the support of judicial colleagues.[23] 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 association.[24] One strand in the

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

21 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" (1997) 36 *Columbia Journal of Transnational Law* 211 at 213.

22 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.

23 *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.

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

reasoning which led the majority of the High Court 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. Sir Gerard Brennan, a judge who derived from Queensland and who wrote the leading opinion in the *Mabo Case*.[25] 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 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. The judiciary of the common law tradition can, 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".[26] 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.

In my reasons in a number 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 itself.[27] I have proposed 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".[28] In elaborating this opinion I have suggested.[29]

> "Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their

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25 (1992) 175 CLR 1 at 42.

26 *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.

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

28 *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.

29 *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" (1998) 20 *Michigan Journal of International Law* 1.

> 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".

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

So far as domestic application of international law by the judges is concerned, Professor Hilary Charlesworth has said, accurately I believe, that any suggested "threat of international law to the Australian legal system is much exaggerated".[30] She has described the High Court as being "very cautious in its embrace of international law; it has kept its gloves and hat on at all times".[31] A similar view of the Court's jurisprudence has recently been expressed by Amelia Simpson and Professor George Williams.[32] If, occasionally, I have lifted my hat to pay passing respect to 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.

CONCLUSIONS

In this Mayo Lecture 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. 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".[33] Beyond this, important questions and cases are regularly presented to the Court concerning extradition law,[34] the *Convention on the Civil Aspects of International Child Abduction,*[35] the international intellectual property protection regimes,[36] various conventions of the International Labor

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

31 *Ibid,* at 66.

32 A Simpson and G Williams, "International Law and Constitutional Interpretation" (2000) 11 *Public Law Review* 205.

33 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.

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

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

36 *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1998) 191 CLR 140; *Phonographic Performance Co of Australia Ltd v Federation of Australian*

Organisation to which Australia is a party,[37] the *Hague Rules* and the *Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*,[38] and the *Closer Economic Relations Treaty* between Australia and New Zealand.[39]

Even if judges of national courts in countries such as Australia were personally still disinclined to lift their eyes to the growth of international law, their ordinary judicial duties would 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. This does not mean that we should be uncritical of institutional and substantive weaknesses,[40] but hostility or indifference to the growth of international law and international institutions are not appropriate responses.

Such 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. We are fortunate, therefore. We have the chance to witness, and to contribute to, changes of the most profound legal significance for law, for Australia and the world. Let future generations say of international law at this moment that it was blessed in Australia with creative intellects who say the tectonic shift occurring and recognised what they saw.

Commercial Television Stations (1998) 195 CLR 158; *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648.

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

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

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

40 Compare: Joint News Release by Minister for Foreign Affairs and Attorney-General, Improving the Effectiveness of United Nations Committees, 29 August 2000; International Commission of Jurists, *ICJ Expresses Concern at Australian Position on UN Treaty Bodies*, 30 August 2000.