The Role of International Standards in Australian Courts*

*Hon Justice Michael Kirby AC CMG***

New perspectives

Over the past decade, I have had the privilege of working in a number of the agencies of the United Nations. Necessarily, this work has given me a perspective of the weaknesses and inefficiencies of the United Nations. But it has also made clear to me its utility in furthering the grand objectives conceived during the Second World War and carried into effect by the UN Charter in 1945.

Working for the United Nations has influenced my approach to the role of international law both generally and in relation to Australian law. It has sharpened my perception both of the potential of international law to assist the development of Australian law and of the difficulty which that potential presents for both legal theory and practical implementation.

In ways which I have described elsewhere, my eyes were opened to the methods by which international human rights treaties could be utilised in the daily work of the courts by my participation in a conference in Bangalore, India, seven years ago.[1] The purpose of this paper is: to describe the Bangalore Principles; to illustrate their growing acceptance in Australian courts and in other countries of the common law; and to demonstrate the many practical instances in which international human rights law can be of assistance in understanding and developing Australian common and statute law.

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1 MD 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.

The Bangalore Principles

The traditional view of most common law countries has been that international law is not part of domestic law. Blackstone in his Commentaries, suggested that:

> The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted in its full extent by the common law, and is held to be part of the law of the land[2]

Save for the United States, where Blackstone had a profound influence, this view came to be regarded, virtually universally, as being "without foundation".[3] In Australia, Mason J explained the traditional position in 1982 in these terms:

> It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia... To achieve this result the provisions have to be enacted as part of our domestic law, whether by a Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament...to legislate so as to incorporate into our law the provisions of [international conventions].[4]

More recently, however, a new recognition has come about of the use that may be made by judges of international human rights principles and their exposition by the courts, tribunals and other bodies established to give them content and effect. This reflects both the growing body of international human rights law and the instruments, both regional and international, which give effect to that law. It furthermore recognises the importance of the content of those laws. An expression that seems to encapsulate the modern approach was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles*.

The Bangalore Principles[5] state, in effect, that:

(1) International law, whether human rights norms or otherwise, is not, as such, part of domestic law in most common law countries;

(2) Such law does not become part of domestic law until Parliament so enacts or the judges, as another source of law-making, declare the norms thereby established to be part of domestic law;

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2 Quoted in *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477.
3 Note 2 above, at 477.
4 *Koowarta v Bjelke-Petersen and Ors* (1982) 153 CLR 168 at 224f. See comment [1994] NZLJ 433 at 434.
5 See Kirby, n 1 above, at 373f.

(3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty, even one ratified by their own country;

(4) But if an issue of uncertainty arises, as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute, a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

(5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

Some lawyers, and not a few judges, brought up in the tradition of the strict divide between international and municipal law, were inclined at first to regard the Bangalore Principles as erroneous.[6] They regarded with scepticism the amount of assistance which could be derived from an international treaty, other international law or the pronouncements of international or regional courts, tribunals and committees.

High judicial pronouncements

In the seven years since Bangalore, however, something of a sea change has come over the approach of courts in Australia, as well as in New Zealand and England.

The clearest indication of the change in Australia can be found in the remarks of Brennan J (with the concurrence of Mason CJ and McHugh J) in *Mabo v Queensland [No 2]*.[7] In the course of explaining why a discriminatory doctrine, such as that of *terra nullius* (which refused to recognise the rights and interests in land of the indigenous inhabitants of a settled colony such as Australia) could no longer be accepted as part of the law of Australia, Brennan J said:

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the international remedies to individuals pursuant to Australia's accession to the *Optional Protocol* to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the *Covenant* and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and

6 See eg, Samuels JA in *Jago v District Court of New South Wales and Ors* (1988) 12 NSWLR 558 (CA) at 580f.

7 (1992) 175 CLR 1.

> important influence on the development of the common law, especially when international law declares the existence of universal human rights.[8]

To similar effect were the remarks of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Limited*,[9] a decision later substantially affirmed by the House of Lords.[10] In a sense, it paved the way for the reasoning of Brennan J in *Mabo* and was referred to by him. In the course of his reasoning on a libel question, Balcombe LJ referred to article 10 of the European Convention on Human Rights to which the United Kingdom is a party. That article relates to freedom of expression. His Lordship observed:

> Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: per Lord Ackner in *Reg v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 761. Thus (1) Article 10 may be used for the purpose of the resolution of an ambiguity on English...legislation...(3) Article 10 may be used when the common law...is uncertain.[11]

A similar question was presented to the New South Wales Court of Appeal in *Ballina Shire Council v Ringland*.[12] A majority (Gleeson CJ and Kirby P; Mahoney JA dissenting) followed *Derbyshire*. In coming to our respective conclusions, both Mahoney JA[13] and I[14] referred to the provisions of article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) which Australia has ratified. Following as it did *Mabo*, nobody questioned in *Ringland* the relevance of a consideration by the court of applicable international human rights principles in assisting it to come to its conclusions about the content of local common law.

In New Zealand, the same trend has emerged. There, the position is somewhat different from that in Australia and England, by reason of the enactment of the *New Zealand Bill of Rights Act 1990*.[15]

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8 Note 7 above, at 42. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 330, 337, 361, 365. Compare, G Triggs, "Customary International Law and Australian Law" in AJ Bradbrooke and AJ Duggan (eds), *The Emergence of Australian Law*, Butterworths, Sydney, 1989, pp 376, 381; BF Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 *James Cook University Law Review* 78.

9 [1992] QB 770 (CA).

10 [1993] AC 534 (HL).

11 Note 9 above, at 812.

12 (1994) 33 NSWLR 680 (CA).

13 Note 12 above, at 721.

14 Note 12 above, at 699.

15 Compare, M Mulgan, "Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution" (1993) 5 *Canterbury*

In *Minister of Transport v Noort; Police v Curran*,[16] the New Zealand Court of Appeal concluded that in interpreting the Bill of Rights Act it was of "cardinal importance" to consider and to give effect to the Act's "antecedents". Cooke regarded the ICCPR as one of the Act's most important "antecedents".

The extent of a possible obligation on the part of New Zealand ministers to have regard to international human rights norms was considered by the Court of Appeal in *Tavita v Minister of Immigration*.[17] Delivering the interim judgment of the New Zealand Court of Appeal, Cooke P stopped short of deciding that international obligations *must* be considered in the performance of the administrative decision-making process.[18] His Honour described the position in New Zealand:

> Since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of the country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts, if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the Executive is necessarily free to ignore them.[19]

Cases applying the Bangalore Principles

In an earlier essay,[20] I collected a number of decisions of the High Court and of the New South Wales Court of Appeal in which reference had been made to international human rights principles in the development of the understanding of local law. As well as appearing in these two courts,[21] such

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Law Review 235; J Craig, "The 'Bill of Rights' Debates in Australia and New Zealand—A Comparative Analysis" (1994) 8 *Legal Studies* 67. See also *R v Goodwin* [1993] 2 NZLR 153 (CA) at 168.

16 [1992] 3 NZLR 260 (CA).

17 [1994] 2 NZLR 257 (CA).

18 Note 17 above. See B O'Callaghan, "Case Note: Tavita v Minister for Immigration" (1994) 7 *Auckland University Law Review* 762 at 764.

19 Tavita, n 17 above, at 266.

20 See Kirby, n 1 above.

21 See eg. *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45; 79 ALR 591 (CA); *S & M Motor Repairs Pty Limited v Caltex Oil (Australia) Pty Limited and Anor* (1988) 12 NSWLR 358 (CA); *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 (CA) at 569; see now (1989) 168 CLR 23.

cases have come before the Federal Court,[22] the Family Court[23] and in the Court of Criminal Appeal of New South Wales.[24] In many of the decisions, a feature of the reasoning is the reference by the judges, not only to the text of a relevant international instrument, but also to the development of the jurisprudence by courts, tribunals and committees, particularly by the European Court of Human Rights.

Australia lacks an established framework for reference to jurisprudence developed around human rights provisions expressed in international law. This has not however stopped the courts, in the manner suggested in the Bangalore Principles, from utilising international law where a relevant gap appears in the common law or a statute falls to be construed which is ambiguous or uncertain of meaning. Increasingly, judges of our tradition, faced with such a problem, are turning not simply to the analogous reasoning which they can derive from past judgments, written often in a different world for different social conditions. Now, increasingly, they are looking, where relevant and applicable, to international human rights jurisprudence. In my view, this is both a natural and desirable development, and one that is particularly apt in this time of globalisation.

Cautionary tales

Critics of the developments which I have outlined would list a number of considerations which certainly need to be taken into account as the judges venture upon this new source of law-making. A primary concern often stems from the fact that treaties are typically negotiated by the executive government, as the modern manifestation of the Crown, with little or no parliamentary participation. The executive, when making treaty decisions, thus may or may not reflect the will of the people as expressed in Parliament.

Processes of ratification are often defective. For example, the Federal Government's accession to the First Optional Protocol to the ICCPR, before the instrument was even tabled in Parliament, has been described by one

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22 See eg, *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 (FFC); 112 ALR 529 at 534f; *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436 (FFC) at 443 (Black J).

23 See eg, *Re Marion* (1990) 14 Fam LR 427 at 449; contrast *Re Jane* (1988) 12 Fam LR 662.

24 See eg, *R v Greer* (1992) 62 A Crim R 442 (NSWCCA); *R v Astill* (1992) 63 A Crim R 148 (NSWCCA); *R v Sandford* (1994) 33 NSWLR 172 (CCA) at 177f, 185f. See also, *Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263 (CA); *Canellis v Slattery* (1993) 33 NSWLR 104 (CA) (reversed HC).

observer as "extraordinary...without any public debate or even public awareness of its existence, let alone its scope and significance".[25]

In federal countries, such as Australia, the ratification of international treaties and their use by courts may be a means to undermine the distribution of powers between the federal and State legislatures in a way never contemplated by the drafters of the Constitution.[26] One reason advanced for using legislation to introduce an aspect of international law into domestic law in a federation, and to refrain from introducing such principles by judicial decision, is that this course will permit the constitutional validity of the statutory introduction to be tested in the courts.

Judicial introduction of human rights norms may divert the community from the more open, principled and democratic adoption of such norms in constitutional or statutory amendments which then have the legitimacy of popular endorsement. It is upon this ground that some criticism has been voiced of the recent discovery by the High Court of fundamental rights to be implied from the nature and purposes of the Constitution although not expressed there.[27] Those who hold to this view urge that it would be preferable to engage in a national debate and openly to embrace an enacted Bill of Rights than to accept such a development from a well-meaning judiciary, introducing it "by stealth".

Some commentators have also expressed scepticism about the international courts, tribunals and committees which pronounce upon human rights.[28] These commentators argue that the various arms of government should be wary of making decisions that may deny their own legal and social history, for the sake of international conformity.

To similar effect, critics have pointed to the generality of the expression of the provisions contained in international human rights instruments. Of necessity, the charters are expressed in language which lacks precision. This means that those who use them may be tempted to read into the broad language what they hope, expect or want to see. Whilst the judge of the common law tradition has an indisputably creative role, such creativity must

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25 A Twomey, *Procedure and Practice of Implementing International Treaties*, Parliamentary Research Background Paper No 27 (1995), p 9.

26 See eg, MD Kirby, "Human Rights—The International Dimension", address, Parliament House, Canberra, 17 February 1995 in Australian Parliament, Senate, *Occasional Papers* (forthcoming).

27 See eg, D Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Monash University Law Review* 195; A Fraser, "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Sydney Law Review* 213; L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166.

28 See eg, *R v Jeffries* [1994] 1 NZLR 290 (CA) at 299.

nevertheless proceed in a judicial way. It must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people.[29]

Finally, some critics caution against undue, premature undermining of the sovereignty of a country by judicial fiat and the authority of every country's law-makers to develop human rights in their own way, at least when they are democratically elected and accountable. It would be ironic if the advance of international human rights principles were to undermine the variety of human legal systems and the democratic accountability which must itself be respected by the courts.

Support for the Bangalore Principles

Against the foregoing considerations, the supporters of the Bangalore Principles rely on a number of ~~factors~~ considerations.

The Bangalore Principles do not threaten the sovereignty of national law-making institutions. They acknowledge that if those institutions have made, by constitutional, statutory or common law decision, a rule which is unambiguous and binding, no international human rights principle can undermine or overrule the applicable domestic law. To introduce such a principle requires the opportunity of a gap in the common law or an ambiguity of a local statute. Then, by direct legislation or indirect introduction by the judicial branch of government, the principle can be imported into the law of the sovereign country. Far from being a negation of sovereignty, this is an application of it.

The process which the Bangalore Principles endorse is, in a sense, as Brennan J described it in *Mabo*, an inevitable one. As countries like Australia, by subscription to the First Optional Protocol, submit themselves to the external scrutiny and criticism of their laws by the United Nations Human Rights Committee, the result must be addressed. If a domestic law is measured and found wanting, a country is then obliged to bring its law into conformity with the treaty, to withdraw from the treaty if it may, or to be revealed as nothing more than a practitioner of human rights "window-dressing".

Modern notions of democracy are more sophisticated than they formerly were. They involve more than simply the reflection in law-making of the will of the majority, intermittently expressed upon a broad range of issues. It is now increasingly accepted that the legitimacy of democratic governance depends upon the respect by the majority for the fundamental rights of

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29 See eg, Brennan J in *Dietrich v The Queen* (1992) 177 CLR 292 at 323.

minorities.[30] Therefore, in so far as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is understood today.

The view has been expressed that a federal Parliament and government is a trustee in a federal country for the international standards of the world community and it is the responsibility of the federal polity to be the nation's voice.[31] The power of a federal Supreme Court to strike down excessive laws and to measure all laws against the standards of the Constitution, ensure that such laws meet the requirements of constitutionality. Federal constitutions must themselves adapt to the world in which the federation finds itself. This, indisputably, is a world of increasing interrelationships in matters of economics and of human rights. Judges, no less than legislatures and governments, can afford to ignore this reality.

Giving effect to international law, where a country has formally ratified a relevant treaty, does no more than give substance to the act which the executive government has taken. The knowledge that the judicial use of international law in this way is now becoming more frequent, may have the beneficial consequence of discouraging ratification where there is no serious intention to accept for the nation the principles contained in the treaty.

The international development of local law is already happening outside the judiciary. For example, international human rights principles are being introduced into domestic law by express legislation.[32] Sometimes that legislation follows determinations of a relevant international body. This was the case in the recent *Human Rights (Sexual Conduct) Act 1994* (Cth), which followed the decision of the United Nations Human Rights Committee in determining the communication by Nicholas Toonen concerning Tasmanian laws on homosexual offences.[33] Given that other branches of government are giving effect to international human rights law, it is scarcely surprising that

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30 See H Charlesworth, "Protecting Human Rights" (1994) 68 *Law Institute Journal* 462 at 463; C Caleo, "Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights (1993) 4 *Public Law Review* 175.

31 See H Charlesworth, "The Australian Reluctance About Rights" in P Alston (ed), *Towards an Australian Bill of Rights* Human Rights and Equal Opportunity Commission and the Centre for International and Public Law, Canberra, 1994, p 53.

32 See eg, *Privacy Act 1988* (Cth).

33 *Toonen v Australia*, UN Doc. CCPR/C/50/D/488/1992 (4 April 1994). For discussion see A Funder, "The Toonen Case" (1994) 5 *Public Law Review* 156; G Selvaner, "Gays in Private, The Problems with the Privacy Analysis in Furthering Human Rights" (1994) 16 *Adelaide Law Review* 331; W Morgan, "Protecting Rights or Just Passing the Buck?" (1994) 1 *Australian Journal of Human Rights* 409.

the courts, as a branch of government, are also taking such law into account in appropriate cases and in permissible circumstances.

The developments just described are hardly surprising or threatening, at least they should not be so to judges and lawyers of our tradition. The international human rights instruments were, for the most part, drawn up by Anglo-American lawyers. In countries such as Australia, their concepts are often already enshrined in constitutional, statutory or common law principles. It is the jurisprudence which is now collecting around these broad concepts that is often helpful in facing the kinds of problems which societies must address today. That is why it is appropriate and useful for the common law now to modify its earlier principle of strict separation of international and domestic law. It is timely that a *rapprochement* between these systems of law should be developed. As we enter a new millennium where there will be increasing international law of every kind, it is part of the genius of our legal system that our courts have found a way to take cognisance of international human rights jurisprudence in appropriate circumstances and by appropriate and familiar techniques of reasoning.

An amber light?

In a paper delivered before his retirement as Chief Justice of Australia, Sir Anthony Mason referred to the idea behind the Bangalore Principles. Sir Anthony stated that the High Court did not hold the view that *any* gap in the common law should be filled through the use of international conventions.[34] Lest it should be thought that the High Court in *Teoh* has rejected the Bangalore idea, it is important to reflect upon what the judges actually stated.

The judges' comments on the point are peripheral to the main subject matter of the case. It concerned a challenge to a finding of a delegate of the Minister for Immigration and Ethnic Affairs. In the Full Federal Court, a majority held that Australia's ratification of the Convention on the Rights Of The Child created a "legitimate expectation" for the purposes of the rules of natural justice in administrative law. Thus parents and children had a legitimate expectation that any action or decision by the Commonwealth would be conducted, or made, in accordance with the principles of the convention.[35] The High Court upheld the Federal Court ruling and it was this issue which led the High Court into a consideration of the relevance of the

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34 A Mason, "Towards 2001—Minimalism, Monarchism or Metamorphism?", The Third Lucinda Lecture, Monash University, 11 April 1995 in *Monash University Law Review* (forthcoming).

35 *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 (FFC).

convention to Australian law, given that, as such, it had not been incorporated into Australian law by federal legislation.

In the course of their judgment dismissing the appeal, Mason CJ and Deane J said this:

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.
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> ...If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.
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> Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law...But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back-door means of importing an unincorporated convention into Australian law.[36]

Mason CJ and Deane J pointed out that, in *Teoh*, they were not concerned with the resolution of an ambiguity of a statute. Nor were they concerned with the development of an existing principle of the common law. To that extent, their remarks on the Bangalore idea were *obiter dicta*. They were essentially cautious. But, as I read them, those remarks were entirely consistent with the Bangalore Principles, although with a warning against excessive enthusiasm.

McHugh J, who dissented in the result, and rejected the idea that the terms of the convention gave rise to a legitimate expectation in the particular case, nonetheless offered a similar analysis of the relevance of the convention to Australian law:

> Conventions entered into by the federal government do not form part of Australia's domestic law unless they have been incorporated by way of statute. They may, of course, affect the interpretation or development of the law of Australia...In that respect, conventions are in the same position as the

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36 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 362.

rules of customary international law. International conventions may also play a part in the development of the common law.[37]

For the last statement, his Honour referred to the crucial passage in the judgment of Brennan J in *Mabo* (above) and to *Dietrich*[38] as well as to two opinions of my own in *Jago*[39] and in *Ringland*.[40]

Therefore, far from rejecting the Bangalore idea, the decision in *Teoh* endorses the basic concept. It cautions against a rude invention of the common law by judges, using unincorporated conventions as a "back-door" means of introducing treaty law where Parliament has held back. With that caution I am in entire, respectful agreement. I believe that such caution is expressed, in terms, in the Bangalore Principles themselves.

Conclusion

The influence of treaty law upon Australian law is growing. The powerful influence of international standards will have an increasing impact on the development of the common law and statute law in Australia. The full evolution of the technique described in the Bangalore Principles has not yet been achieved. But the idea is now amongst us. It is a powerful idea. It is one appropriate to the times in which we live. It is one which promises a gradual harmonisation between internationally accepted principles and the municipal law of a country such as Australia.

From a subject of esoteric interest to a few lawyers advising states and international agencies, international law is increasingly becoming of relevance to Australian law. If then we look to the United Nations and law-making for the 21st century, we can scarcely overlook the way in which treaty law, adopted under the United Nations, is coming to influence Australian law, directly and indirectly. It is the privilege of lawyers of this generation to contribute to this inevitable and natural historical development. But first they must realise that it is happening, and why.

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37 Note 36 above, at 384.
38 *Dietrich v The Queen* (1992) 177 CLR at 321 at 360.
39 *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 (CA) at 569.
40 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA) at 709f.