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ALL INDIA JURISTS' CONFERENCE

BRAHMA KUMARIS

MT ABU, RAJASTHAN, INDIA

6 JUNE 1996

JURISTS' ROLE IN ESTABLISHING A BETTER WORLD

The Hon Justice Michael Kirby AC CMG

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INTRODUCTION

It is a great honour and pleasure for me to visit India once again. From my earliest childhood I have had a deep fascination for India. As a young man I twice interrupted the busy life of a barrister to travel throughout India. In 1970 and in 1974 I journeyed to the four corners of this subcontinent. From Madras and Cape Comorin in the south to Delhi and Simla in the north; from Goa and Bombay in the west to Darjeeling and Calcutta in the east, I have spent more than seven months of my life

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\* Justice of the High Court of Australia. President of the International Commission of Jurists.

travelling in India. It is for me a second home. It is as if there is something missing in the vibrant and modern environment in which I spend most of my life. The sights of India at dusk, when the dust catches the crimson light of sunset, enlivened with the sounds and smells of India: these are the images that beckoned me back to India and, for the first time, to Mt Abu.

I express thanks to the conference organisers for giving me this opportunity to meet so many judges and lawyers of India. Not only is India the largest Parliamentary democracy in the world, it is also the most populous member of the community that lives by the common law. This is a legal system which both India and Australia derived from England. But each of us has made it our own. Each of us acknowledges the sovereignty of the people<sup>1</sup>. It is thus the people, collectively and individually, who are responsible for the law. Because law is such an important bonding element for the international and national communities, lawyers have a special place in helping to establish a better world.

I want to share with you my ideas on the ways in which jurists may play a role in building a better world. I will do so by

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<sup>1</sup> In the case of Australia see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70-72.

reference to my own life. I will offer my thoughts on the way in which lawyers may contribute to a better international community and to better national legal systems. I will also refer to the conduct of lawyers on a personal level. It is in these three contexts - international, nation and personal - that lawyers face challenges which they can turn to advantage.

### INTERNATIONAL

A special feature of our time is the growing realisation of the inter-connections which bind us together in the international community. We who grew up in the Commonwealth of Nations, sharing the treasury of the literature of the English language, have enjoyed a special advantage in securing an international perspective of many issues, including in the law. But even without that advantage, we would have come to realise the power of globalisation. The notion may always have been there in humanity's struggle to identify a purpose for existence and a common allegiance to a deity, to nature or to humanity itself. But the movement towards internationalisation gathered pace from the middle of the nineteenth century with the invention of the telegraph, the telephone and other means of telecommunication. To this was soon added, in the twentieth century, flight, broadcasting, satellites and inter-active computers. Now, truly, we live in a global village.

All too often the mind of man remains unchanged, living in past, primitive times. Although this century has seen the liberation of so many peoples from colonialism and despotism, it has also seen two global wars and many other conflicts which have taken a terrible toll in human life. It has seen the advent of nuclear weapons with their fearsome potential for the fragile environment of our planet. It has also witnessed the most horrible cases of genocide, with anonymous cruelty to millions, perpetrated by otherwise seemingly decent individuals who went home to their families at night.

It is into this world, with its global challenges and dangers, that we have witnessed the growth of the United Nations organisation, in which India, from the start, has played, such a notable part.

Most lawyers of my generation originally looked upon international law as something separate: consigned to the clouds, the business of states and their officials. But in my life, as a lawyer, I have witnessed the growing relevance of international law to my life as a jurist. In very many small ways I have been privileged to play a part in this process. I believe that, in the future, it will be the privilege of many lawyers to contribute to the building of international law and to its application for the betterment of humanity. The only alternative to more conflict and genocide is the creation of an international legal order built on respect for the rule of law. Such an order will

include respect for fundamental human rights and also for economic and social equity to all people of the planet.

My own introduction to international law came almost by accident. The Australian Law Reform Commission, of which I was the chairman, was asked to examine the Australian laws on privacy protection. At that time, the Organisation for Economic Cooperation and Development ("OECD") in Paris (of which Australia is a member) commenced a project on the implications of transborder data flows for the protection of privacy. I was elected Chairman of the Expert Group assigned to conduct this study. The guidelines developed by the Expert Group<sup>2</sup> were adopted by the OECD Council and recommended to member states. Their principles have been adopted in the legislation of many OECD countries, including my own<sup>3</sup>. This taught me the practical ways in which international bodies, tackling a global problem presented by new technology, could develop legal principles which crossed linguistic, cultural and legal traditions. Lawyers and others could come together to help solve a problem which was basically one of respecting the integrity and

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<sup>2</sup> Organisation for Economic Cooperation and Development, *Guidelines on the Protection of Privacy and Transborder Data Flows*, Paris, 1980. See (1985) 59 *Aust LJ* 683.

<sup>3</sup> *Privacy Act* 1988 (Cth).

individuality of human beings. From that moment I became an enthusiast for the role of international institutions and an optimist about the development of international legal principles for the protection of common values.

Later, I took part in the general conference of UNESCO in Paris. That exposure to this vital agency of the United Nations led on to two opportunities which have required me to tackle two very different but equally important challenges for our world and for its laws. The first was a series of committees assigned to the highly sensitive task of defining who are a "people" for the peoples' right to self-determination which is envisaged by the *Charter* of the United Nations and guaranteed by the two international covenants<sup>4</sup>. If ever there is an important issue for the betterment of our world it is to find a peaceful and equitable way of allowing the fulfilment of the peoples' right to self-determination without a reversion to atavistic tribalism and jingoistic nationalism which are so incompatible with the necessities of life today.

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<sup>4</sup> *International Covenant on Civil and Political Rights*, Article 1; *International Covenant on Economic, Social and Cultural Rights*, Article 1.

More recently, UNESCO has appointed me to the International Bioethics Committee. This body is contributing to a draft of an international convention to deal with the challenge of the Human Genome Project. The mapping of human genes is not only the greatest cooperative scientific endeavour in history. It is also a development of enormous economic potential as scientists patent human genes that may be associated with the treatment of genetic disorders. Truly, by scientific discoveries, we have found the key that unlocks the mysteries of human existence. There can be few challenges to the law greater than that of regulating disturbance of the genetic makeup of the human species. Some would say that, by genetic manipulation, we will build a better species suited to a better world. But the survival of humanity, in times of plague and pestilence, has depended in the past upon genetic diversity. Jurists must become more aware of the Human Genome Project and of its potential to alter the very definition of what it is to be a "human".

Another great challenge to humanity, including in India, is presented by the global epidemic of HIV/AIDS. When the epidemic came along, the World Health Organisation invited me to take part in the Global Commission on AIDS which was established to respond to the epidemic. It soon became clear that AIDS presented not simply a major challenge to medical science, health facilities and the education of the community. It also presented important challenges to the legal profession, to judges and to lawmakers. At a conference in India last year,



judges and to lawmakers. At a conference in India last year, opened by the Chief Justice of India, I presented a paper on the role of the judiciary in responding to HIV/AIDS<sup>5</sup>. Paradoxically, the experts working with the World Health Organisation soon reached the conclusion that the best way to prevent the spread of this epidemic that threatened the building of a better world, is to protect the rights of those most at risk of infection. This includes sex workers, injecting drug users, homosexuals and pregnant mothers who are infected. Getting lawyers and lawmakers to adjust their thinking to this paradox is no easy task. Yet the sufferings of those who live with HIV/AIDS are such that we cannot build a better world without addressing our attention to the alleviation of such suffering. If it means reform of the law, for example on drug use, sex workers and homosexuals, we, the lawyers, must give the lead. Bold actions if necessary. Nothing else is likely to turn the tide of the epidemic, particularly in a country so populous as India.

My experience has been that one participation in contributing to the building of a better world through the agencies of the United Nations, tends to lead to another. The

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<sup>5</sup> M D Kirby, "The Role of the Judiciary and HIV Law" in D C Jayasuriya (ed) *HIV Law, Ethics and Human Rights - Text and Materials*, UNDP, New Delhi, 1995, 312.

International Labour Organisation asked me to take part in a Commission on Freedom of Association. With two distinguished jurists, respectively from Barbados (Sir William Douglas) and Mauritius (Justice Rajsoomer Lallah) I travelled to South Africa just before the change of Government. The purpose was to scrutinise South Africa's labour laws and to test them against the principles of the ILO Conventions. Our report was prepared and delivered to the ILO. In recent weeks I have received copy of the new *Labour Relations Act* of South Africa. It draws heavily on the recommendations of our international committee. This was a practical contribution by jurists to a country, long isolated from international law, but now a full member of the United Nations and of the Commonwealth of Nations.

When Malawi moved to throw off the burden of the one-party state, the United Nations Development Programme ("UNDP") invited me to chair the constitutional conference. Sitting at the same table were representatives of the Government of Dr Hastings Banda and of the Opposition Parties, many of whom had been imprisoned for a long time by the Life-President. The invitation to a trusted outsider, who was a jurist in the tradition familiar to Malawi, showed the way in which, when the opportunity comes, we can sometimes contribute to the building of human rights and democracy far from our own countries.

Then in 1993 the Secretary-General of the United Nations (Dr Boutros Boutros-Ghali) appointed me his Special

Representative for Human Rights in Cambodia. For nearly three years, until my appointment to the High Court of Australia in 1996, I conducted missions and scrutinised the laws and practices of that unfortunate country. My purpose was to direct technical assistance where this was needed to build the rule of law in the place of the rule of anarchy which the Pol Pot regime had installed. Cambodia suffered the worst genocide *per capita* of any country in a century of genocide. More than a million Cambodians (in a population of 9 million) were executed or died of starvation. The work of the United Nations' Transitional Authority for Cambodia ("UNTAC") supported the peaceful election which established the current Government of Cambodia.

Many fine lawyers have taken part in the process of transition. Everywhere I went in Cambodia I saw volunteers, many of them lawyers. They were working with the human rights organisations, in the cities and in the provincial districts. A number of them came from India. My first encounter with Cambodia was at a training session for a group of former teachers who were being instructed on how to be judges. One of the instructors was Justice P N Baghwati, past-Chief Justice of India. Teachers were called into service because virtually all the lawyers and judges had been killed. A lawless and brutal regime quickly disposes of lawyers. It is proof positive of the importance of lawyers to building a better world to see what happens when anarchy and chaos take the place of the rule of law and human rights.

I realise that the opportunities which have fallen to me in the international sphere do not come to every lawyer. I marvel the combination of chances that have brought these opportunities my way. But each of us should be ready to play a part. We should be aware of the growing importance of international institutions and particularly the agencies of the United Nations and international human rights agencies, such as the International Commission of Jurists, Lawasia, the International Bar Association and Amnesty International. We should be alert to the fine work done by the United Nations in the field. There are many heroes to whom no statues will be erected. We should support the United Nations, which is the hope of the world. We should form or join United Nations Associations and participate in meetings of jurists and others which address international issues.

A better world will not come by wishing and praying, although a constructive attitude helps. It will come by the action of idealistic and optimistic people, including lawyers. The starting point is a realisation of the growing importance of international law and international agencies for the world we live in. It is by these human, and therefore imperfect, instruments that a better world will eventually be built. Jurists, but particularly jurists of the common law tradition who know the way our legal system was built over a millennium, will look to the coming millennium with anticipation. If the past millennium

was that in which the common law was built for our nations, the coming millennium will be that of international law. In business law and in the law of human rights the influence of international law will expand apace. It is the province of lawyers to see what is happening and to ensure that the shape of the new international legal order is one protective of basic rights and of economic equity.

### NATIONAL

Within our national legal systems jurists can all play a part in building a better world. This is true whether we are justices of the highest court or an attorney working as a sole practitioner for indigent prisoners who seek access to the law. Each one of us has a vital part to play in bringing the rule of law to our fellow citizens. It is not much use dreaming about a better world if we miss the daily opportunities to contribute to a better world in our own professional endeavours.

Once again, I seek to illustrate from my own life the way in which opportunities knock and we, the lawyers, must respond.

Soon after I was appointed to judicial office I was invited to become the first Chairman of the Australian Law Reform Commission. This body, like the Law Commission of India, advises the National Parliament on the reform, modernisation and improvement of the law. I spent a decade in the Law Reform

Mr F G Brennan QC, know Sir Gerard Brennan, the Chief Justice of Australia. He is the Chief Justice of the Court on which I am proud to serve.

The Law Reform Commission worked on numerous projects of great importance to the building of a better world in Australia. These included improvements in the system of handling complaints against police<sup>6</sup>, in criminal investigation<sup>7</sup>, in developing a modern law on human tissue transplantation<sup>8</sup>. Child welfare laws<sup>9</sup>, sentencing<sup>10</sup>, the provision of class actions<sup>11</sup> and improved access to justice - a matter in which India has given a lead to other common law countries<sup>12</sup>. Many of the proposals of the Australian Law Reform Commission have passed into law.

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<sup>6</sup> Australian Law Reform Commission, *Complaints Against Police* (ALRC 1), Canberra, 1975; *ibid* ALRC 9, 1978.

<sup>7</sup> *Ibid*, *Criminal Investigation*, (ALRC 2), Canberra, 1975.

<sup>8</sup> *Ibid*, *Human Tissue Transplants* (ALRC 7), Canberra, 1977.

<sup>9</sup> *Ibid*, *Child Welfare* (ALRC 18), Canberra, 1981.

<sup>10</sup> *Ibid*, *Sentencing of Federal Offenders* (ALRC 15), Canberra, 1980.

<sup>11</sup> *Ibid*, *Grouped Proceedings in the Federal Court* (ALRC 46), Canberra, 1988.

<sup>12</sup> *Ibid*, *Standing in Public Interest Litigation* (ALRC 27), Canberra, 1985 referring to *Bandhua Mukti Morcha v Union of India* AIR 1994 SC 802, 813-4. But see *id*, 840-1; *S P Gupta v Union of India* AIR 1982 SC 149.

It is a great privilege for lawyers to participate in the orderly reform of the law. An important new text on the legal profession in the United States<sup>13</sup> suggests that part of the decline in the legal profession in that country has been occasioned by the withdrawal by lawyers from the financially unprofitable work of legal reform. It is the duty of every lawyer to contribute to a better world and a better society by participating, whenever possible, in law reform committees and in proposals for reform of the law. In democracies the potential for law reform is there. We must all contribute to their realisation.

In our common law system judges too have an important function in developing the law. They do this by filling the gaps of the common law using analogous reasoning and by providing solutions to ambiguous statutes. One very important development of the past decade saw its genesis in Bangalore, India. I refer to the Bangalore Principles on the Domestic Application of International Human Rights Norms<sup>14</sup>. At a

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<sup>13</sup> A Kronman, *The Lost Lawyer*, 1992.

<sup>14</sup> Commonwealth Secretariat, *Developing Human Rights Jurisprudence - The Domestic Application of International Human Rights Norms*, Record of Judicial Colloquium in Bangalore, India, February 1988, London 1988.

meeting convened by the former Chief Justice Baghwati in Bangalore, jurists from a number of Commonwealth countries (and one, Justice Ruth Bader-Ginsburg now of the United States Supreme Court) agreed on a technique which is now increasingly being used by jurists in Australia. If the common law is silent or the statute is ambiguous a judge may remedy the gap or resolve the ambiguity by reference to international human rights principles. In this way, a reconciliation is being achieved between the growing body of jurisprudence which has developed around the international covenants and the municipal legal systems. By this reconciliation, jurists can help establish a better world where national and international law are in harmony. This does not mean the unquestioning and automatic adoption of international law as part of domestic law. But it does mean the selective use by jurists of the best thinking concerning the international principles which have been adopted as expressing the human rights of all peoples where relevant to problems in municipal law.

Before I joined the High Court of Australia, an important case came for decision by that Court concerning the title to land of Australian Aborigines. The case is *Mabo v Queensland [No 2]*<sup>15</sup>. Until that decision it had been assumed that the common

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<sup>15</sup> (1992) 175 CLR 1.



law of Australia gave no recognition to native title to land. This was so despite a finding that the Aboriginal people, before European settlement of Australia, had a highly developed system of law and tradition<sup>16</sup>. By the common law it was assumed that Australia, when "discovered", had been *terra nullius*. When this theory was ultimately challenged in Australia's highest court, it held that the common law did indeed recognise a form of native title. Part of the reasoning of Justice Brennan in the leading judgment was derived from internationally recognised principles of human rights<sup>17</sup>. The *Mabo* case illustrates the way in which judges often have to make fundamental choices. Advocates can lead them to correct decisions by expanding the sources of reference.

Amongst the sources now available, through the genius of the common law, is the jurisprudence of the international conventions on human rights wherever this is shown to be relevant to local decision-making. Use of such material is not for

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<sup>16</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 - where Blackburn J said, at 267: "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is shown in the evidence before me".

<sup>17</sup> (1992) 175 CLR 1 at 42.

the judges alone. They will not be led to that use except by creative and imaginative lawyering by advocates. We should see this as an exciting time in which advocates and judges in courtrooms can contribute to the building of a better world by the use of the international jurisprudence of human rights. A more recent meeting in Bangalore of the International Commission of Jurists emphasised that this obligation extends beyond civil and political rights to the implementation of economic, social and cultural rights<sup>18</sup>.

#### LOCAL AND PERSONAL

Beyond international and national contributions, jurists can help to build a better world by their personal conduct. The law is often a stressful and demanding profession. Different people respond in different ways to stress and tension. Some lash out with rudeness and anger. Others retreat into isolation and non-communication. Still others cover their anxieties with false humour. We have all seen these characteristics in our colleagues and in ourselves.

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<sup>18</sup> International Commission of Jurists, *Bangalore Declaration and Action Plan*, 25 October 1995.

When I was asked to address the inaugural session of judicial education for judges in Australia I chose the topic of judicial stress for my address. It was obvious, as I embarked upon my theme, that it caused stress and anxiety in some members of the audience<sup>19</sup>. Yet we can help to build a better world around us in our profession if we all understand the inherent tensions and stresses that are involved in it. Only by doing so will we be able to take charge of these natural feelings and direct them in constructive ways for the improvement of our professional performances.

People depend upon lawyers for guidance through difficult times where their liberty, their reputation and their assets are at risk. Lawyers can help to build a better world by improving their performance in relation to their clients. Judges can do so by improving their conduct in court, showing respect to every advocate and individual who comes before them, rejecting stereotypes and judging each case strictly on its merits.

These are aspects of a lawyer's vocation that tend not to be taught in law school. Yet they are vital. In every country surveys of clients show that the chief complaint about lawyers

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<sup>19</sup> M D Kirby, "Judicial Stress" (1995) v 13 No 2 *Australian Bar Review* at 101-115.

involves a suggested failure of communication - a failure to explain carefully and patiently enough, the problem faced by the client and the realistic options that are lawfully available.

Long ago, before I joined the law, an event took place in my life which taught me what it was to be a true professional person. My mother fell ill. Her specialist was a senior physician in Sydney. My father telephoned him. He said that it would be no problem for him to come to our suburban home that evening on his way to a nearby hospital for war veterans. He arrived that evening at our humble home resplendent in military uniform. It was quite a sight for a twelve year-old child. Patiently and gently he went about his professional ministrations. When they were completed he talked briefly to the children. He came into my little room and saw my desk and my study programme. He gave me words of encouragement which I have never forgotten. Then he went off into the night. But he left behind an abiding memory of a professional person dedicated, by his individual actions, to building a better world. Willing to take the extra step. Ready to offer the extra help. Prepared to see each person in his care as a whole human being with a family and a life extending far beyond the narrow professional problem.

Each one of us in the law is called to a noble vocation. The quest for justice according to law is a noble quest. Building the rule of law and respect for fundamental human rights is a worthy calling. It is one which contributes, day by day, to a

better world. Jurists are fortunate to serve in such a  
They are, or should be, aware of its many failings and  
reform of the law. They must be alert to the legal needs of  
disadvantaged and the poor. At a personal level, in the  
community and within the international community, they are  
ready to offer their skilled services in a way that improves  
society and better the world we all live in.

We in India and Australia, and in many countries  
share many links between our judiciary and legal professions.  
It was in the hope of strengthening those links, and thus  
contributing to a better world, that I accepted this invitation  
to visit Mt Abu. These few words being concluded, I am sure  
in the remaining time I will learn infinitely more from you  
than you have from me. But India is a generous land,  
discovered many times. It reaches deep into its  
traditions to welcome the visitor and to offer gently  
its wisdom and its experience. Far away, in Canberra,  
I often think of this encounter with you. I am sure it will  
enrich my judgments and deepen my understanding of justice  
and the law. We share our minds together, seeking common  
wisdom. That too is a contribution to establishing a  
better world.