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The Common Law and International Law – A Dynamic Contemporary Dialogue

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**THE COMMON LAW AND INTERNATIONAL LAW — A
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The Hon Michael Kirby AC CMG^{*}

A DYNAMIC DIALOGUE

Three objectives: In describing the contemporary impact of international law on familiar national systems of common law, I begin with a number of objectives:

1. To analyse the growing importance in municipal jurisdiction of international law, with its extensive body of legal principles and wealth of associated jurisprudence. I will demonstrate how this body of law is becoming an increasingly significant influence on the development of the common law;

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2. To draw attention to some of the ways in which barriers are still being erected against the use of international law, despite the fact that international legal materials can frequently offer assistance in resolving difficult questions regarding the scope and applicability of common law rules and principles; and

3. To endeavour explain why scepticism and even hostility persist towards international law and to identify the arguments that can be advanced to respond to such antagonism.

In addressing these objectives, I will divide these remarks into four parts. First, I will identify at the actual experience of a number of jurisdictions. I will consider significant decisions in each of the jurisdictions selected. The second and third parts will address the respective experiences with international law and the common law of the United Kingdom and Australia. In the fourth part, I will turn to the jurisprudential basis, and the merits, of using international law to develop municipal common law.

One instantly recognisable feature of this area of legal discourse is the different paths that courts in Australia and the United Kingdom have taken to reach the point at which they each stand today. The use of international law as an influence on the development of the common law has progressed at noticeably different speeds in each country. Significant discussion about the benefits of international law began to

appear in United Kingdom case law by the late 1970s. It was necessary to wait until the 1992 decision of *Mabo v Queensland (No 2)*¹ before the High Court of Australia would make a pronouncement of general importance on the topic.

The European effect: In a sense, this differential between the two jurisdictions is hardly surprising. The ratification by the United Kingdom of the *European Convention for the Protection of Fundamental Rights and Freedoms* (ECHR), coupled with acceptance of the right of individual complaint to the European Commission and later to the European Court of Human Rights, were events bound to have a significant impact on the law of the United Kingdom. Even before its domestic incorporation, the Convention exerted a powerful influence on the interpretation of statutes and the declaration of the common law in the United Kingdom to a degree previously unknown in the case of other international treaties. In consequence of the United Kingdom's membership of the European Community (later the Union) international law issues came to be raised before British courts with increasing frequency.

As early as 1974, Lord Denning expressed the opinion that the influx of cases with a European element was like "an incoming tide [which] cannot be held back."² While some distinguished observers

¹ (1992) 175 CLR 1.

² *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418.

lamented the slow uptake of foreign law by British courts,³ it cannot be doubted that the United Kingdom's close ties with European institutions proved to be a catalyst for change and for bringing international law directly into the legal system of the United Kingdom.

More recent developments have reinforced, rather than reduced, the emerging differences between Australia and the United Kingdom. In 1998, the United Kingdom's enactment of the *Human Rights Act* saw the incorporation of the ECHR into domestic law as from 2000. Yet while the United Kingdom Parliament has strengthened the links between international law and domestic law, no comparable human rights instrument has yet been adopted at the federal level in Australia. Although the national government has hesitated on this issue, two of the Australian sub-national jurisdictions have taken a lead by enacting comprehensive human rights statutes. Another undertook steps in preparation for doing so before postponing any action to await a federal initiative.⁴

³ See, eg, T H Bingham, "There Is a World Elsewhere': The Changing Perspectives of English Law" (1992) 41 *International and Comparative Law Quarterly* 513 at 519ff.

⁴ See *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic). Consultations recommending the enactment of human rights legislation have also been conducted in two other States: Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, 2007); Government of Western Australia, *A WA Human Rights Act: Report of the Consultation Committee* (2007).

The customary law divide: The differences between Australia and the United Kingdom do not end there. The treatment of, and attention given to, customary international law has been significantly different in each country. After some somewhat disparaging comments in the 1949 case of *Chow Hung Ching v The King*⁵ (to which I will return), judicial remarks about the status of customary international law in Australia were few and far between.⁶ As a consequence, the rules governing the use of customary international law in Australia remain, to some extent, unclear.⁷ By contrast, in the United Kingdom, the place of customary international law has been the subject of extensive discussion in a line of cases, dating back to the eighteenth century.⁸ Although the issue is not

⁵ (1949) 77 CLR 449. See Sir Anthony Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 *Public Law Review* 20 at 24.

⁶ Some notable exceptions where customary international law has been discussed include *Nulyarimma v Thompson* (1999) 96 FCR 153; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 per Brennan and Toohey JJ.

⁷ Stephen Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 *Adelaide Law Review* 213 at 263; Penelope Mathew, "International Law and the Protection of Human Rights in Australia: Recent Trends" (1995) 17 *Sydney Law Review* 177 at 194.

⁸ *Buvot v Barbut* (1737) Cas Temp Talbot 281; *Triquet v Bath* (1764) 3 Burr 1478; *R v Keyn* (1876) 2 Ex D 63; *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391; *Chung Chi Cheung v The King* [1939] AC 160; *Thakar v Secretary of State for the Home Office* [1974] QB 684; *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529; *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] 1 Ch 286.

yet finally resolved, there is a more or less general agreement on the status of customary international law in domestic law in Britain.⁹

Although these comments are addressed to the effect of international law on the common law, its influence does not stop there. Both in Australia and the United Kingdom, where ambiguity arises in the construction of a statute dealing with a matter affected by international law, it is generally regarded as proper for the courts to resolve that ambiguity by interpreting the statute so as to conform, as far as possible, with the applicable principle of international law.¹⁰ Such an approach is not new. In Australia, the principle may be traced to the early days of the High Court. In 1908, in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*,¹¹ Justice O'Connor observed that:

“Every statute is to be interpreted and applied so far as its language admits so as not to be inconsistent with the comity

⁹ See, eg, Malcolm N Shaw, *International Law* (5th ed, 2003) at 129; Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 44; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 135; Rebecca M M Wallace, *International Law* (5th ed, 2005) at 40; Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 11.

¹⁰ With respect to the United Kingdom, see, eg, *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771 per Lord Diplock; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] AC 696 at 747–748 per Lord Bridge of Harwich, 760 per Lord Ackner.

¹¹ (1908) 6 CLR 309. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476 at 492 per Gleeson CJ.

of nations, or with the established rules of international law.”¹²

The influence of international law on the interpretation of the written Constitution is not so firmly settled in Australia. Although I am of the opinion that international law can play a role, at least when uncertainty arises over constitutional questions,¹³ other members of the High Court of Australia have expressed a contrary view.¹⁴ The topic remains a source of lively debate in the judiciary and the academy. But my focus in this paper is on the common law.

THE APPROACH OF OTHER JURISDICTIONS

New Zealand: Before examining the common law systems of Australia and the United Kingdom, I will identify a number of insights offered by the courts and legal systems of other countries. Some, such as New Zealand, have considered the use of international law for the development of the common law in a manner broadly similar to the

¹² (1908) 6 CLR 309 at 363.

¹³ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657–661; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417–418; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 380–381; *Austin v Commonwealth* (2003) 215 CLR 185 at 293.

¹⁴ *AMS v AIF* (1999) 199 CLR 160 at 180 per Gleeson CJ, McHugh and Gummow JJ; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 per McHugh J.

approach taken in Australia and the United Kingdom.¹⁵ The international law of human rights has come to assume particular significance in the domestic legal system of New Zealand following the enactment of the *Bill of Rights Act* in 1990. That Act was to provide an influential statutory model for the United Kingdom *Human Rights Act* of 1998 and the two similar measures so far adopted in Australian sub-national jurisdictions.

South Africa and India: South Africa, on the other hand, has taken a more robust approach. Section 232 of the *Constitution of the Republic of South Africa* 1996 reads: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” Section 233 provides a role for international law when a court is interpreting legislation. In recognition of its importance and relevance, South Africa has placed international law in a position of prominence in its legal system. There was a partial model for this course in the *Constitution of India* (Article 51(a)) requiring the State to foster respect for international law. By removing doubts as to the legitimacy of using international law as an interpretative aid, such constitutional provisions ensure that the judiciary’s focus is on *how*, and not *whether*, international law may influence the development of domestic law.

¹⁵ See, eg, the use of international law in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260; *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

Canada: The move towards accepting and using international law, can also be seen in Canada, particularly since the 1980s. For most of the twentieth century, the judiciary of the country, in the words of Hugh M Kindred, “tended to disregard [international law] and even to treat it with the contempt of exclusionary nationalism.”¹⁶ *Baker v Canada (Minister of Citizenship and Immigration)*¹⁷ involved a turning point for the attitude of the Canadian judiciary.

The present approach towards international law in Canadian courts tends towards the other end of the spectrum. International legal principles are commonly applied, often extensively, in a wide range of decisions.¹⁸ Such has been the change in judicial attitudes that the problem in Canada has now become one of determining how to use international materials in a principled and coherent fashion.¹⁹ In this respect, the Canadian judiciary has struggled, as have the courts in

¹⁶ Hugh M Kindred, “The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach” in Oonagh E Fitzgerald, *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006) 5 at 17.

¹⁷ [1999] 2 SCR 817.

¹⁸ Hugh M Kindred, “The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach” in Oonagh E Fitzgerald, *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006) 5 at 17.

¹⁹ See generally *ibid.*

Australia and the United Kingdom, with the theories of incorporation and transformation and how to treat customary international law.²⁰

DEVELOPMENTS IN THE UNITED KINGDOM

What of the approach of English law to the relationship between international law and the common law? How should that approach be compared with the somewhat different one adopted by Australian courts?

Whilst some shared features exist, I will treat the two primary sources of international law — custom and treaties — separately in an endeavour to avoid the criticism of a “lack of rigour” that has sometimes been said to characterise analyses of the interaction between international law and domestic law.²¹ This distinction is particularly relevant when discussing the legal position of the United Kingdom because the rules governing the use of customary international law and treaty law differ somewhat, and are therefore deserving of separate analysis.

²⁰ Armand de Mestral and Evan Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (2006) 31 at 35. See also below.

²¹ Stephen Donaghue, “Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia” (1995) 17 *Adelaide Law Review* 213 at 214.

Customary international law

It is impossible to consider the influence of customary international law on the development of the common law of England without mentioning the incorporation/transformation debate.²² The extensive discussion of these concepts in academic literature has given the distinction a somewhat legendary status even if, in reality, it is far from legendary.²³ With a few notable exceptions,²⁴ the courts have “generally

²² For a discussion of the two concepts, see *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529 at 553 per Lord Denning MR.

²³ See, eg, the discussions in Malcolm N Shaw, *International Law* (5th ed, 2003) at 128ff; Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 41ff; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 131ff; Rebecca M M Wallace, *International Law* (5th ed, 2005) at 40ff; J G Collier, “Is International Law Really Part of the Law of England?” (1989) 38 *International and Comparative Law Quarterly* 924; Daniel P O’Connell, “The Relationship between International Law and Municipal Law” (1960) 48 *Georgetown Law Journal* 431 at 444ff; Andrew J Cunningham, “The European Convention on Human Rights, Customary International Law and the Constitution” (1994) 43 *International and Comparative Law Quarterly* 537 at 547; Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 11–12; Hilary Charlesworth et al, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423 at 451; Felice Morgenstern, “Judicial Practice and the Supremacy of International Law” (195) 27 *British Year Book of International Law* 42; H Lauterpacht, “Is International Law a Part of the Law of England?” (1939) 25 *Transactions of the Grotius Society* 51; Kristen Walker, “Treaties and the Internationalisation of Australian Law” in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204 at 227ff; Sir Anthony Mason, “International Law as a Source of Domestic Law” in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (1997) 210 at 212ff.

²⁴ See, eg, *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529 at 553 per Lord Denning MR. In the Australian context, see *Nulyarimma v Thompson* (1999) 96 FCR 153 at 178–191 per Merkel J.

eschewed analysis of the role of custom by reference to the distinction between incorporation and transformation”,²⁵ commonly assigning the debate to the academic sphere. Lord Justice Stephenson remarked that “the differences between the two schools of thought are more apparent than real”.²⁶

Criticism of the supposed distinction is not confined to the judiciary.²⁷ The somewhat illusory nature of the debate has encouraged academic commentators to look for alternative taxonomies, or to abandon a rigid classification altogether. Professor James Crawford, for example, has urged a focus not on the labels “incorporation” and “transformation” but on how, in practical terms, customary international law has influenced the decisions of courts in individual cases.²⁸ Writing with W R Edeson, Professor Crawford noted that “[t]he difficulty with

²⁵ Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 132.

²⁶ *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529 at 569 per Stephenson LJ. See also *Nulyarimma v Thompson* (1999) 96 FCR 153 at 184 per Merkel J.

²⁷ Kristen Walker, “Treaties and the Internationalisation of Australian Law” in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204 at 228.

²⁸ James Crawford, “International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison” (Speech delivered for The First Michael Kirby Lecture in International Law, Australian and New Zealand Society of International Law, Canberra, 27 June 2008) <http://law.anu.edu.au/Cipl/Lectures&Seminars/2008/KirbyLecture_Crawford.pdf>. See also James Crawford, “General International Law and the Common Law: A Decade of Developments” (1982) 76 *American Society of International Law Proceedings* 232 at 232.

slogans in the present context is that they fail to give guidance in particular cases.”²⁹

The lack of enthusiasm for the terms “incorporation” and “transformation” does not mean that these words serve no useful purpose. On the contrary, the distinction the words connote can sometimes provide a valuable insight when assessing, on a case-by-case basis, the changing attitudes of the judiciary in the United Kingdom toward the use of international law in common law elaboration.

If a decision is said to stand for the proposition that customary international law is automatically *incorporated* into domestic law, one can say that the judiciary has adopted a generally favourable stance towards international law. *Incorporation* views customary international law as a source of law closely connected with municipal sources. On the other hand, if a decision is said to stand for the proposition that international law must be *transformed* before it can become part of domestic law, the court has exhibited a more cautious attitude towards the use of international law when expressing domestic law. *Transformation* treats customary international law as distinctly separate from domestic law. Even if the technical distinction between the terms is more apparent than real, the two expressions tend to reflect the level of

²⁹ James Crawford and W R Edeson, “International Law and Australian Law” in K W Ryan (ed), *International Law in Australia* (1984) 71 at 78.

enthusiasm for customary international law as a legitimate and influential body of legal principles, apt for use by the national judiciary.

These two labels can be deployed to help plot a pattern of fluctuating judicial attitudes towards the effect of customary international law on the common law of England. The starting point of analysis of the case law is usually taken to be the bold and unqualified judicial statements written in *Buvot v Barbuit*³⁰ and *Triquet v Bath*.³¹ These decisions are said to exemplify an approach to international law more closely reflecting the incorporation doctrine,³² particularly after Lord Talbot declared in *Buvot* that “the law of nations in its full extent [is] part of the law of England”.

This early enthusiasm was, however, qualified by decisions written during the late nineteenth and early twentieth century. Thus, the decisions in *The Queen v Keyn*³³, and arguably in *West Rand Central Gold Mining Co Ltd v The King*³⁴, were viewed as signalling a resurgence of the transformation doctrine.³⁵ If this understanding was

³⁰ (1737) Cas Temp Talbot 281.

³¹ (1764) 3 Burr 1478.

³² Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 41; Malcolm N Shaw, *International Law* (5th ed, 2003) at 129.

³³ (1876) 2 Ex D 63.

³⁴ [1905] 2 KB 391.

³⁵ Sir William S Holdsworth, *Essays in Law and History* (1946) at 263–266. See also I A Shearer, “The Relationship between International

Footnote continues

correct, the cases suggested that isolationist tendencies and scepticism about the assistance offered by international law were on the rise in the courts of the United Kingdom of that time.

This view was not, however, shared by all commentators. Some considered the cases “ambiguous” about the incorporation/transformation question.³⁶ Thus, Sir Hersch Lauterpacht thought that the “relevance [of *Keyn’s* case] to the question of the relation of international law to municipal law has been exaggerated.”³⁷ Professor Ian Brownlie was likewise of the opinion that the *West Rand* case was fully consistent with the incorporation doctrine. He suggested, instead, that the oft-cited opinion of Cockburn CJ in that case was focused on proving the *existence* of rules of customary international law in domestic courts, not examining whether those rules were incorporated or had to be transformed.³⁸

Law and Domestic Law” in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (1997) 34 at 40ff; Rebecca M M Wallace, *International Law* (5th ed, 2005) at 41.

³⁶ Malcolm N Shaw, *International Law* (5th ed, 2003) at 131.

³⁷ H Lauterpacht, “Is International Law a Part of the Law of England?” (1939) 25 *Transactions of the Grotius Society* 51 at 60.

³⁸ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 43. See also Sir Anthony Mason, “International Law as a Source of Domestic Law” in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (1997) 210 at 214; J G Collier, “Is International Law Really Part of the Law of England?” (1989) 38 *International and Comparative Law Quarterly* 924 at 929; *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529 at 569 per Stephenson LJ; James Crawford and W R Edeson, “International Law and Australian Law” in K W Ryan (ed), *International Law in Australia* (1984) 71 at 73.

Statements on customary international law continued to appear in judicial decisions of the English courts throughout the twentieth century. Many such decisions continued to obscure the dividing line between the theories of incorporation and transformation. Thus, in *Chung Chi Cheung v The King*,³⁹ Lord Atkin said:

“[I]nternational law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”

Commentators have expressed concern over this comment as it appeared to advocate, simultaneously, the incorporation and transformation doctrines.⁴⁰ Indeed, the quotation from Lord Atkin illustrates the problems of trying to classify judicial statements as falling into either the incorporation or transformation camp, treating them as rigidly differentiated alternatives. At an attitudinal level, if we leave labels

³⁹ *Chung Chi Cheung v The King* [1939] AC 160 at 167–168.

⁴⁰ Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 134; J G Collier, “Is International Law Really Part of the Law of England?” (1989) 38 *International and Comparative Law Quarterly* 924 at 931; Daniel P O’Connell, “The Relationship between International Law and Municipal Law” 48 *Georgetown Law Journal* 431 at 446 (1960).

to one side, Lord Atkin's statement speaks relatively clearly. It suggests that customary international law can, and should, influence domestic law. Although the precise impact of custom remained unclear and the subject of debate, it was obvious that, by the mid-twentieth century, the judiciary in the United Kingdom was of the opinion that, at the least, international law could be a legitimate and valuable source of law in certain cases.

A broadly positive attitude towards international law was affirmed in 1977 when Lord Denning concluded, in *Trendtex Trading Co v Central Bank of Nigeria*, that "the rules of international law, as existing from time to time, do form part of our English law."⁴¹ Cases such as *Trendtex*, and later *Maclaine Watson & Co Ltd v International Tin Council (No 2)*,⁴² led many observers of this controversy to conclude that the doctrine of incorporation had finally prevailed in the United Kingdom.⁴³ More importantly, however, such decisions were viewed as confirming the willingness of courts in the United Kingdom to refer to international law when developing the municipal common law.

⁴¹ [1977] QB 529 at 554 per Lord Denning MR. See also at 578–579 per Shaw LJ.

⁴² [1989] 1 Ch 286.

⁴³ Malcolm N Shaw, *International Law* (5th ed, 2003) at 129; Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 44; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 135; Rebecca M M Wallace, *International Law* (5th ed, 2005) at 40; Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 11.

To avoid becoming enmeshed in the incorporation/transformation debate, several commentators came to refer to customary international law as “a source of English law.”⁴⁴ This “source” formulation resonates closely with the Australian approach to customary international law. Importantly, however, in the courts of the United Kingdom, the twentieth century saw the gradual rise of a familiarity with, and empathy towards, customary international law that was different from the more hesitant approach that had gone before.

Treaties

Impact of treaties on the common law: When one considers the role of treaties in the development of the common law in the United Kingdom, the ECHR obviously now looms foremost. Indeed, it began to exert a far-reaching influence on British courts well before its domestic

⁴⁴ J G Collier, “Is International Law Really Part of the Law of England?” (1989) 38 *International and Comparative Law Quarterly* 924 at 935. See also Daniel P O’Connell, “The Relationship between International Law and Municipal Law” (1960) 48 *Georgetown Law Journal* 431 at 445; *R v Jones (Margaret)* [2006] 2 All ER 741 at 751 per Lord Bingham. Note, however, the criticisms of this formulation by James Crawford, “International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison” (Speech delivered for The First Michael Kirby Lecture in International Law, Australian and New Zealand Society of International Law, Canberra, 27 June 2008) <http://law.anu.edu.au/Cipl/Lectures&Seminars/2008/KirbyLecture_Crawford.pdf>; Rosalyn Higgins, “The Relationship between International and Regional Human Rights Norms and Domestic Law” (1992) 18 *Commonwealth Law Bulletin* 1268 at 1273.

enactment by the *Human Rights Act 1998* (UK) and its commencement in 2000. By the late 1970s, United Kingdom courts were regularly turning to human rights treaties, particularly the ECHR, to resolve common law issues.⁴⁵ A brief reminder of some of the more significant decisions will illustrate the growing acceptance of international law as a useful guide for local judges when developing declarations of the common law for their own jurisdictions.

In 1976 in *R v Chief Immigration Officer, Heathrow Airport; Ex parte Bibi*, a Pakistani woman and her children were refused admission to the United Kingdom for the stated purpose of visiting her husband. Article 8(1) of the ECHR, which refers to the right to respect for a person's private and family life, was invoked on the woman's behalf. In response, Lord Denning stated:

“The position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it.”⁴⁶

This was an influential statement about how the United Kingdom judiciary would express their approach of using international law in common law elaboration.

⁴⁵ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 47.

⁴⁶ [1976] 3 All ER 843 at 847.

Two years later, in 1978, in a case involving an allegedly unfair dismissal where the ECHR was again relied upon, Lord Justice Scarman said:

“it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations.”⁴⁷

Although in dissent as to the result of that case, this statement by Lord Justice Scarman would prove, with the passage of time, to be influential upon later judicial thinking.

While a shift in judicial attitudes was unquestionably taking place in the United Kingdom by the 1970s, the courts remained careful to avoid overstepping the mark. In particular, judges were conscious of the line between the respective responsibilities of the judiciary and of the legislature and executive with respect to international law. Thus, in *Malone v Metropolitan Police Commissioner*,⁴⁸ the plaintiff asked the Court to hold that a right to immunity from telephonic interception existed

⁴⁷ *Ahmad v Inner London Education Authority* [1978] QB 36 at 48. See also *R v Secretary of State for the Home Department; Ex parte Phansopkar* [1976] QB 606 at 626.

⁴⁸ [1979] Ch 344.

based, in part, on article 8 of the ECHR. Although Sir Robert Megarry VC gave “due consideration [to the Convention] in discussing the relevant English law on the point”,⁴⁹ he cautioned that courts in the United Kingdom could not implement treaties through the back door:

“It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown’s treaty obligations, or to discover for the first time that such rules have always existed.”⁵⁰

After statements such as this, it was clear that the courts were not going to use the Convention to create new rights, particularly those which might have widespread consequences, where the English common law had previously been silent on the subject.

Such caution did not spell the end of the ECHR as a source of influence on the common law in the United Kingdom. The *Malone* case may now be contrasted with the decision in *Gleaves v Deakin*,⁵¹ decided just one year later. In that case, a private prosecution was brought against the authors and publishers of a book, charging them with criminal libel. In its decision, the House of Lords refused to allow the authors and publishers to call evidence before the committal

⁴⁹ [1979] Ch 344 at 366.

⁵⁰ [1979] Ch 344 at 379.

⁵¹ [1980] AC 477.

proceedings concerning the generally bad reputation of the prosecutor. Lord Diplock (with Lord Keith of Kinkel agreeing) made a significant suggestion for reform to the common law offence of libel. He sourced his suggestion to the United Kingdom's treaty obligations:

“The law of defamation, civil as well as criminal, has proved an intractable subject for radical reform. There is, however, one relatively simple step that could be taken which would at least avoid the risk of our failing to comply with our international obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. That step is to require the consent of the Attorney-General to be obtained for the institution of any prosecution for criminal libel. In deciding whether to grant his consent in the particular case, the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specific in article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent.”⁵²

It follows that, by the early 1980s, international treaty law was becoming a prominent part of the judicial “toolkit” in the United Kingdom where a judge was faced with difficult issues of common law interpretation and elaboration. Thus, in *Attorney-General v British Broadcasting Corporation*,⁵³ the Attorney-General sought an injunction to restrain the BBC from broadcasting a programme critical of a Christian religious sect on the ground that the broadcast would prejudice an appeal pending before a local valuation court. The issue for decision was whether the local valuation court was a “court” for the purposes of

⁵² [1980] AC 477 at 483.

⁵³ [1981] AC 303.

the High Court's powers governing punishment for contempt of court. Lord Fraser of Tullybelton observed that "in deciding this appeal the House has to hold a balance between the principle of freedom of expression and the principle that the administration of justice must be kept free from outside interference."⁵⁴ He went on to say:

"This House, and other courts in the United Kingdom, should have regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and to the decisions of the Court of Human Rights in cases, of which this is one, where our domestic law is not firmly settled."⁵⁵

Unsurprisingly, in light of his earlier opinions in the English Court of Appeal, Lord Scarman adopted a similar approach. He took note of the United Kingdom's obligations under the Convention in expressing his opinion about the content of the common law.⁵⁶

Further steps toward a transparent and principled approach to the use of international law on the part of United Kingdom courts occurred in the early 1990s in the decisions in *Attorney-General v Guardian Newspapers Ltd (No 2)*⁵⁷ and *R v Chief Metropolitan Stipendiary*

⁵⁴ [1981] AC 303 at 352.

⁵⁵ [1981] AC 303 at 352.

⁵⁶ [1981] AC 303 at 354.

⁵⁷ [1990] 1 AC 109 at 283 per Lord Goff of Chieveley.

Magistrate; Ex parte Choudhury.⁵⁸ However, it was in *Derbyshire County Council v. Times Newspapers Ltd.*⁵⁹ that the strongest statements were expressed regarding when international law could, and even must, be used to interpret and develop the common law. At issue in that appeal was whether a local public authority was entitled to bring proceedings at common law for libel to protect its reputation. The three members of the English Court of Appeal offered different comments on the effect of article 10 of the ECHR — at that stage unincorporated in United Kingdom law — dealing with the right to freedom of expression. The main point of difference between the participating judges concerned when each judge thought it was appropriate to refer to international law.

For Lord Justice Ralph Gibson, reference by a court to such a source could be made when uncertainty existed:

“If ... it is not clear by established principles of our law that the council has the right to sue in libel for alleged injury to its reputation, so that this court must decide whether under the common law that right is properly available to the council as a local government authority, then, as is not in dispute, this court must, in so deciding, have regard to the principles stated in the Convention and in particular to article 10.”⁶⁰

⁵⁸ [1991] 1 QB 429 at 449.

⁵⁹ [1992] QB 770.

⁶⁰ [1992] QB 770 at 819.

Going further, Lady Justice Butler-Sloss expressed the opinion that reference to international law was not only preferable, but mandatory, when uncertainty or ambiguity existed. Her Ladyship said:

“Where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. ... But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10.”⁶¹

Lord Justice Balcombe went further still. He held that it would be appropriate to refer to international law even when there was no ambiguity or uncertainty:

“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. ... Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of article 10.”⁶²

Although all three of these judicial opinions expressed an acceptance of the use of international law to develop the common law in particular circumstances, the differences in their respective approaches may be observed. The law remained unsettled, awaiting a decision on the point from the House of Lords.

⁶¹ [1992] QB 770 at 830.

⁶² [1992] QB 770 at 812.

An opportunity for the House of Lords to consider the issue arose in *Director of Public Prosecutions v Jones (Margaret)*.⁶³ Although the differences arising from *Derbyshire* were not fully settled in that appeal, three Law Lords affirmed the need for ambiguity or uncertainty in the common law before reference to international law would be warranted.⁶⁴ The requirement of ambiguity or uncertainty is not, however, one that has been supported by all commentators. For example, Dame Rosalyn Higgins, until recently a Judge and later President of the International Court of Justice, has criticised the prerequisite of ambiguity or uncertainty:

“If many human rights obligations are indeed part of general international law ... then it surely follows that the old requirement that there be an ambiguity in the domestic law is irrelevant.”⁶⁵

The requirement of uncertainty or ambiguity has also been critically discussed by Australasian commentators.⁶⁶

⁶³ [1999] 2 AC 240.

⁶⁴ [1999] 2 AC 240 at 259 per Lord Irvine of Lairg LC, 265 per Lord Slynn of Hadley, 277 per Lord Hope of Craighead.

⁶⁵ Rosalyn Higgins, “The Relationship between International and Regional Human Rights Norms and Domestic Law” (1992) 18 *Commonwealth Law Bulletin* 1268 at 1273.

⁶⁶ See, eg, Kristen Walker, “Treaties and the Internationalisation of Australian Law” in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204 at 217. Ambiguity was originally a pre-requisite for resort to international human rights law under the Bangalore Principles of 1988. However,

Footnote continues

It might seem unsatisfying to terminate this analysis with cases in the United Kingdom decided between 1992 and 1999. However, as the House of Lords acknowledged in 2001,⁶⁷ the passage of the *Human Rights Act* 1998 (UK) provides a distinctive legislative basis for considering at least those international human rights norms expressed in the ECHR when developing the common law. The need to rely on judge-made rules in identifying the effect of international law was significantly reduced by force of this legislation, if not completely removed. This was so because, by the Act, the identified rules of international law were given domestic force in the United Kingdom. Obviously, there are reasons of principle and convenience for adopting this approach. It allows greater certainty and clarity as to when, and to what extent, international law may be of assistance to municipal judges in the United Kingdom in expressing, developing and applying the common law. As a matter of basic legal principle, once a legislature, acting within its powers, has spoken in a relevant way, its voice replaces any earlier opinions of judges.

that requirement was discarded as these principles were developed in 1998. Cf. K J Keith, "Protecting Human Rights in a Time of Terror: The Role of National and International Law" (2005) 13 *Waikato Law Review* 22 at 30–31.

⁶⁷ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 207–208 per Lord Steyn; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] 1 QB 728 at 759 per Laws LJ.

The doctrine of legitimate expectations: English cases, particularly *Derbyshire*,⁶⁸ have played an important part in guiding Australian courts in their search for an appropriate role for international law.⁶⁹ This exchange of judicial wisdom has not, however, been all one way.

In *Minister of State for Immigration and Ethnic Affairs v Teoh*,⁷⁰ the High Court of Australia held that Australia's ratification of the United Nations *Convention on the Rights of the Child* gave rise to a legitimate expectation that federal administrative decision-makers, in the performance of their functions and in the absence of any express law to the contrary, would comply with its terms. In that case this conclusion had the consequence that the decision-maker was held obliged to give the applicant notice and an opportunity to respond, if the decision-maker were to arrive at a decision inconsistent with the expectation raised by the ratification of the treaty. Although doubt was cast upon this principle in a subsequent decision in Australia,⁷¹ *Teoh* has not been overruled. It

⁶⁸ [1992] QB 770.

⁶⁹ *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J, 360 per Toohey J; *Minister for Immigration and Ethnic Affairs v Teoh* (1992) 183 CLR 273 at 288 per Mason CJ and Deane J.

⁷⁰ (1995) 183 CLR 273. See also now *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 10, 13, 21–30, 37–38, 47–49.

⁷¹ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 28–34 per McHugh and Gummow JJ, 38–39 per Hayne J, 44–48 per Callinan J. Cf *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 416; *Povey v Qantas Airways Ltd* (2005) 223 CLR

Footnote continues

has been followed, or like principles applied, in other common law countries.⁷²

In the United Kingdom, the status for the administrative decision-making of unincorporated treaties was to suffer a significant setback in *R v Secretary of State for the Home Department; Ex parte Brind*.⁷³ In that case, the House of Lords held that administrative decision-making did not have to be exercised in compliance with the provisions of the ECHR, to which the United Kingdom was a party but which had not, to that time, been enacted as part of the United Kingdom's municipal law. Their Lordships were at pains to avoid crossing the line that distinguishes judicial to legislative functions. Lord Ackner, for example, stated that, to require the Secretary of State "to have proper regard to the Convention ... inevitably would result in incorporating the Convention into English domestic law by the back door."⁷⁴

Nonetheless, in 1998, in *R v Secretary of State for the Home Department; Ex parte Ahmed*,⁷⁵ the English Court of Appeal concluded

189 at 199; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 167.

⁷² See, eg, *Tavita v Minister of Immigration (NZ)* [1994] 2 NZLR 257 at 266 per Cooke P.

⁷³ [1991] 1 AC 696.

⁷⁴ [1991] 1 AC 696 at 761–762.

⁷⁵ [1998] INLR 570.

that the decision in *Brind* did not prevent the application of a doctrine of legitimate expectation similar to that found by the Australian court in *Teoh*. *Ahmed* was a case to which the *Human Rights Act 1998* (UK) did not yet apply. The applicants therefore relied on the United Kingdom's ratification both of the United Nations *Convention on the Rights of the Child* and the ECHR as founding the proposed legitimate expectation. That expectation was held to apply in the absence of a legal reason justifying a contrary approach. It required that the Secretary of State, and his officials, would act in relation to the appellants in accordance with the obligations contained in those treaties. In response to this argument, Lord Woolf observed:

“I will accept that the entering into a Treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country had undertaken. This is very much the approach adopted by the High Court of Australia in the immigration case of *Minister for Immigration and Ethnic Affairs v Teoh*.”⁷⁶

The appellants failed in *Ahmed* because the Secretary of State had clearly stated his intention *not* to follow the obligations imposed by the treaties. The case nevertheless explicitly endorsed the principle of

⁷⁶ [1998] INLR 570 at 583–584.

legitimate expectations as expressed in *Teoh*, absent any clear reason to negative the resulting expectation.

Cases in the United Kingdom since *Ahmed* have resulted in mixed outcomes.⁷⁷ In *R v Uxbridge Magistrates' Court; Ex parte Adimi*,⁷⁸ after once again referring to the Australian decision in *Teoh*, the doctrine of legitimate expectation received express endorsement from Lord Justice Simon Brown and Mr Justice Newman. The latter said that it was:

“firmly established that treaty obligations assumed by the executive are capable of giving rise to legitimate expectations which the executive will not under municipal law be at liberty to disregard.”⁷⁹

Three years later in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*,⁸⁰ Lord Justice Simon Brown recanted his earlier support for the doctrine, stating:

⁷⁷ See James Crawford, “International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison” (Speech delivered for The First Michael Kirby Lecture in International Law, Australian and New Zealand Society of International Law, Canberra, 27 June 2008) <http://law.anu.edu.au/Cipl/Lectures&Seminars/2008/KirbyLecture_Crawford.pdf>.

⁷⁸ [2001] QB 667.

⁷⁹ [2001] QB 667 at 690. See also at 686 per Simon Brown LJ. Further, see *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.

⁸⁰ [2004] QB 811

“I now recognize that the views I expressed in the Divisional Court in [*Adimi*] are to be regarded as at best superficial, and that the conclusion I reached there, with regard to the legitimate expectations of asylum seekers to the benefits of article 31, is suspect.”⁸¹

It follows that, in the United Kingdom, the doctrine of legitimate expectation, based solely on treaty ratification by the executive, continues to evidence a measure of uncertainty. Encouraging signs exist that ratified but unincorporated treaties will have some effect upon common law concepts, such as procedural fairness in administrative decision-making. However, the last word on all of these questions is awaited either from the House of Lords (or a future Supreme Court) or by the enactment of relevant legislation.

Summarising the United Kingdom experience

Courts in the United Kingdom have tended to treat customary international law and treaty law as presenting different categories for which different consequences follow. There is no doubt that, in accordance with the basic dualist approach, treaties, as such, are not a source of direct rights and obligations unless validly incorporated into municipal law.⁸² Accordingly, the focus of most meaningful consideration of this topic is directed at the extent to which such treaties can influence

⁸¹ [2004] QB 811 at 830 per Simon Brown LJ. See also at 844 per Laws LJ.

⁸² This principle stems as far back as *The Parlement Belge* (1879) 4 PD 129, if not earlier.

the development of the common law. On the other hand, with customary international law, some decided cases, such as *Trendtex*,⁸³ have suggested that such custom, where it expresses universal rules observed by civilised nations, automatically forms a part of domestic law. Other cases accept that, whether part of municipal law as such, or not, international customary law may be treated as a contextual consideration, relevant to the derivation by national judges of the common law applicable to a particular case.

One can confidently state that courts in the United Kingdom today generally approach international law without hostility and, more recently, with a broad appreciation that it can be a source of useful analogies and comparisons and thus can become a source for common law principles.

When arguments about international law have been raised by the parties, the courts in the United Kingdom have commonly acknowledged them and engaged with the issues and arguments they present. When international law has afforded possible guidance upon difficult or undecided common law issues, courts in the United Kingdom have not shied away from treating such international law as a useful source of knowledge and legal principle. As will be demonstrated, this conclusion is confirmed by the fact that statements on the potential utility of international law started to appear in Britain much earlier than in

⁸³ [1977] QB 529.

Australia. Moreover, judicial attitudes of indifference or hostility to international law in judicial reasoning have been less evident in the United Kingdom. The question is presented: why should this be so?

DEVELOPMENTS IN AUSTRALIAN LAW

Australian approaches to international law: The Australian experience with international law as a guide to the development of the common law has, so far, reflected a somewhat different history. For two countries with such a long shared legal experience, particularly in respect of the common law, it is striking to notice that the developments in this area have been so different. While each jurisdiction now appears to be moving on a similar path towards ultimately similar outcomes, the paths travelled to get there have by no means been the same.

Generally speaking, the Australian judiciary has displayed a greater hesitation towards treating international law as a legitimate and useful source of legal ideas and principles. Several commentators have noted that “anxieties” appear to exist in the attitudes of many Australian judges (and other decision-makers) so far as international law is concerned. It has been suggested that such “anxieties” may stem from some or all of the following sources:

“the preservation of the separation of powers through maintaining the distinctiveness of the judicial from the

political sphere; the fear of opening the floodgates to litigation; the sense that the use of international norms will cause instability in the Australian legal system; and the idea that international law is essentially un-Australian.”⁸⁴

Whilst courts must act with due respect to the separation of constitutional powers, the Australian judiciary has itself occasionally been ambivalent on this subject.⁸⁵ At other times, it has acted with substantial hesitation, when it came to consider international law. Occasionally the scepticism about international law has been quite obvious. Thus, in *Western Australia v Ward*,⁸⁶ Justice Callinan, in the High Court of Australia, remarked:

“There is no requirement for the common law to develop in accordance with international law. While international law may occasionally, perhaps very occasionally, assist in determining the content of the common law, that is the limit of its use.”⁸⁷

This attitude to international law in the Australian judiciary – by no means an isolated one - has proved rather difficult to shift. Chief Justice Mason and Justice Deane, members of the High Court in the 1980s and

⁸⁴ Hilary Charlesworth et al, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423 at 446.

⁸⁵ See, eg, *Combet v Commonwealth* (2005) 224 CLR 494 at 594; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 134; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 602–603.

⁸⁶ (2002) 213 CLR 1.

⁸⁷ (2002) 213 CLR 1 at 389.

early 1990s, were supporters of the reference to international law as an aid to the development of the Australian common law.⁸⁸ However, even they advocated a generally “cautious approach” to its use.⁸⁹ Their successors have, for the most part, been even more hesitant.

A feature of the Australian approach, that had tended to enlarge a measure of caution on the part of Australian judges, has been the absence of a sharp distinction in the Australian cases between customary international law and treaty law. In general, Australian courts have not sought to apply different rules to international law, according to its source. Instead, they have tended to view them as constituent parts of a single international law corpus. I will highlight some important elements of Australian decisional law as it has emerged chronologically, rather than analytically. I will take this course because judicial developments in Australia on this topic have generally occurred in identifiable phases.

The early isolationist years

Chow Hung Ching’s Case: For most of the twentieth century, international law lay largely dormant in Australian judicial reasoning.

⁸⁸ See, eg, Sir Anthony Mason, “The Influence of International and Transnational Law on Australian Municipal Law” (1996) 7 *Public Law Review* 20.

⁸⁹ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J.

With respect to customary international law, prospects were particularly unpromising after a decision handed down during the early period: *Chow Hung Ching v The King*.⁹⁰ In that case, the response of the High Court of Australia to customary international law was at best lukewarm, evincing a strong sympathy for the transformative approach.⁹¹ Justice Dixon, whose reasons in *Chow Hung Ching* have proved most influential with the passage of time,⁹² said:

“The theory of Blackstone that ‘the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land’ is now regarded as *without foundation*. The true view, it is held, is ‘that international law is not a part, but is one of the sources, of English law’.”⁹³

This statement cannot be viewed as entirely negative, still less hostile, to the use of international law as a source of the Australian common law. The “source”-based view that Justice Dixon mentioned,

⁹⁰ (1949) 77 CLR 449.

⁹¹ James Crawford and W R Edeson, “International Law and Australian Law” in K W Ryan (ed), *International Law in Australia* (1984) 71 at 77.

⁹² Hilary Charlesworth et al, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423 at 453. See also I A Shearer, “The Relationship between International Law and Domestic Law” in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (1997) 34 at 49.

⁹³ *Chow Hung Ching v The King* (1949) 77 CLR 449 at 477 (emphasis added).

apparently based on an article written by J L Brierly,⁹⁴ has come to stand as the modern authoritative position on international law and the common law in Australia. The rejection of Blackstone's statement on incorporation, however, reflected a general lack of enthusiasm for international law which would not change until some 40 years later.

Justice Murphy's approach: Although early hints of a change of attitude in the High Court of Australia may be seen in some of the opinions expressed jointly by Justices Evatt and McTiernan (and separately by Chief Justice Latham) in *R v Burgess; Ex parte Henry*,⁹⁵ an exception to the tendency to confine the influence of international law on Australian municipal law emerged most strongly in the judicial opinions of Justice Lionel Murphy. During the late 1970s and 1980s, he often stood alone in the expression of his view that international law could, and should, influence the development of the common law of Australia.⁹⁶ Justice Murphy forged a path for international law which would later influence, directly or indirectly, several majority opinions of

⁹⁴ J L Brierly, "International Law in England" (1935) 51 *Law Quarterly Review* 24.

⁹⁵ (1936) 55 CLR 608.

⁹⁶ Further information on the opinions of Murphy J may be found in Michael Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Ballilol — A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363 at 375–376.

the High Court.⁹⁷ Sometimes his influence was unacknowledged by later judges. Occasionally they may even have been unaware of the intellectual debt they owed to this original legal thinker.

Justice Murphy used international law on several occasions in cases involving the interpretation of the common law.⁹⁸ Thus, in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*,⁹⁹ he made reference to the *International Covenant on Civil and Political Rights* (ICCPR), specifically article 14, in holding that the privilege against self-incrimination did not extend to corporate bodies.¹⁰⁰ In *Dugan v Mirror Newspapers Ltd*,¹⁰¹ he referred to both the ICCPR and ECHR in holding that the common law of Australia did not prevent a prisoner who had been sentenced to death, whose sentence had been commuted to life imprisonment, from maintaining proceedings in court for a civil wrong.¹⁰² A majority of the High Court of Australia in *Dugan* upheld the application of the old English legal doctrine of “corruption of

⁹⁷ For a discussion of Murphy J’s jurisprudential legacy, see Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997).

⁹⁸ These examples are borrowed from Kristen Walker, “Treaties and the Internationalisation of Australian Law” in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204 at 212.

⁹⁹ (1985) 156 CLR 385.

¹⁰⁰ (1985) 156 CLR 385 at 395.

¹⁰¹ (1978) 142 CLR 583.

¹⁰² (1978) 142 CLR 583 at 607.

the blood” in the case of convicted capital felons. They held that Mr Dugan had no right in law to sue for defamation in the courts.

One of Justice Murphy’s most important opinions was written in dissent in *McInnis v The Queen*.¹⁰³ At issue in that case was whether a person, charged with a serious criminal offence, enjoyed a common law entitlement to be provided by the state with skilled legal representation at his trial. A majority of the High Court held that no miscarriage of justice had occurred in the trial of Mr McInnis, even though he was legally unrepresented through circumstances beyond his control. In dissent, Justice Murphy held that an effective right to the provision by the state of defence counsel existed as part of Australia’s common law. In coming to this conclusion, he referred to article 14(3) of the ICCPR.

In 1992, the High Court of Australia in *Dietrich v The Queen*¹⁰⁴ again held that no common law *right* to counsel existed. However, Justice Murphy’s use of international law to guide the development of the common law was belatedly vindicated. Effectively, the rule expressed in *McInnis* was overruled. It was held that courts could deploy their power to stay criminal proceedings if an indigent accused, without fault, was unable to afford the costs of legal representation to defend a serious criminal accusation.

¹⁰³ (1979) 143 CLR 575.

¹⁰⁴ (1992) 177 CLR 292.

The Bangalore turning point

The Bangalore principles: A tipping point in this controversy arose following the adoption, in 1988, of the *Bangalore Principles on the Domestic Application of International Human Rights Norms*¹⁰⁵. My own views about the use and utility of international law changed greatly after I participated in the high level judicial colloquium organised by the Commonwealth Secretariat and Interights and held in Bangalore, India where these principles were agreed. The meeting was chaired by the Hon. P N Bhagwati, former Chief Justice of India. At the time of the meeting, I was President of the New South Wales Court of Appeal and was the sole participant from Australasia. A number of other participants from Commonwealth countries attended, including Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (later Chief Justice of Mauritius), Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Judge Ruth Bader Ginsburg (later a Justice of the Supreme Court of the United States) also took part.

The *Bangalore Principles* were a modest but useful statement of the role that international law could play in the judicial decision-making of municipal courts. They acknowledged the reality that many lawyers

¹⁰⁵ See M.D. Kirby “The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms” (1988) 62 ALJ 514 at 531-2 where the Principles are reproduced.

from common law countries are brought up in, and are familiar with, a traditional dualist system where firm boundaries are maintained between international law and domestic law. Thus, Principle 4 of the *Bangalore Principles* states:

“In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law.”

This did not mean, however, that international legal principles were irrelevant to the development of domestic law. The remainder of Principle 4 went on to state:

“However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete.”

Principle 6 recognised the need for this process of international law recognition to “take fully into account local laws, traditions, circumstances and needs.” Principle 7 went on to state:

“It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.”

The *Bangalore Principles* did not advocate applying international law in the face of clearly inconsistent domestic law. Nor did they suggest that international law was the only, or even the primary, consideration to which reference might be had when ambiguity arose in domestic law. Instead, the *Bangalore Principles* sought to encourage the use of international law as a source of legal principles that, by a process of judicial reasoning from context and by analogy, could guide the development of the common law where ambiguity or uncertainty arose as to the content of the local law.

The *Bangalore Principles* were to prove influential in several countries. With respect to the United Kingdom, Murray Hunt has written:

“At the time of the formulation of the Bangalore Principles, the UK was on the threshold of an important transition as far as the domestic status of international human rights norms was concerned, and the Principles are a useful measure of the worldwide progress towards acceptance of the legitimate use which could be made of such norms by national judges.”¹⁰⁶

Court of Appeal decisions: When I began to appreciate the way in which the wealth of international legal materials, without binding me, could sometimes be of assistance in the performance of my judicial decision-making, I immediately began to refer to international law, where

¹⁰⁶ Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 37.

appropriate, when seeking to resolve ambiguities, uncertainties or to fill gaps in the common law of Australia.

In 1988, the case of *Jago v District Court of New South Wales*¹⁰⁷ came before me, sitting with Justices Samuels and McHugh in the New South Wales Court of Appeal. The case concerned an application for a permanent stay of criminal proceedings for an alleged abuse of process occasioned by serious delay in bringing the proceedings to trial. The decision required a determination of the content of the right to a *fair* trial as expressed by the common law of Australia and also whether a different and separate right to a *speedy* trial existed which the Australian common law would recognise and enforce. There was no constitutional or statutory principle to afford an express rule that would reduce the uncertainty and decide the matter before the Court.

Justice Samuels was particularly sceptical about using international law to inform his judicial conclusions on the foregoing questions. He preferred, instead, to look at disputed historical materials on the right to a fair trial, principally cases decided in earlier times by the courts of the United Kingdom. Nevertheless, he was not averse to making reference to international law, stating:

“Certainly, if the problem offers a solution of choice, there being no clear rule of common law, or a statutory ambiguity,

¹⁰⁷ (1988) 12 NSWLR 558.

I appreciate that considerations of an international convention may be of assistance. ... [However] In most cases I would regard the normative traditions of the common law as a surer foundation for development.”¹⁰⁸

I expressed preference for a judicial approach that could consider any relevant international legal materials, notably article 14(3) of the ICCPR. I expressed my reasons in this way:

“I do not find it useful, in such an important matter, to attempt to find and declare the common law of this State [New South Wales] in 1988 by raking over the coals of English legal procedures of hundreds of years ago. As Samuels JA has demonstrated, these procedures are imperfectly known and subject to much scholarly controversy. ... A more relevant source of guidance in the statement of the common law of this State may be the modern statements of human rights found in international instruments, prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law.”¹⁰⁹

Another case arose in 1988 which presented the possibility for reference to the principles of international law.¹¹⁰ The moving party was a deaf mute. She had been provided with an interpreter in a hearing before the Compensation Court. During the proceedings, upon application by counsel, the trial judge directed the interpreter to desist from interpreting part of the argument concerning legal submissions. The interpreter declined to do this on the given basis that the proceedings

¹⁰⁸ (1988) 12 NSWLR 558 at 582.

¹⁰⁹ (1988) 12 NSWLR 558 at 569.

¹¹⁰ *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

were in open court and thus that she had a duty to interpret what was being to the party who would otherwise not know what was occurring. The Court of Appeal unanimously held that the trial judge had erred in directing the interpreter as he did. If the mute litigant was not properly excluded from the court or the court lawfully closed, she was entitled to have the words of argument interpreted to her.

In the course of my reasons, I referred to article 14 of the ICCPR. I concluded that the provision could cast light on the content of the right to a fair trial although the ICCPR had not been incorporated into Australian municipal law. I noted: “Those provisions are now part of customary international law. It is desirable that the common law should, so far as possible, be in harmony with such provisions.”¹¹¹ Justice Samuels also thought it relevant to refer to article 14 in balancing the requirements of procedural fairness with the need for a trial judge to retain control over court proceedings. Justice Clarke agreed.

*Cachia v Haines*¹¹², in 1991, involved a dispute concerning a self-represented litigant who had successfully defended proceedings brought against him by his former solicitors. At issue was the ambit of a costs order awarded in favour of a self-represented litigant. I held that such a litigant was entitled to be compensated for the time spent by him in

¹¹¹ (1988) 93 FLR 414 at 422.

¹¹² (1991) 23 NSWLR 304.

preparing and conducting the case. Although, ultimately, the case involved the interpretation of the New South Wales *Supreme Court Rules*, earlier interpretations of the rules had been based upon English common law decisions relating to costs. On the relevance of international law, I remarked:

“The time has passed when Australian judges meekly and blindly accepted non-binding English dicta which their own more egalitarian instincts tell them are incompatible with the justice of the common law as it is declared in this country. They may act with greater confidence in this regard where they know that the English dicta offend basic rules of international human rights law, including as stated in the *International Covenant on Civil and Political Rights* and where the dicta have been roundly and repeatedly criticised by expert bodies of lawyers who have troubled to reconsider their effect. This approach does not involve the error of incorporating international human rights law, as such, into Australian domestic law. It simply uses such statements of international law as a source of filling a lacuna in the common law of Australia or for guiding the court to the proper construction of the legislative provision in question.”¹¹³

Although I was dissenting as to the outcome of *Caccia*, the approach to the use of the principles of the international law of human rights was one that I would continue to deploy until my appointment to the High Court of Australia in 1996.¹¹⁴

¹¹³ (1991) 23 NSWLR 304 at 312–313.

¹¹⁴ See, eg, *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 276 per Kirby P.

The Mabo decision in the High Court

Recognising the influence: Until the early 1990s, the High Court of Australia, following *Chow Hung Ching*, made little comment on the role of international law. . However, the position changed in 1992 in *Mabo v Queensland (No 2)*.¹¹⁵ There the High Court held that the common law of Australia recognised a form of native title which, in cases where it has not been extinguished, reflected the common law entitlement of the indigenous inhabitants of Australia to their traditional lands. The decision overturned the previous classification of Australia at British settlement as “terra nullius”.

The most important majority reasons in *Mabo* were delivered by Justice F.G. Brennan, with whom Chief Justice Mason and Justice McHugh agreed. Justice Brennan made a number of important observations on the development of the common law by reference to international law. First, he stressed that the courts in Australia would not alter the common law in an unprincipled fashion. He said:

“In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.”¹¹⁶

¹¹⁵ (1992) 175 CLR 1.

¹¹⁶ (1992) 175 CLR 1 at 29.

Secondly, he held that the common law of Australia was not confined to reflecting the values of a bygone era of discrimination and disrespect for human rights:

“If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be, nor be seen to be frozen in an age of racial discrimination.”¹¹⁷

Thirdly, in an oft-quoted passage, Justice Brennan spelt out the role for international law in the development of the Australian common law:

“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 on 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 which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.”¹¹⁸

¹¹⁷ (1992) 175 CLR 1 at 41–42.

¹¹⁸ (1992) 175 CLR 1 at 42.

This advance in the judicial acceptance of international law was reflected in another decision delivered in 1992: *Dietrich v The Queen*.¹¹⁹ That case concerned a prisoner who was convicted of an indictable offence — the importation into Australia of a trafficable quantity of heroin. Before his trial, the prisoner had made a number of attempts to secure legal assistance. However, he was unsuccessful on each occasion. In consequence, he was not legally represented at his trial.

A majority of the High Court of Australia held that, in the circumstances, the accused had been denied his right to a fair trial. While Chief Justice Mason and Justice McHugh did not explicitly invoke international law to sustain the content of the right in question, they assumed, without deciding, that Australian courts should use international law where the common law was ambiguous. They called this a “common-sense approach”.¹²⁰ Although in dissent as to the result, Justice Brennan reaffirmed the position he had stated in *Mabo*, observing in connection with article 14 of the ICCPR that, “[a]lthough this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law.”¹²¹ Justice Toohey similarly stated: “Where the common law is unclear, an

¹¹⁹ (1992) 177 CLR 292.

¹²⁰ (1992) 177 CLR 292 at 306.

¹²¹ (1992) 177 CLR 292 at 321.

international instrument may be used by a court as a guide to that law.”¹²²

Applying the Mabo approach: Later decisions of the High Court of Australia have affirmed the status of international law as a contextual consideration casting light on the content of the municipal common law. Thus, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,¹²³ Chief Justice Mason and Justice Toohey, in joint reasons, stated:

“[I]nternational law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights.”¹²⁴

Chief Justice Mason and Justice Deane reiterated the same approach in their joint reasons in *Minister of State for Immigration and Ethnic Affairs v Teoh*.¹²⁵ It was in this case that the High Court held that the ratification of a treaty by the executive could give rise to a legitimate expectation that a Minister and administrative decision-makers would comply with the obligations imposed by that treaty. Even Justice McHugh, who dissented in *Teoh*, was of the opinion that international

¹²² (1992) 177 CLR 292 at 360–361.

¹²³ (1992) 178 CLR 477.

¹²⁴ (1992) 178 CLR 477 at 499.

¹²⁵ (1995) 183 CLR 273 at 288.

treaties could assist the development of the common law, a position to which he had adhered in *Mabo*.¹²⁶

With changes to the personnel of the High Court of Australia, references to international law in recent times became less frequent. Other Australian courts have, however, continued to follow the High Court's lead in the 1990s and to refer quite frequently to international law where ambiguity or uncertainty arises in the interpretation of the common law.¹²⁷ The facultative doctrine stated in *Mabo*, has never been overruled.

The Australian experience

Nevertheless, deep-seated judicial attitudes toward international law in Australia have proved difficult to change. The distinction between custom and treaties has generally been disregarded as a relevant consideration in the development of the common law of Australia. This was perhaps surprising because Australian courts enthusiastically, and frequently, referred to decisions of other jurisdictions, notably the United Kingdom and United States, where a different rule was emerging. It is arguably but a small step to refer to the jurisprudence of international

¹²⁶ (1995) 183 CLR 273 at 315.

¹²⁷ See, eg, *Minogue v Williams* [2000] FCA 125 at [24] per Ryan, Merkel and Goldberg JJ; *R v Stringer* (2000) 116 A Crim R 198 at 217 per Adams J; *R v Granger* (2004) 88 SASR 453 at 477 per Perry J; *Tomasevic v Travaglini* (2007) 17 VR 100 at 114 per Bell J.

and regional courts where the contents of universal rights are being elaborated and refined. Australia's legal isolationism was not destined to last forever. By the end of the twentieth century, a renewed effort to bring Australia in from the cold occurred at many levels of the judiciary, including, most importantly, in the High Court of Australia itself.

THE LEGITIMACY OF INTERNATIONAL LAW

The supposed difficulties: It is useful to collect the reasons why some judges and other observers continue to express hesitations about making any reference to international law. This attitude can generally be explained by reference to a number of familiar considerations:

1. When considering customary international law, a common criticism is the difficulty that can arise in identifying which rules of custom are relevant to a particular case.¹²⁸ Determining the precise content of such rules can sometimes be problematic. In *Polyukhovich v Commonwealth*,¹²⁹ for example, the Australian government argued that an obligation existed in 1998, under customary international law, requiring states, such as Australia, to try war criminals for offences

¹²⁸ Rosalie Balkin, "International Law and Domestic Law" in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005) 115 at 119; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 132. See also the discussion in Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 43–44.

¹²⁹ (1991) 172 CLR 501.

alleged to have occurred in the pre-1945 years. The two judges who considered this argument, Justices Brennan and Toohey, expressed difficulty in determining whether such a rule existed. Thus, Justice Toohey remarked:

“It is impossible, perhaps, to say definitively what were the limits of crimes at international law between 1939 and 1945. This is not merely because of the state of historical record, but because of the nature of international law. The sources of international law and their relative status are not, and were not then, finally fixed. Documents such as those emanating from the United Nations and states’ legislation are strong authority, but there is no hierarchy of judicial and legislative organs, creating a system of binding precedent as in municipal law.”¹³⁰

If the precise scope and applicability of rules of customary international law are uncertain,¹³¹ it is understandable that some judges and practitioners will find them of little or no assistance when seeking to discover, and declare, the common law of the nation with the requisite degree of certainty and transparency appropriate to a legal rule affecting the rights and duties of an individual.

¹³⁰ (1991) 172 CLR 501 at 674. See also at 558–559 per Brennan J; *Chow Hung Ching v The King* (1948) 77 CLR 449 at 472 per Starke J.

¹³¹ Hilary Charlesworth et al, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423 at 451; Ivan Shearer, “The Implications of Non-Treat Law-Making: Customary Law and its Implications” in Philip Alston and Madelaine Chiam, *Treaty-Making and Australia: Globalisation versus Sovereignty?* (1995) 93 at 94; Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 12; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 135.

2. A related criticism is sometimes levelled against treaty-based law, particularly in the case of treaties containing statements of international human rights. Such instruments are commonly expressed at quite a high level of generality. Consequently, they often lack detailed language and specific elaborations of the principles they express. This might not necessarily be a weakness, still less a defect, in the relevant statements of international law. Generality in the expression of human rights norms allows them ordinarily to endure and to be applied to circumstances often quite different from those envisaged by the drafters.

Nevertheless, the problem remains that broadly-worded international instruments may not add much certainty or clarity to the municipal common law. They may encourage, or allow, national judges to use international law to develop domestic law in a manner that reflects little more than what the judges hope, expect or want to find. Although the common law is obviously the subject of legitimate and proper judicial development, and necessarily reflects the values and opinions of the judges declaring its contents, judges are not free to change the common law in an idiosyncratic, unprincipled or arbitrary fashion.¹³² The question thus arises whether it is more legitimate, and safer, for judges in national courts to adhere to the contents of their own national legal sources of inspiration and guidance, ignoring the open-ended rules of international

¹³² *Mabo* (1992) 175 CLR 1 at 29 (Mason CJ and McHugh J agreeing).

law as too imprecise and malleable to be of use in the task of finding and declaring the contents of binding national law.

3. A third criticism levelled against the use of international law stems from the structure of the system of democratic government itself. Both in Australia and the United Kingdom,¹³³ treaties are negotiated and ratified by the executive government. No prior or even later approval by the legislature is constitutionally required. It is, however, generally speaking, the legislature, not the executive nor the judiciary as such, that is responsible for deciding whether the body of law expressed in an international treaty will be incorporated into domestic law. This is why courts have repeatedly warned that the judiciary must not effectively incorporate treaties into domestic law by way of the “back door”, under the guise of “developing” the common law or, indeed, interpreting a statute or construing the national constitution.

To act in such a way would amount to an impermissible usurpation by the courts of law-making powers and responsibilities belonging to other branches of government. It would also risk politicising the courts in an undesirable way because any judicial moves to incorporate substantial treaty provisions might attract fierce antagonism

¹³³ It is also a feature that poses difficulties for other countries, such as Canada: Armand de Mestral and Evan Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (2006) 31.

from the other arms of government on separation of powers grounds.¹³⁴

The courts are acutely aware of this problem. In *Teoh*, Chief Justice Mason and Justice Deane stated:

“[T]he courts should act ... 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 backdoor means of importing an unincorporated convention into Australian law.”¹³⁵

4. To similar effect, it is sometimes argued that reference to international human rights “principles” or the “universal rules” of fundamental rights when developing the common law, tends to subvert domestic attempts to incorporate human rights into the legal system through the transparent, democratic and accountable legislative process.

If a country desires a charter of rights, so the argument goes, such an instrument should be introduced into the law by the legislature, following a dialogue between the people and their elected representatives. It is the place of the legislature, not the judiciary, to

¹³⁴ See, eg, Henry Burmester and Susan Reye, “The Place of Customary International Law in Australian Law: Unfinished Business” (2000) 21 *Australian Year Book of International Law* 39 at 51.

¹³⁵ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J. In the Canadian context, see the concerns contained in the dissent of Iacobucci and Cory JJ in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at 866.

decide which, if any, principles of human rights recognised by international law will form part of a country's charter or otherwise be recognised by its legal system. Although this argument has less relevance to the United Kingdom, following the enactment of the *Human Rights Act*, it continues to have forensic force in Australia where comprehensive human rights legislation does not yet exist at the federal level and where several earlier attempts to introduce such general legislation failed dismally.¹³⁶

Answering the critics: What can be said in response to the foregoing criticisms and concerns? Even acknowledging the movement in courts around the world towards the use of international law in the development of the common law, should its use be confined in particular ways, or even abandoned? A number of arguments can be advanced in support of the use of international law and a proper jurisprudential basis can be identified, for the judiciary of our tradition acting in that way.

1. Even the staunchest critic of the evolutionary growth of the common law must admit that it never stands still. To remain relevant, the common law must develop and adapt, but on a case-by-case basis. This is not merely an historical feature of the legal systems of the United Kingdom and Australia. It is an operational necessity. If a properly

¹³⁶ Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009, 30-36).

functioning common law system requires judges to apply the law to new and different fact situations, one must naturally ask: where should a judge look when seeking guidance for the decisions that they are obliged to make?

In an adversarial system, such as exists in the United Kingdom and Australia, the party that argues most persuasively will often carry the day. When both parties are represented by skilled counsel, no clear winner may emerge. More importantly, before one can examine the respective arguments of the parties, it is necessary to know what material a party may rely upon when advancing their arguments and what material must be excluded as legally inadmissible or irrelevant.

A regular source of guidance for judges in declaring the common law by determining new and difficult questions about its scope and content, is legal history.¹³⁷ However, historical materials sometimes constitute a far-from-perfect guide. Previous judicial reasoning can be the subject of interpretative disagreements, with reasonable minds differing over the rule, or *ratio decidendi*, of earlier cases. More importantly, historical materials are often unhelpful and even misleading. If, for example, a court were required to determine the scope and content of the common law right to a fair trial, a judge could be led astray

¹³⁷ For a comparison of the different sources of guidance, see *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 where Samuels JA looked extensively to historical materials while I made reference to international law.

if he or she were to use exclusively historical materials in reaching his or her decision. This is because the right to a fair trial has evolved substantially over time.

What was required to constitute a fair trial in the seventeenth or eighteenth century is certainly not the same as it is today.¹³⁸ To now read the decision of the High Court of Australia in *McInnis*¹³⁹, involving an accused person abandoned at trial by his counsel, forced on to defend himself without legal representation against serious charges in a substantial criminal trial, illustrates quite vividly the advances that have occurred in notions of fair trial in fewer than thirty years. The reason for the change can be traced to changing values and the basic principles of justice and fairness that have evolved over time.

It is here that international law can help to illuminate the judicial path. International legal rules and principles — as well as decisions made by international courts and tribunals — may sometimes provide a surer guide than history affords as to what is required for a fair trial. Article 14 of the ICCPR or article 6 of the ECHR may provide a source of ideas and values which can inform the content of a nation's common law. After all, the ICCPR and the ECHR are supposed to be directed at stating universal values. It can therefore, at least sometimes, be useful

¹³⁸ *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569 per Kirby P.

¹³⁹ (1979) 143 CLR 575. See above.

for a judge to draw on the wisdom of contemporary judicial decisions of an international or regional court as much as for that a judge to draw on, say, the wisdom of seventeenth century judicial decisions of an English court.¹⁴⁰ Shane Monks explains why references to international materials require no great leap in the established judicial method:

“Australian courts have always made reference to case law from other common law jurisdictions, including the United States (with which Australia has never shared membership of a hierarchy of courts). There is no logical reason why international law should be a less acceptable source of comparative law than any other municipal jurisdiction. On the contrary, its acceptance by many different jurisdictions should make it a more acceptable source of comparison.”¹⁴¹

References to elaborations of any relevant principles of international law can also lend greater legitimacy and principle to judicial decision-making:

“Referring to international law could assist in distancing the judicial law-making role from domestic controversy and party-politics and, as an objective source of law, from any suggestion that judges are simply imposing their own personal political views.”¹⁴²

¹⁴⁰ *Ibid.*

¹⁴¹ Shane S Monks, “In Defence of the Use of Public International Law by Australian Courts” (2002) 22 *Australian Yearbook of International Law* 201 at 222–223.

¹⁴² *Ibid* at 223.

The advances of the common law in the past have occurred as a result of the attempts by judges to express the changing values of society deserving of legal enforcement. One inescapable contemporary influence in the expression of such values is the emerging content of international law. Technology, including media, affords today's judges and litigants a wider context for the expression of values simply because this is the world that they inhabit for which the municipal common law must now be expressed. The expansion of the sources is no more than a recognition of the growth of global and regional influences upon the world in which judges, litigants and other citizens operate.

2. It is also important to recognise how, in practice, international law is usually deployed by domestic judges. As first expressed, the *Bangalore Principles* required ambiguity to justify any reference to international law. If a clear constitutional, statutory or common law rule exists, international law could not be invoked to override that authority. Ambiguity, uncertainty or possibly a gap in the applicable law was originally required before reference could be made to an international legal principle. At least so far as the common law is concerned, it is always subject to a legislative override. Subsequent versions of the *Bangalore Principles* have deleted the requirement for ambiguity.¹⁴³ This might involved a change more apparent than real. If a text is clear

¹⁴³ Referring to the 1998 re-statement: see K J Keith, "Protecting Human Rights in a Time of Terror: The Role of National and International Law" (2005) 13 *Waikato Law Review* 22 at 31.

judges and other affected would normally give it judicial effect. As a practical matter, this would generally relieve the decision-maker from searching for different meanings.

3. Affording international human rights law a place in the development of the common law therefore pays a proper regard to the special status of human rights norms.¹⁴⁴ Most advanced nations have moved beyond purely majoritarian conceptions of democracy.¹⁴⁵ Respect for the fundamental rights of all people within a polity, including minorities, is now generally accepted as a prerequisite for a functioning democratic society.¹⁴⁶

In developing the common law by reference to human rights principles, the judiciary, far from undermining the democratic system of government, plays a critical role in upholding that system. In this way, judges contribute to respect for democracy in its fullest sense. By its very nature, international law can help the municipal judiciary to

¹⁴⁴ Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 35; Kristen Walker, "Treaties and the Internationalisation of Australian Law" in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204 at 233.

¹⁴⁵ Michael Kirby, "A Bill of Rights for Australia — But Do We Need It?" (1995) 21 *Commonwealth Law Bulletin* 276 at 282. In the Canadian context, see Armand de Mestral and Evan Fox-Decent, "Implementation and Reception: The Congeniality of Canada's Legal Order to International Law" in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (2006) 31 at 60–61.

¹⁴⁶ See, eg, Hilary Charlesworth, "Protecting Human Rights" (1994) 68 *Law Institute Journal* 462 at 463.

understand, and more consistently adhere to, fundamental human rights and freedoms. Moreover, it can stimulate legislative decision-making which may have neglected, ignored or unduly postponed the protection of minorities and the provision of legal equality for all citizens.

4. Particularly in “an era of increasing international interdependence”,¹⁴⁷ it is impossible today to ignore Lord Denning’s “incoming tide”¹⁴⁸ of international law. With many cases coming before the courts involving disputes with an international flavour — whether it be the identity of the parties, the applicable law or the subject matter of the dispute — litigants and the wider community generally expect a country’s laws, including the common law, to be in broad harmony with any relevant provisions of international law.¹⁴⁹ This is not a proposition based on ideological posturing. It derives from the reality of life in what is now a closely interconnected world. The law is an integral component of modern society. The intellectual nationalism of the past no longer affords a satisfying boundary in today’s world for the sources of common law elaboration and expression.

¹⁴⁷ Kristen Walker, “Treaties and the Internationalisation of Australian Law” in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204 at 233.

¹⁴⁸ *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418 per Lord Denning.

¹⁴⁹ See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 41–42 per Brennan J (Mason CJ and McHugh J agreeing).

5. Using international law to influence the development of municipal common law also helps to resolve an inherent tension between two legal theories. On the one hand, it is normally for the legislature to determine whether a treaty will be incorporated into domestic law. On the other, treaty ratification by the executive should not be treated as an inconsequential or legally neutral act. As Sir Robin Cooke, then President of the New Zealand Court of Appeal, remarked, undertaking to be bound by an international instrument should not amount to mere “window-dressing”.¹⁵⁰ Judges should neither encourage nor condone such an attitude on the part of executive government given the growth of international law in recent decades and its daily importance for most countries.

One method for affording proper recognition of a country's international legal obligations, while still respecting the functions of the legislature to enact any significant law binding on the people, is to seek, where possible, to develop the common law in line with the international obligations. According to international law itself, treaties, when ratified, bind the country, including all three arms of government. They do not just bind the executive government. When judges pay regard to the content of treaty law they therefore help to ensure that the judiciary, as an arm of government, is not hindering respect for the international obligations to which the country has agreed to be bound in accordance

¹⁵⁰ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

with its own legal processes. Apart from any other consequence, when judges take the ratification of a treaty at face value this tends to restrain symbolic gestures, empty “feel-good” posturing not intended by those involved to have any municipal legal effect even though they certainly have international legal results.

6. Employing international law in this manner is neither novel nor is it particularly radical. It adopts an incremental approach that places international law on a plane equivalent to other interpretative aids long used by judges in developing and declaring the common law, such as historical and other scholarly materials. Domestic human rights legislation, such as the United Kingdom *Human Rights Act*, affords international human rights principles far more direct and immediate applicability. In countries such as Canada and South Africa, human rights law now enjoys a constitutional status and pervades all aspects of their legal systems.

Referring to international law, and especially when there is ambiguity or uncertainty in the common law, is thus a modest step in judicial reasoning by comparison to what is required in most other countries today. It observes the proper boundaries between the legislature, executive and judiciary, each of them, within their respective spheres, performing their proper functions in accordance with their own procedures. At the same time, it ensures that a country’s legal system does not become isolated from that of the community of nations. This is an even greater danger in the case of a country such as Australia

because, as yet, it has no federal human rights legislation that provides a direct path for access to international human rights law and jurisprudence, permitting these sources to have a more immediate and expressly enacted effect upon the nation's domestic law.

7. Finally, the judicial use of international law does not normally amount to the introduction of a set of rules and principles substantially different from the laws with which we are familiar. Both Australia and the United Kingdom would probably consider that they ordinarily observe and respect fundamental rights and freedoms. Doubtless, as a general proposition this is so. International human rights law is normally consistent with and re-enforces such values. This fact is neither surprising nor accidental. As Lord Scarman often pointed out, key documents, such as the *Universal Declaration of Human Rights* and the ICCPR were profoundly influenced by values substantially derived from the Anglo-American legal tradition. The international law of human rights talks to both countries in a familiar language and in terms of well-recognised concepts. It expresses principles that accord very closely with our own long expressed legal, moral and cultural traditions.

CONCLUSION: AN ONGOING CONVERSATION

It is inevitable that international law will continue to enter municipal law in a multitude of ways. The effect is already great. For example, commentators have suggested that some 40 percent of Canadian statutes today are adopted to implement international commitments in

Canada in whole or in part.¹⁵¹ However that may be, to attempt to stem the tide of international law is to attempt to prevent the inevitable whilst risking isolation and irrelevance of municipal law in the process.

Sir Anthony Mason, a former Chief Justice of the High Court of Australia, in a statement endorsed by his successor, Sir Gerard Brennan,¹⁵² explained that:

“The old culture in which international affairs and national affairs were regarded as disparate and separate elements [is] giving way to the realisation that there is an ongoing interaction between international and national affairs, including law.”¹⁵³

In the United Kingdom, Lord Bingham of Cornhill, until recently the senior Law Lord, expressed similar sentiments. In 1992 he wrote:

¹⁵¹ Armand de Mestral and Evan Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (2006) 31 at 34.

¹⁵² Speech delivered at the Fiftieth Anniversary of the International Court of Justice, Opening of Colloquium, High Court of Australia, Canberra, 18 May 1996.

¹⁵³ Sir Anthony Mason, “The Influence of International and Transnational Law on Australian Municipal Law” (1996) 7 *Public Law Review* 20 at 23.

“Partly in hope and partly in expectation ... the 1990s will be remembered as the time when England ... ceased to be a legal island”.¹⁵⁴

It was Lord Bingham’s hope and expectation that the time had come when England no longer had:

“an unquestioning belief in the superiority of the common law and its institutions [that meant there was] very little to be usefully learned from others”.¹⁵⁵

Although, as a result of education and experience, many lawyers continue to exhibit a strong, even zealous, faith in their own legal systems, it is important, as Lord Bingham noted, not to forget the benefits that can be gained from looking beyond one’s own comfort zone. This means considering the jurisprudence not only of other common law jurisdictions but also of different legal traditions and of international courts and other bodies interpreting international treaties and declaring international customary law.

Recognising the importance of international law does not consign domestic law to the sidelines of a country’s legal system. The “legal transformation” which is taking place is not the replacement of national law with international law where the latter suffers the flaw of a

¹⁵⁴ T H Bingham, “‘There Is a World Elsewhere’: The Changing Perspectives of English Law” (1992) 41 *International and Comparative Law Quarterly* 513 at 514.

¹⁵⁵ *Ibid.*

democratic deficit.¹⁵⁶ On the contrary, international law offers an opportunity to enhance both the relevance and utility of domestic law by ensuring, through principles such as respect for human equality and non-discrimination, that all persons in society will fully realise, and exercise, the freedoms that they enjoy within their polity.

In the Australian case of *Dietrich*,¹⁵⁷ for example, international law was cited by the majority judges to support the proposition that Australia's domestic laws should apply equally to both the rich and poor in the important matter of ensuring the fair trial of an accusation of a criminal offence. With the assistance of article 14 of the ICCPR, the High Court of Australia found that the common law entitlement to a fair trial would, in some circumstances, justify a stay of proceedings where the accused was unable to secure access to appropriate legal representation. In other words, international legal principles helped to ensure that domestic criminal laws applied in a non-discriminatory way to all people. The same result could, perhaps, have been secured by a close study of local historical materials or foreign case law; arguable implications from the constitutional text; admissible social, criminological or philosophical sources; forensic arguments; and rhetorical submissions. Nevertheless, the invocation of such sources had not

¹⁵⁶ Oonagh E Fitzgerald, "Understanding the Question of Legitimacy in the Interplay between Domestic and International Law" in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (2006) 125 at 130.

¹⁵⁷ (1992) 177 CLR 292.

produced a just outcome in the same court only twelve years earlier in the *McInnis* case. The invocation of the principle of international human rights law helped to make the difference and to produce an outcome more in line with the values of civilised nations. The methodology was incremental. All that had occurred was a broadening of the sources of relevant information in harmony with the world in which the common law now operates.

Because courts in most developed countries are now aware of the contents and usefulness of international law, particularly as that law expresses the universal values of human rights, it seems inevitable that such law will be referred to with increased frequency when municipal judges are required to develop their own common law in new and difficult cases. This is a process that started many years ago. It will continue into the future. It is a development not without controversy, as I have shown. There are problems to be acknowledged such as the selection, availability and efficiency of having access to a wider pool of international data. But it is a controversy we have to resolve.

A particular controversy is one that I have mentioned but not dealt with, namely the extent to which regard may be had to the statements of universal principle in international law when construing written constitutions (such as those of the United States, Canada, and Australia), adopted before the advent of the modern international law of

human rights. That controversy presents additional questions, suitable for another day.¹⁵⁸ Constitutions are special statutes. They are inescapably political in character. Their interpretation often engenders strong nationalistic and partisan passions. Typically, once interpreted, they are difficult to change. The influence upon them of international law is therefore a question deserving of separate attention.

The continuing evolution of the Constitution of the United Kingdom, in the form of new written instruments addressed to the government of the country, probably means that the United Kingdom will not be cut off from such constitutional controversies that face the United States, Canada and Australia. But in the United Kingdom the response, when it comes, is likely to be more temperate and more sympathetic because of the increasing role that international law, especially European law, is having on all branches of the written law. Meanwhile, the common law continues to evolve, also influenced by the contextual phenomenon of international and regional law.

Reconciling comfortable municipal jurisdictionalism with global and regional realities constitutes one of the largest challenges that faces lawyers of the common law tradition today. Given its history and

¹⁵⁸ Michael Kirby, "International Law: The Impact on National Constitutions" (2006) 21 *American University International Law Review* 327; Michael Kirby, "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges" (2008) 9 *Melbourne Journal of International Law* 171 at 185.

methodology and the judicial actors who are in charge, it is highly unlikely that an accommodation will not be reached. The clues to the future are the familiar features of the common law techniques that make it one of Britain's most successful exports: incrementalism; practical realism; and reasoning by analogy and the use of logic from one case to the next.
