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INTERNATIONAL LAW AND
THE COMMON LAW:
CONCEPTUALISING THE
NEW RELATIONSHIP

The University of Adelaide
Fourth James Crawford Biennial Lecture on International Law
14 October 2009.

The Hon. Michael Kirby AC CMG

THE UNIVERSITY OF ADELAIDE

**FOURTH JAMES CRAWFORD BIENNIAL LECTURE ON
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INTRODUCTION

This is the fourth lecturer in this series. The first was the honorand himself, Professor James Crawford. He was followed by Professor Ivan Shearer, and by Professor Hillary Charlesworth. Each of the first three lecturers was at one time a member of the Faculty and Professor of Law of this University. So I am the first outsider to be trusted with this responsibility.

Yet I am no stranger to the University of Adelaide. During my service in the Australian Law Reform Commission and later in the appellate judiciary, I enjoyed the closest and most harmonious of relationships with this law school. There must be something special in the water of Adelaide to spawn so many great international lawyers. However, knowing the sensitivity of the citizens of Adelaide about their water, I had better not develop that metaphor. The fact remains, that Adelaide has

* Some parts of this lecture come from an earlier talk given by the author at the City University of London on 23 April 2009, to be published in *Legal Studies* (2009) forthcoming.

** Justice of the High Court of Australia (1996-2009); President of the Institute of Arbitrators & Mediators Australia (2009-). The author acknowledges the assistance of Mr. Scott Stephenson, Research Officer in the High Court of Australia, and of Mr. James Crumrey-Quinn of the University of Adelaide in the preparation of this lecture.

always been an important centre for the teaching of international law. May it always remain so.

My lecture, like Caesar's Gaul, is divided into three parts. The first will be a tribute to James Crawford, a friend of mine since I persuaded him to accept appointment as a commissioner of the Australian Law Reform Commission in 1982. Secondly, I will describe the conversation that is occurring between the common law and the growing body of international law that is such a powerful force in the contemporary world. I will do so not only by reference to developments that have been occurring in the United Kingdom (original source of the common law) and Australia, but also in Malaysia and Singapore as well. I include the neighbouring states out of respect for the video link that has been established, on this (as on past) lecture occasions, with alumni and other friends in Malaysia and Singapore with whom the University of Adelaide has a special relationship. Finally, I will offer some thoughts as to how one can conceptualise the growing use that is being made of international law in expositions of the common law. In doing this, I will attempt to offer a few prognostications.

The topic is expressly technical. However, I hope to demonstrate that it is also interesting for the dynamic of change and development that it illustrates in the discipline of law. Certainly, it is important for it concerns the relationship of the law of jurisdictions with the modern world of global technology, trade and other relationships.

PROFESSOR JAMES CRAWFORD

James Crawford was born in Adelaide in 1948. He was educated at Brighton High School and this University. He proceeded to Oxford

University for his D.Phil. degree before returning here as a lecturer in law in 1974. In less than ten years, he had been appointed Reader and then Professor of Law. It was at that time that I tempted him to leave leafy Adelaide and to accept appointment in the Australian Law Reform Commission (ALRC) whose foundations commissioners had included Professors Alex Castles and David St.L. Kelly. I pay a tribute to the huge contributions that the Adelaide Law School and legal profession made to the creation of the ALRC. It may have been the influence of the early German settlers that made Adelaide a special place for reform and critical examination of the law.

James Crawford came to Sydney to take charge of a reference that had been assigned to the ALRC on the subject of the recognition of Aboriginal customary laws¹. He steered the ALRC to producing an outstanding report. Inevitably, the topic was inevitably highly controversial. Many of the proposals were never translated into positive law. Nevertheless, the conduct of the investigation, under Professor Crawford, materially altered the national *Zeitgeist* on the interface of law and our indigenous people. It promoted the notion, novel at the time, that the Australian legal system had far to go in adjusting to the laws and customs of the indigenes of this continent. In my view, it is no coincidence that the radical step of re-stating the common law of Australia to recognise Aboriginal native title took place in the *Mabo* decision of 1992². Moreover, the key that unlocked the door to that ruling, rejecting earlier statements of the common law, was a recognition given voice by Justice F.G. Brennan (himself earlier an ALRC commissioner) that the universal principles of human rights forbade

¹ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31), 1986.

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

acceptance of a common law rule based upon discrimination against Aboriginal citizens by reference to their ethnicity³.

James Crawford was heroic in his labours in the ALRC. He led other projects, including one on sovereign immunity⁴, and the other on reform, patriation and federalisation of Admiralty Law and jurisdiction⁵. His recommendations in those projects were, almost without exception, translated into Australian federal law⁶.

In 1986, whilst serving as an ALRC commissioner, Professor Crawford was appointed Challis Professor of International Law in the University of Sydney. He became Dean of the Sydney Law School in 1991. This was a post he held until 1992. He was then elected to the position of Whewell Professor of International Law in the University of Cambridge. This is an appointment he still holds whilst also serving for a time as Chair of the Faculty Board of Law, serving as a member and rapporteur of the United Nations International Law Commission (1991-2001), publishing several standard legal texts, building one of the strongest practices as an advocate before international courts and tribunals; and being elected to positions in international bodies, including as a conciliator and arbitrator, nominated by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID). Many of Professor Crawford's recent activities have involved international commercial arbitration. This was the subject that he chose to address on his return to the University of

³ (1992) 175 CLR 1 at 42 per Brennan J.

⁴ *Foreign State Immunity* (ALRC 24, 1984).

⁵ *Civil Admiralty Jurisdiction* (1986, ALRC 33).

⁶ *Foreign State Immunities Act 1985* (Cth) and *Admiralty Act 1988* (Cth). Some aspects of the report on Aboriginal customary laws were also implemented, e.g. by the *Crimes & Other Legislation Amendment Act 1994* (Cth); and the *Native Title Act 1993* (Cth).

Sydney earlier this year to deliver an invited lecture to celebrate the Law School's establishment in its new institutional home⁷.

Enough has been said of James Crawford's illustrious career to demonstrate that he is one of the most famous of the *alumni* of the University of Adelaide. He is certainly one of the world's leaders in scholarly analysis of the direction of international law. In the last year of my service on the High Court of Australia, he did me the honour of inaugurating a lecture series at the Australian National University named after me⁸. Now I have the opportunity to repay the compliment. But it is not a difficult task because each of us has had that peculiar and beneficial experience of participating in the creation of international law. In his case, this has been done in the International Law Commission and before international courts and tribunals. In my case, it arose in activities of several of the agencies of the United Nations: UNESCO, the World Health Organisation, the United Nations Development Programme, the International Labour Organisation, the United Nations Office on Drugs and Crime, and as Special Representative of the Secretary-General for Human Rights in Cambodia.

Engagements of this kind in international activities can sometimes dampen starry-eyed optimists. But they also illustrate the dynamism, energy and irrepressible force of the growth of international law today. International law expands in harmony with the technology of international flight, shipping, satellites and telecommunications. It advances under the impetus of global media, trade and problems

⁷ J. Crawford, "Developments in International Commercial Arbitration: The Regulatory Framework", University of Sydney, Distinguished Lecture Series, 4 May 2009 (unpublished).

⁸ J. Crawford, Inaugural Kirby Lecture, ANU, "International Law in the House of Lords and the High Court of Australia 1996-2008: a Comparison" in (2009) 28 *Australian Year Book of International Law* (forthcoming) (in press).

demanding global resolution. It spreads in response to the needs of the human species to secure and enforce laws that reduce the perils of modern warfare and encourage harmonious accommodation, the alternative to which is unprecedented destruction of the environment, the species, or both.

This is an exciting time to be engaged with international law. James Crawford, educated in Adelaide at this University, is one of the most brilliant legal actors in the modern drama. We, his students, friends, colleagues, teachers and admirers, are proud of his accomplishments. But especially so because he is always distinctively an Australian.

INTERNATIONAL LAW AND COMMON LAW

Defining the Issues: The common law is the judge-made body of law declared by superior court judges in the course of resolving disputes brought before them for decision. Because different principles apply, for present purposes I will set aside two important, but different, problems, namely the interaction of international law with the construction of a written constitutional text and the interpretation of general legislation by reference to international law. Upon the first of these subjects (constitutional interpretation) there have been sharp differences of opinion in the High Court of Australia⁹. Similar differences have emerged in reasoning in the Supreme Court of the United States of America¹⁰.

⁹ See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [62]; cf at 617 [152].

¹⁰ See e.g. *Atkins v Virginia* 536 US 304 (2002); *Lawrence v Texas* 539 US 558 (2003); *Roper v Simmons* 125 S.Ct. 1183 (2005). See also M.D. Kirby, "International Law – the Impact on National Constitutions", 21 *AMU Int'l L Rev* 327 (2006).

The interaction between national constitutions and the growing body of international law, at least in countries that do not have an express constitutional provision directing courts how they should approach the issue, is highly contentious in nation states such as Australia and the United States of America because their written constitutions were adopted long before the emergence of the modern treaties that express international law and, indeed, most to the contemporary principles of customary international law. Depending upon the view taken concerning the extent to which this consideration of timing governs the interpretation of the constitutional text, international law may be viewed as irrelevant because outside the “original intent” of those who first adopted and accepted the constitutional text¹¹. Interesting although this particular debate may be, it is not the subject of this lecture.

Similarly, I am not here concerned with the extent to which municipal courts should read contemporaneous statutory provisions so as to be consistent with universal principles of international law. At the beginning of the Australian Commonwealth, in 1908, in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*¹², Justice O'Connor declared that:

“Every statute is to be interpreted and applied so far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.”¹³

This is another very interesting question, highly relevant to the discovery of the law applicable in many instances, given that statute law has now

¹¹ See e.g. *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-225 [181]-[182], per Heydon J.

¹² (1908) 6 CLR 309. See also *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Plaintiff S157/2000 v The Commonwealth* (2002) 211 CLR 476 at 492 per Gleeson CJ

¹³ (1906) 6 CLR 309 at 363.

overtaken common law as the source of most of the written law of modern nations. The influence of international law on the interpretation of statutes, at least where such statutes were not specifically enacted to give effect to international legal obligations, is also a matter of debate, at least in Australia¹⁴. Those who yearn for my views must await publication of *The Adelaide Law Review* issue in February 2010, including my article on the *Jumbunna* case of 1908. It has been the subject of debate in the courts of the United Kingdom. However, both by common law¹⁵ and now by provisions of the *Human Rights Act 1998* (UK)¹⁶, it is generally regarded in that country as proper for courts to resolve any ambiguity by interpreting the statute so as to conform, as far as possible, with the applicable principles of international law, especially if those principles express the fundamental law of human rights stated for the United Kingdom in the European Convention on Human Rights. Again, this is an interesting and important debate. But this is not the occasion to explore it¹⁷.

Instead, in these remarks, I intend to concentrate on the synergy between international law, as expressed in customary law and in treaties, and common law by how international law has influenced judicial declarations as to the content of the common law. I will do this by reference to case law and academic analysis (including some observations by James Crawford himself). I will mention cases arising in

¹⁴ See e.g. *Coleman v Power* (2004) 220 CLR 1 at 93-99 [243]-[257]. Similar issues have arisen in the United Kingdom: *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; Bennion, *Statutory Interpretation – A Code*, 4th ed., 2002, 779.

¹⁵ See *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.

¹⁶ *Human Rights Act 1998* (UK), s6.

¹⁷ See M.D. Kirby, "The *Jumbunna* Case after 100 Years", (forthcoming) *Adelaide Law Review* (2009).

the United Kingdom, Australia, Malaysia and Singapore. My survey should give us some idea of the emerging trends.

Obviously, in earlier times, before the establishment of the United Nations Organisation in 1945, international law was much more modest, both in content and applications. However, since the mid-1970s, both in Europe but also in countries of our own region, international law has begun to cover a much wider range of subjects. As early as 1974, Lord Denning expressed the opinion that the influx of cases, as he put it, with a European element in Britain was like “an incoming tide [which] cannot be held back”¹⁸. It may not be doubted that the close ties with European institutions forged by the United Kingdom in the past thirty years have proved a catalyst for legal change and for bringing international law more directly into the legal system of the United Kingdom. Inevitably this has not been exactly the same in Australia, Malaysia or Singapore. Most especially, the *Human Rights Act*, which came into domestic effect in the United Kingdom as from 2000, has inevitably had a large impact on the thinking of British lawyers and judges. When a body of law becomes part of the daily concerns of a lawyer, it is inevitable that its provisions will influence the way other parts of the law will be viewed and interpreted. A new habit of mind is encouraged which cannot but influence the way lawyers and judges approach problems and discover and apply the law that is needed for the resolution of problems.

UK 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

¹⁸ H.P. Bulmer Ltd v J. Bollinger SA (1974) Ch 401 at 418.

incorporation/transformation debate.¹⁹ 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.²⁰ With a few notable exceptions,²¹ the courts have “generally eschewed analysis of the role of custom by reference to the distinction between incorporation and transformation”²². Many judges have assigned the debate to the academic sphere. Lord Justice Stephenson remarked that “the differences between the two schools of thought are more apparent than real”.²³

Criticism of this supposed distinction is not confined to the judiciary.²⁴ The somewhat illusory nature of the debate has encouraged academic commentators to look for alternative taxonomies, or to abandon such rigid classification altogether. Professor Crawford, for example, has urged us to focus not on the labels “incorporation” and “transformation” but on how, in practical terms, customary international law has actually

¹⁹ 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.

²⁰ 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.

²¹ 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.

²² Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at 132.

²³ *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.

²⁴ 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.

influenced the decisions of courts in individual cases.²⁵ Writing with W R Edeson, Professor Crawford noted that “[t]he difficulty with slogans in the present context is that they fail to give guidance in particular cases.”²⁶

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 occasionally 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 distinctive 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 first be *transformed* before it can become part of domestic or national law, the court has exhibited a more cautious attitude towards the use of international law. *Transformation* treats customary international law as distinct and separate from domestic law. Even if, in practice, the technical distinction between the

²⁵ 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.

²⁶ James Crawford and W R Edeson, “International Law and Australian Law” in K W Ryan (ed), *International Law in Australia* (1984) 71 at 78.

terms is more apparent than real, the two expressions tend to reflect differing levels of enthusiasm for customary international law as a legitimate and influential body of legal principles, apt for use by a 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. A starting point for analysis of the case law is usually taken to be the bold and unqualified judicial statements written in *Buvot v Barbuit*²⁷ and *Triquet v Bath*.²⁸ Those decisions are said to exemplify an approach to international law more closely reflecting the *incorporation* doctrine,²⁹ 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 British enthusiasm was, however, qualified by decisions written during the late nineteenth and early twentieth century. Thus, the judicial decisions in *The Queen v Keyn*³⁰, and arguably in *West Rand Central Gold Mining Co Ltd v The King*³¹, were viewed as signalling a resurgence of the *transformation* doctrine.³² If this understanding were 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 at that time.

²⁷ (1737) Cas Temp Talbot 281.

²⁸ (1764) 3 Burr 1478.

²⁹ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 41; Malcolm N Shaw, *International Law* (5th ed, 2003) at 129.

³⁰ (1876) 2 Ex D 63.

³¹ [1905] 2 KB 391.

³² Sir William S Holdsworth, *Essays in Law and History* (1946) at 263–266. 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 40ff; Rebecca M M Wallace, *International Law* (5th ed, 2005) at 41.

Such a view was not, however, shared by all commentators. A number considered the cases about the incorporation/transformation question “ambiguous”.³³ 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.”³⁴ Professor Ian Brownlie was likewise of the opinion that the *West Rand* case was fully consistent with the incorporation doctrine. He argued that the oft-cited opinion of Cockburn CJ in that case had been focused on proving the *existence* of rules of customary international law in domestic courts, not on examining whether those rules were in some way incorporated or had first to be transformed.³⁵

Statements on this issue in the context of customary international law continued to appear in judicial decisions of the English courts throughout the twentieth century. Many of the decisions continued to obscure the dividing line between the theories of incorporation and transformation. Thus, in *Chung Chi Cheung v The King*,³⁶ 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

³³ Malcolm N Shaw, *International Law* (5th ed, 2003) at 131.

³⁴ H Lauterpacht, “Is International Law a Part of the Law of England?” (1939) 25 *Transactions of the Grotius Society* 51 at 60.

³⁵ 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.

³⁶ *Chung Chi Cheung v The King* [1939] AC 160 at 167–168.

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 expressed concern over this comment as it appeared to advocate, simultaneously, the incorporation and transformation doctrines.³⁷ Indeed, the quotation from Lord Atkin illustrates the problems of trying to classify judicial statements as falling into either the *incorporation* or the *transformation* camp: treating them as rigidly differentiated alternatives. At an attitudinal level, if we leave labels 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 international custom remained unclear and the subject of debate, it was obvious that, by the mid-twentieth century, the judiciary in the United Kingdom was moving to an 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.”³⁸ Cases such as *Trendtex*, and later *Maclaine Watson & Co Ltd v International Tin Council (No 2)*,³⁹ led many observers of this controversy to conclude that the doctrine of incorporation had finally prevailed in the United

³⁷ 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).

³⁸ [1977] QB 529 at 554 per Lord Denning MR. See also at 578–579 per Shaw LJ.

³⁹ [1989] 1 Ch 286.

Kingdom.⁴⁰ 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 of that jurisdiction.

To avoid becoming enmeshed in the incorporation/transformation debate, several commentators came to refer to customary international law simply as “a *source* of English law.”⁴¹ 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 judicial approach that had gone before.

UK 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 European Convention on Human Rights (ECHR) obviously now looms foremost. Indeed, it began to exert a far-reaching influence on British courts long before its domestic incorporation by the *Human Rights Act 1998* (UK) that commenced in 2000. By the late 1970s, United Kingdom courts were regularly turning to human rights

⁴⁰ 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.

⁴¹ 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.

treaties, particularly the ECHR, to resolve common law issues.⁴² A brief reminder of some of the more significant decisions illustrates the growing acceptance of international law as a useful guide for local judges when developing declarations of the local 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.”⁴³

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

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

⁴² Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 47.

⁴³ [1976] 3 All ER 843 at 847.

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.”⁴⁴

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

A shift in judicial attitudes was unquestionably taking place in the United Kingdom by the 1970s. Still, 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*,⁴⁵ the plaintiff asked the Court to hold that a right to immunity from telephonic interception existed based, in part, on article 8 of the ECHR. Although Sir Robert Megarry VC said that he had given “due consideration [to the Convention] in discussing the relevant English law on the point”,⁴⁶ 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.”⁴⁷

⁴⁴ *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.

⁴⁵ [1979] Ch 344.

⁴⁶ [1979] Ch 344 at 366.

⁴⁷ [1979] Ch 344 at 379.

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

Nevertheless, 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*,⁴⁸ determined 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 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 international 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.”⁴⁹

⁴⁸ [1980] AC 477.

⁴⁹ [1980] AC 477 at 483.

Nevertheless, in the United Kingdom, by the early 1980s, international treaty law was becoming a prominent part of the judicial “toolkit” where a judge was faced with difficult issues of common law interpretation and elaboration. Thus, in *Attorney-General v British Broadcasting Corporation*,⁵⁰ 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. An issue for decision was whether the local valuation court was a “court” for the purposes of 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.”⁵¹ 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.”⁵²

Unsurprisingly, in light of his earlier opinions, written 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.⁵³

⁵⁰ [1981] AC 303.

⁵¹ [1981] AC 303 at 352.

⁵² [1981] AC 303 at 352.

⁵³ [1981] AC 303 at 354.

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)*⁵⁴ and *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury*.⁵⁵ However, it was in *Derbyshire County Council v. Times Newspapers Ltd*.⁵⁶ 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 the *Derbyshire* 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.”⁵⁷

⁵⁴ [1990] 1 AC 109 at 283 per Lord Goff of Chieveley.

⁵⁵ [1991] 1 QB 429 at 449.

⁵⁶ [1992] QB 770.

⁵⁷ [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.”⁵⁸

Lord Justice Balcombe went further still. He held that it would be appropriate to refer to any relevant principles of 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.”⁵⁹

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 were striking. The law remained unsettled, awaiting a decision on the point from the House of Lords.

An opportunity for the House of Lords to resolve the question arose in *Director of Public Prosecutions v Jones (Margaret)*.⁶⁰ Although the differences arising from *Derbyshire* were not fully settled in that appeal,

⁵⁸ [1992] QB 770 at 830.

⁵⁹ [1992] QB 770 at 812.

⁶⁰ [1999] 2 AC 240.

three Law Lords affirmed the need for ambiguity or uncertainty in the common law before reference to international law would be warranted.⁶¹ 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.”⁶²

The requirement of uncertainty or ambiguity has also been critically discussed by Australasian commentators.⁶³

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 2001,⁶⁴ the passage of the *Human Rights Act* 1998 (UK) provides a distinctive legislative basis for considering, when developing the common law, at least those international human rights norms expressed in the ECHR. The need to rely on judge-made rules in identifying the effect of international law

⁶¹ [1999] 2 AC 240 at 259 per Lord Irvine of Lairg LC, 265 per Lord Slynn of Hadley, 277 per Lord Hope of Craighead.

⁶² Rosalyn Higgins, “The Relationship between International and Regional Human Rights Norms and Domestic Law” (1992) 18 *Commonwealth Law Bulletin* 1268 at 1273.

⁶³ 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, 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.

⁶⁴ *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.

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.

Summarising the United Kingdom experience: From this it follows that 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.⁶⁵ Accordingly, the focus of most meaningful consideration of this topic in the United Kingdom is directed at the extent to which such treaties can influence the development of the common law. On the other hand, with customary international law, some decided cases, such as *Trendtex*,⁶⁶ have suggested that such custom, where it expresses universal rules observed by civilised nations, automatically forms a part of domestic law in the United Kingdom. Other cases accept that, whether part of municipal law as such, or not, international customary law may be treated at least as a

⁶⁵ This principle stems as far back as *The Parlement Belge* (1879) 4 PD 129, if not earlier.

⁶⁶ [1977] QB 529.

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. More recently, they have done so with a broad appreciation that it can be a source of useful analogies and comparisons and thus can become a source for inspiration in the derivation of contemporary 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, say, in Australia. Moreover, judicial attitudes of indifference or hostility to international law in judicial reasoning have been less evident in the United Kingdom than elsewhere in Commonwealth countries. The question is presented: why should this be so?

Australian approaches to international law: The Australian experience with international law as an influence on 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 often 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.”⁶⁷

Whilst courts must act with due respect to the separation of constitutional powers, the Australian judiciary has occasionally been ambivalent on this subject.⁶⁸ 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 express. Thus, in *Western Australia v Ward*,⁶⁹ Justice Callinan, in the High Court of Australia, remarked:

⁶⁷ Hilary Charlesworth et al, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423 at 446.

⁶⁸ 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.

⁶⁹ (2002) 213 CLR 1.

“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.”⁷⁰

This attitude to international law in the Australian judiciary – by no means an isolated one - has proved rather difficult to alter. Chief Justice Mason and Justice Deane, members of the High Court in the 1980s and early 1990s, were supporters of the contextual reference to international law as an aid to the development of the Australian common law.⁷¹ However, even they advocated a generally “cautious approach” to its use.⁷² Their successors have, for the most part, been still 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 origins. 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.

⁷⁰ (2002) 213 CLR 1 at 389.

⁷¹ See, eg, Sir Anthony Mason, “The Influence of International and Transnational Law on Australian Municipal Law” (1996) 7 *Public Law Review* 20.

⁷² *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J.

Chow Hung Ching's Case: For most of the twentieth century, international law lay largely dormant in Australian judicial reasoning. 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*.⁷³ 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.⁷⁴ Justice Dixon, whose reasons in *Chow Hung Ching* have proved most influential with the passage of time,⁷⁵ 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’.”⁷⁶

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, apparently based on an article written by J L Brierly,⁷⁷ 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.

⁷³ (1949) 77 CLR 449.

⁷⁴ James Crawford and W R Edeson, “International Law and Australian Law” in K W Ryan (ed), *International Law in Australia* (1984) 71 at 77.

⁷⁵ 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.

⁷⁶ *Chow Hung Ching v The King* (1949) 77 CLR 449 at 477 (emphasis added).

⁷⁷ J L Brierly, “International Law in England” (1935) 51 *Law Quarterly Review* 24.

The Bangalore principles in Australia: 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*⁷⁸. 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 properly play in the judicial decision-making of municipal courts. They acknowledged the reality that many lawyers 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

⁷⁸ 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.

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 one source of legal principles that, by a process of judicial reasoning from context and by analogy, could guide the development of the local common law where ambiguity or uncertainty arose as to the content of that law.

In time, 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.”⁷⁹

The Mabo decision in the High Court: 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)*.⁸⁰ 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:

⁷⁹ Murray Hunt, *Using Human Rights Law in English Courts* (1997) at 37.
⁸⁰ (1992) 175 CLR 1.

“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.”⁸¹

Secondly, he declared 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.”⁸²

Thirdly, in an oft-quoted passage, Justice Brennan spelt out the role for international law in the judicial 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.”⁸³

This advance in the judicial acceptance of international law was reflected in another important decision delivered in 1992: *Dietrich v The*

⁸¹ (1992) 175 CLR 1 at 29.

⁸² (1992) 175 CLR 1 at 41–42.

⁸³ (1992) 175 CLR 1 at 42.

Queen.⁸⁴ That case concerned a prisoner who was convicted of an indictable federal, statutory 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”.⁸⁵ Although in dissent as to the result, Justice Brennan reaffirmed the position he had adopted 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.”⁸⁶ Justice Toohey similarly stated: “Where the common law is unclear, an international instrument may be used by a court as a guide to that law.”⁸⁷

Applying Mabo in Australia: 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.

⁸⁴ (1992) 177 CLR 292.

⁸⁵ (1992) 177 CLR 292 at 306.

⁸⁶ (1992) 177 CLR 292 at 321.

⁸⁷ (1992) 177 CLR 292 at 360–361.

Thus, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,⁸⁸ 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.”⁸⁹

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*.⁹⁰ 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 treaties could assist the development of the common law, a position to which he had adhered in *Mabo*.⁹¹

With changes to the personnel of the High Court of Australia, references to international law in more 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.⁹² The facultative doctrine stated in *Mabo*, has never been overruled or formally doubted by the High Court of Australia.

⁸⁸ (1992) 178 CLR 477.

⁸⁹ (1992) 178 CLR 477 at 499.

⁹⁰ (1995) 183 CLR 273 at 288.

⁹¹ (1995) 183 CLR 273 at 315.

⁹² 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.

Summarising 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 differential rule was emerging. It is arguably but a small step to refer to the jurisprudence of international 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 in *Mabo*.

Impact of international law in Malaysia: On the whole, international law has received relatively little judicial attention in the courts of Malaysia. In the days of the Federated Malay States, Earnshaw CJC, writing in *Public Prosecutor v Wee Ah Jee*⁹³ in 1919, had to determine whether a magistrate had been correct in refusing to exercise jurisdiction where an offence had occurred on the high seas but the defendant had been brought before a local court for the application of Malaysian law. Adopting a strictly "dualist" approach, the Chief Justice held:

"The Courts here must take the law as they find it expressed in the Enactments. It is not the duty of a Judge or Magistrate to

⁹³ (1919) 2 FMSLR 193.

consider whether the law so set forth is contrary to International Law or not.”

Nearly seventy years later in *Public Prosecutor v Narogne Sookpavit & Ors*⁹⁴, a criminal appeal before the Acj Johore Bahru Court had to consider the liability of a number of Thai fishermen who had been arrested for offences against the *Fisheries Act* 1963 (Mal). The Thai citizens attempted to rely on Article 14 of the Geneva Convention on the Territorial Sea and the Contiguous Zone⁹⁵. That Convention had been ratified by Malaysia but had not been enacted, or otherwise incorporated, into domestic law. In the result, the Court considered the provisions of the Convention from the perspective that it helped evidence the requirements of customary international law. However, in the absence of a countervailing statute to replace the provisions of the *Fisheries Act*, the Court concluded that its duty was to apply the domestic statutory law:

“[E]ven if there was such a right of innocent passage and such a right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation. ... The moral of this story therefore would appear to be that urgent inter-governmental action is required to clarify the extent of the privilege or right of innocent passage through these waters.”

The dualist approach is also observed in Malaysia in relation to treaty law. In fact, Articles 74 and 76 of the Constitution of Malaysia specifically empower the legislature to enact laws implementing treaties. The Malaysian courts have held that the international rules of

⁹⁴ [1987] 2 MLJ 100 at 106.

⁹⁵ 516 UTS 205 (entered into force 10 September 1964).

interpretation of treaties will take precedence over any conflicting domestic rules of interpretation when what is under consideration is the enactment of the content of a treaty to which Malaysia is a party⁹⁶. This approach is likewise consistent with the approach that has been adopted by the High Court of Australia⁹⁷.

In Malaysia, a highly influential decision affecting the use of international law was the 1963 decision which held that “the constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia”⁹⁸. This tendency to adopt the “four walls” principle in constitutional adjudication may have spilled over into statutory interpretation and the use of international law to inform the content of the Malaysian common law.

In Malaysia, that body of law is settled by the reception of the English common law prior to independence in 1956⁹⁹. In this respect, the position may be contrasted with that of Singapore where the common law of England continued to apply until November 1993¹⁰⁰. After these differential dates of reception, the common law is determined by the local judges, necessarily with sensitivity to local cultural and social concerns. Occasionally, with respect to customary international law, the Malaysian courts have treated that body of law as being of

⁹⁶ *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355 at 358.

⁹⁷ *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 251-256 per McHugh J. See also 294-295.

⁹⁸ *Government of the State of Kelantan* [1963] MLJ 355 at 358 per Thomson CJ.

⁹⁹ *Civil Law Act 1956* (Mal), art.3(1).

¹⁰⁰ *Application of English Law Act 1994* (Sin).

persuasive value. Thus in *Mohomad Ezam v Ketua Polis Negara*¹⁰¹, in the Federal Court of Malaysia, Siti Norma Yaakob FCJ observed:

“If the United Nations wanted these principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law. ... Our laws backed by statutes and precedents ... are sufficient for this court to deal with the issue of access to legal representation [without the necessity of resort to international law].”

Without the stimulus of a statute such as the *Human Rights Act 1998* in the United Kingdom, or of urgent need to reconceptualise an important body of the common law as was presented in the *Mabo* decision in Australia, Malaysian courts appear generally to have adhered to the dualist doctrine. International customary law can sometimes be a persuasive consideration in elucidating local common law. But where there is clear positive local law – in the constitution, a statute or a clear provision of local common law – international customary law has not proved a strong influence on the shaping of Malaysia’s own common law. At least, this appears to be the case to the present time. But the door to influence is not closed by decisional authority.

The emerging position in Singapore: The Constitution of Singapore is silent on the treatment that is to be given to international law by Singapore’s courts. As a matter of practice, those courts have generally followed the United Kingdom’s legal approach up to the time of Singapore’s independence. Describing the role played by international law in Singapore, Simon Tay has said¹⁰²:

¹⁰¹ [2004] 4 MLJ 449 at 512.

¹⁰² “The Singapore Legal System and International Law: Influence or Interference?” in Kevin Y.L. Tan (ed), *The Singapore Legal System* (1999) 467 at 468-469.

“There are a number of reasons why we may now expect that international law will have a larger role in national legal systems such as Singapore’s. ... In the case of Singapore there are also reasons why the reverse is ... true: that the national legal system is reaching out to the international system. This is because of governmental policies to encourage the city-state to serve as an international hub and to meet international standards in many fields. There is, correspondingly, a closer interaction between national and international law and policies in Singapore than might be seen in larger nations. This is especially noticeable in the field of economic activity, such as international trade and transport by air and sea. There is also considerable attention and pride in the government on the high international rating that the Singapore system of justice is accorded by a number of international investment analysts.”

Nevertheless, other commentators in Singapore have drawn a distinction between the utilisation of international law in matters of economics, investment and trade and the position so far as cases concerning the environment and human rights are concerned. Professor Thio Li-An summarises the Singaporean approach¹⁰³:

“While readily borrowing from foreign commercial case law, Singapore courts display a distinct reticence in cases concerning public law values, where the emphasis is on ‘localizing’ rather than ‘globalizing’ case-law jurisprudence in favour of communitarian or collectivist ‘Singapore’ or ‘Asian’ values, in the name of cultural self-determination.”

Attempts to incorporate suggested principles of international human rights law into a case in Singapore challenged capital punishment by hanging, did not succeed in *Nguyen Tuong Van v Public Prosecutor*¹⁰⁴.

¹⁰³ L.A. Thio, “In the Courts: The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court – Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecutor v Nguyen Tuong Van* (2004)”, (2004) *Oxford Uni Commonwealth LJ* 214 at 215.

¹⁰⁴ [2005] 1 SLR 103 at 127.

Much of the court's reasoning drew upon the old Malay decisions as to finding the applicable law within the "four walls" of the local express provisions. A measure of support for this approach could be found in the advice of the Privy Council in a Singapore appeal: *Haw Tua Tau v Public Prosecutor*¹⁰⁵. However, that decision was written in the Privy Council before more recent advances in judicial reasoning that have occurred both in the United Kingdom and in Australia.

There is no definitive case law on the reception of international customary law into domestic Singaporean law. Generally speaking, however, the Singaporean courts have followed the traditional dualist approach that was established in the Federated Malay States Supreme Court prior to independence¹⁰⁶.

Simon Tay has suggested that the courts of Singapore are open to persuasion by reference to international law in the development of the common law, or if the local law is clear, whether constitutional, statutory or common law, it will prevail¹⁰⁷. Thus, even if a principle of customary international law had emerged prohibiting execution by hanging, the existence of the domestic statute in Singapore, providing for such punishment, was held to prevail in the event of any inconsistency¹⁰⁸. The conversation between international law and local law, at least in matters touching human rights, is somewhat muted and certainly quite weak¹⁰⁹. In the spectrum of national approaches to the use of customary international law in the elaboration of local common law, the

¹⁰⁵ [1980] 1 SLR 73 at 81-82.

¹⁰⁶ *Public Prosecutor v Wee Ah Jee* (1919) 2 FMSLR 193.

¹⁰⁷ *Nguyen* [2005] 1 SLR 103 at 112.

¹⁰⁸ [2005] 1 SLR 103 at 128.

¹⁰⁹ *Re Gavin Millar QC* [2008] 1 SLR 297 at 313 per Kwang J (a case involving an application by a foreign barrister to appear in Singapore in defamation proceedings brought by the Minister Mentor).

judges in the United Kingdom appear to be most comfortable with the approach; those of Australia are selective in its use; and those of Malaysia and Singapore seem content with the state of English law, routed in strict dualism, as it existed at and after the moment independence and separation from the common law source.

Still, as recently as last week, the Court of Appeal in Singapore, in a sensitive case involving a defamation action brought by a senior politician, appears not to have ruled out the possibility that the line of authority in the English courts creating the *Reynolds* test for defamatory publication, might have some part to play in the evolution of Singapore's own common law on the subject¹¹⁰.

THE ADVANCE OF INTERNATIONAL LAW: THE WAY AHEAD

The arguments against the use of international law to inform local judges on their own judicial acts in declaring the municipal common law are now easy enough to see. They include the legal tradition of dualism; the absence of a democratic component in the creation of international law; the availability of treaties, with local ratification and municipal enactment if it is desired to import directly the relevant international principles; and the suggested adequacy of the more traditional sources for the evolution of the common law.

As against such considerations, there are a number of reasons why judges and other observers, in the United Kingdom, Canada, New Zealand, and even Australia, appear increasingly willing to reach for

¹¹⁰ *Far East Economic Review v Lee Hsien Loong*, unreported, Court of Appeal of Singapore, 6 October 2009 referring to *Reynolds v Times Newspapers Ltd.* [2002] 2 LRC 690; [1999] 4 AllER 609.

principles of customary international law in expounding the local common law, where it is silent or obscure on the point in issue.

The arguments for such a course are based substantially in pragmatics:

1. That where the law is uncertain, it is often useful, and apparently desirable, to reach for developments that have occurred on the international stage. It is better to do this than to appeal to one's own limited knowledge and experience and case law that may not have addressed the issue at all.

The common law is inherently always in a state of development. To remain relevant it must adapt, on a case by case basis. Where important issues of principle are at stake, an appeal to fundamental principles of universal justice will often be a helpful guide to the judge uncertain as to what the law provides¹¹¹.

Shane Monks has explained why references to international materials require no great leap in the established judicial method observed in common law countries:

“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.”¹¹²

¹¹¹ [2008] 1 SLR 297 at 138.

¹¹² 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.

References to elaborations of any relevant principles of international law can lend a measure of apparent 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.”¹¹³

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 much wider context for the expression of values simply because this is the world that the judges and litigants 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, like other citizens operate today.

2. It is also important to recognise how, in practice, international law is ordinarily 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

¹¹³ *Ibid* at 223.

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.¹¹⁴ This might involve a change more apparent than real. If a text is clear judges and others affected in every jurisdiction would normally give the text 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 pays a proper regard to the special status of universal human rights norms.¹¹⁵ Most advanced nations have moved beyond purely majoritarian, electoral conceptions of democracy.¹¹⁶ Respect for the fundamental rights of all people within a polity, including minorities, is now generally accepted as a prerequisite for a functioning democratic polity.¹¹⁷

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 assist the municipal judiciary to understand, and more consistently adhere to, fundamental human rights and freedoms. Moreover, it can stimulate legislative decision-

¹¹⁴ 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.

¹¹⁵ 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.

¹¹⁶ 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.

¹¹⁷ See, eg, Hilary Charlesworth, "Protecting Human Rights" (1994) 68 *Law Institute Journal* 462 at 463.

making which may occasionally 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”,¹¹⁸ it is impossible today to ignore Lord Denning’s “incoming tide”¹¹⁹ 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.¹²⁰ 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. To draw a line between the international law affecting trade and technology but to exclude the international law of human rights appears to embrace an unstable distinction unlikely to survive for long. By definition, all international law is binding on nation states. Selectivity in the recognition of parts of international law, thought to be of immediate economic utility, is not a very attractive principle from a dispassionate and specifically *legal* standpoint.

¹¹⁸ 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.

¹¹⁹ *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418 per Lord Denning.

¹²⁰ 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 can also help 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 accepted by the courts to be 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 be regarded as mere “window-dressing”.¹²¹ Judges should neither encourage nor condone such an attitude on the part of executive government. Especially so, 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 concerned, 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, in accordance with its own legal processes has agreed to be bound. Apart from any other consequence, when judges take the ratification of a treaty at face value this tends to restrain purely symbolic or political gestures: empty “feel-

¹²¹ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

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 such a manner is thus 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 our legal tradition in developing and declaring the common law. The most obvious example is provided by the case of historical and other scholarly materials. Domestic human rights legislation, such as the United Kingdom *Human Rights Act*, affords international human rights principles of far more direct and immediate applicability. In countries such as India, Canada and South Africa, international 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 therefore 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, performs 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 nation state such as Australia because, as yet, it has no federal human rights legislation that affords a direct and express 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 lawyers of the Anglo-American common law tradition 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 true. Perhaps Malaysia does also, although the *Lina Joy*¹²² case on apostasy has proved very controversial¹²³. International human rights law is normally consistent with and re-enforces, such values. This fact is neither surprising nor accidental. As Lord Scarman 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 such 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

From the foregoing survey, 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 of some kind or another.¹²⁴ However that may be, to attempt to halt the incoming tide of

¹²² *Lina Joy v. Majlis Agama Islam Wi Layah Persekut van & Anor*[2005] 6 MLJ.

¹²³ M.D. Kirby, "Fundamental Human Rights and Religious Apostasy" (2008) 17 *Griffith Law Review* 151.

¹²⁴ 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.

international law as an influence and source of domestic common 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,¹²⁵ 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.”¹²⁶

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

“Partly in hope and partly in expectation ... the 1990s will be remembered as the time when England ... ceased to be a legal island”.¹²⁷

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”.¹²⁸

¹²⁵ Speech delivered at the Fiftieth Anniversary of the International Court of Justice, Opening of Colloquium, High Court of Australia, Canberra, 18 May 1996.

¹²⁶ Sir Anthony Mason, “The Influence of International and Transnational Law on Australian Municipal Law” (1996) 7 *Public Law Review* 20 at 23.

¹²⁷ T H Bingham, “‘There Is a World Elsewhere’: The Changing Perspectives of English Law” (1992) 41 *International and Comparative Law Quarterly* 513 at 514.

¹²⁸ *Ibid.*

Although, as a result of education and experience, many lawyers continue to exhibit a strong, even zealous, faith in the superiority of their own legal systems, it is surely important, as Lord Bingham noted, not to forget the benefits that can be gained from occasionally looking beyond one's own jurisdictional 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 from a flaw of a democratic deficit.¹²⁹ 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, dignity and non-discrimination, that *all* persons in society will fully realise, and exercise, the freedoms that they enjoy within the jurisdiction.

In the Australian case of *Dietrich*,¹³⁰ 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,

¹²⁹ 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.

¹³⁰ (1992) 177 CLR 292.

in some circumstances at least, justify a stay of proceedings where the accused was unable to secure access to appropriate legal representation. In other words, international legal principles and their elaboration helped to ensure that domestic criminal laws applied in a non-discriminatory way to all people.

It is true that the same result could, perhaps, have been secured by a close study of local historical, in many cases, 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 produced a just outcome in the same court only twelve years earlier in the *McInnis* case¹³¹. The invocation of the principle of international human rights law helped to make a forensic and argumentative difference and to produce an outcome that most would regard as 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 realities of 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 reconsider or are urged 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

¹³¹ *McInnis v The Queen* (1979) 143 CLR 575.

without controversy, as I have acknowledged. There are problems to be addressed 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 face in contemporary circumstances.

No country in the world today is outside the reach of the expanding application of international law, including the principles of international customary law. The lawyers' imagination has to adjust to the new paradigm. Jurisdictionalism prevails. Domestic jurisdiction of nation states is still powerful. Ultimately, it may have the last word. But in the age of inter-planetary travel; of informatics; of the human genome; of nuclear fission; of global problems such as HIV/AIDS and climate change; and of global challenges to peace, security and justice for all people, municipal law has an important part to play.

In the future, in my view, it will be realised that local judges are often exercising a kind of international jurisdiction when they decide cases. There will never be enough international courts to give effect to international law. Nor should there be an undue proliferation of expensive and new international courts and tribunals. The implementation of international customary law must increasingly be delegated to national courts. In much the same way as, in the Australian Commonwealth, state courts may be invested with and exercise federal jurisdiction¹³². Reconciling the rules of domestic jurisdiction and the principles of international law is a great challenge for lawyers of the current age and the age still to come. The challenge is one to which James Crawford has responded repeatedly and

¹³² Australian Constitution, s.77(iii).

eloquently in his writings. He has also responded to it in his work as a leading theoretician of international law and as an advocate before international and national courts and tribunals.

International law has always been a subject of great importance in the University of Adelaide. Its importance will continue to expand. It will expand by treaty law but also by the impact of international customary law. Lawyers of the coming age will find this both natural and inevitable. It is for this reason that the influence of international law on the shape and rules and application of national systems of common law is bound to expand. Essential to that movement is the teaching of international law as a vital part of the preparation of lawyers for their role in the future of their discipline. The University of Adelaide has a fine tradition here which it must cherish and continue.

I nurture the hope that part of the dramatic recent rise in the global recognition of the excellence of the University of Adelaide rests upon the long established excellence of its teaching and researching of law¹³³. And in its outstanding tradition of teaching and researching of international law as a cutting edge subject for a world of unprecedented change. James Crawford is a splendid example of what this University stands for and why its fame continues to expand.

¹³³ D. Harrison, "Unis do well in world rankings", *Sydney Morning Herald*, 9 October 2008, 6 referring to the inclusion of the University of Adelaide in the top one hundred world universities according to the *The times Higher Education Supplement*.