has been to protection of economic interests. The traditional imposition of positive fiduciary obligations on guardians remains relevant to the guardian-ward relationship in modern times and would enable the full extent of the Stolen Generation claims to be vindicated.

CONCLUSION

This article has demonstrated that there are two sound bases for the imposition of positive duties on fiduciaries. The use of fiduciary duty in the Stolen Generation context is appropriate. Australian fiduciary law as it stands cannot properly accommodate the Stolen Generation claims. Rather than attempting to twist the claims to fit a formulation designed to protect economic interests, a change in the formulation is needed.

Protection of non-economic interests such as those of the Stolen Generation, requires the imposition of prescriptive duties. Fiduciary law in Canada now protects non-economic interests by imposing positive duties in some circumstances. Australian courts have rejected the application of the Canadian developments. However, in relation to the Stolen Generation situation, positive duties can be found in the Law of Guardian and Ward. This provides specific positive duties appropriately imposed on guardians in their capacity as guardian of the person. It should be recognised that the Law of Guardian and Ward regulates the relationship between the State and the Stolen Generation.

International Law as a Tool of Constitutional Interpretation

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Justice Kirby of the High Court of Australia has recently begun to use international law in his interpretation of the Australian Constitution. This article analyses this development in light of prior case law and the views of other current members of the High Court. It briefly outlines the cases in which members of the High Court have, over the years, drawn on international law in interpreting the Constitution. It then explores in greater detail Kirby J's approach to the use of international law in constitutional interpretation and considers the reaction to that approach by other members of the High Court. Finally, it provides a normative argument concerning the interaction of international law and constitutional law. The article argues that, although the use of international law in constitutional interpretation is not novel, Kirby J's articulation of an interpretive principle is novel. It concludes that, while international law has had and should have a role to play in constitutional interpretation, a robust role for international law is unlikely to be accepted by a majority of the Court as presently constituted.

I INTRODUCTION

In a series of judgments in the past five years, Justice Kirby has developed an interpretive principle concerning the use of international law in constitutional interpretation. He has adapted the words of Brennan J in *Mabo v Queensland [No 2]*[1] to formulate the proposition that:

> [t]he common law, and constitutional law, do not necessarily conform with international law. However, international law is a legitimate and important influence on the development of the common law and constitutional law,

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1 (1992) 175 CLR 1, 42 ('*Mabo*').

especially when international law declares the existence of universal and fundamental rights.[2]

So far he is very much alone in his endeavour, though as Kirby J himself has noted, 'today's heresies sometimes become tomorrow's orthodoxy'.[3]

In this paper I will explain and assess Kirby J's interpretive principle. I shall argue that international law should, as Kirby J asserts, be considered a legitimate influence on constitutional interpretation. I will also argue that Kirby J's approach is not entirely new, as there has been support for the use of international law in constitutional interpretation in several cases over the course of the last century. What is new about Kirby J's approach is that he has articulated an explicit interpretive principle, whereas previous cases had involved the ad hoc and unexplained use of international law. It might well be argued that Kirby J's approach is not new in that he is merely extending an existing principle of statutory interpretation to the Australian Constitution. I disagree with such a characterisation, however, as I do not consider the Constitution to be equivalent to an ordinary statute. Rather, the Constitution is a 'special' statute[4] - that is, although technically an Imperial statute, it is our foundational legal document, developed in Australia and adopted after referenda in each colony. It stands in a special position,[5] subject to a distinct body of jurisprudence concerning its interpretation. Thus, although it is correct to say that Kirby J has extended an existing principle into the constitutional arena, I regard this extension as novel, and indeed controversial, as the discussion of judicial responses to Kirby J's approach in Part III of this paper reveals.

In Part II of this article, I shall briefly outline the cases in which members of the High Court have, over the years, drawn on international law in interpreting the Constitution. In Part III, I shall explore in greater detail Kirby J's approach to the use of international law in constitutional interpretation and consider the reaction to that approach by other members of the present High Court. In Part IV, I shall provide a normative argument concerning the interaction of international law and constitutional law. I conclude that, while international law has had and should have a role to play in constitutional interpretation, a robust role for international

2 *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513, 657 ('*Newcrest*'). And see also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 417–418 ('*Kartinyeri*'), *Smanovic v R* (1998) 154 ALR 702, 708; Re *Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 179 ALR 296, 314; *Levy v Victoria* (1997) 189 CLR 589, 644-5; *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 380-1; Michael Kirby, 'International Law: Down in the Engine room', *ANZSIL/ASIL Joint Meeting*, 26 June 2000: 6-7, <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_inter_law.htm> at 15 May 2002; Michael Kirby, 'Domestic Implementation of Human Rights Norms', *ANU Conference on Implementing International Human Rights*, 6 December 1997, 29-32 <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_inghts.htm> at 15 May 2002.

3 Kirby, 'Domestic Implementation of Human Rights Norms', ibid, 32.

4 *Kartinyeri* (1998) 195 CLR 337, 418.

5 Ibid 384 (Gummow and Hayne JJ); *Polites v The Commonwealth* (1945) 70 CLR 60, 78 (Dixon J) ('*Polites*').

law is unlikely to be accepted by a majority of the High Court as presently constituted.

I note at this point that I will not be dealing in any detail with the more general question of the relationship between international law and domestic law - that is, the incorporation/transformation debate. Although this is a constitutional question, it is not the question on which I wish to focus, and it has been dealt with extensively elsewhere.[6] Briefly, however, it may be noted that in our legal system treaties are not automatically 'part of' domestic law. Rather, an act of transformation is required to give treaties direct effect in Australian law.[7] In relation to customary international law, the position is more complex. It is still possible to argue that customary international law is 'part of' the Australian common law without requiring legislation to transform customary international law into Australian law, based on English authorities (such as *Triquet v Bath*[8] and *Trendtex Trading Corporation v Central Bank of Nigeria*[9]) and some older Australian cases (such as *Polites*[10] and *Chow Hung Ching v R*[11]). However, such a proposition was rejected by Dixon CJ in *Chow Hung Ching*[12] and, more recently, impliedly rejected by a majority of the Full Federal Court in *Nulyarimma v Thompson*.[13] There is no recent High Court support for an incorporation approach to customary international law and Sir Anthony Mason, in his extra-judicial writings, has noted that in Australia we seem to prefer the transformation approach to customary international law.[14] However, both treaties and customary international law have been used quite frequently by the Courts in the development of the common law and in the interpretation of legislation.[15] More recently, treaties have been used in the area of legitimate expectations in administrative law.[16] The question that remains is whether and how international law may be used in constitutional cases.

6 See, for example, Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction* (1996) 204; Andrew Mitchell, 'Genocide, Human Rights Implementation And The Relationship Between International And Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 15; James Crawford and William Edeson, 'International Law and Australian Law' in K W Ryan (ed), *International Law in Australia* (2nd ed, 1984) 71; Charles Alexandrowicz, 'International Law in the Municipal Sphere According to Australian Decisions' (1964) 13 *International and Comparative Law Quarterly* 78.

7 For a more detailed discussion of the relationship between treaties and Australian law, see Walker, ibid.

8 (1764) 3 Burr 1478 [97 ER 777].

9 [1977] 1 QB 529.

10 (1945) 70 CLR 60.

11 (1948) 77 CLR 449 ('*Chow Hung Ching*').

12 Ibid 477.

13 [1999] FCA 1192 (1 September 1999), paras 24, 52 ('*Nulyarimma*').

14 Anthony Mason, 'International Law as a Source of Domestic Law' in Brian Opeskin (ed), *International Law and Australian Federalism* (1997) 218. And see generally the discussion in Mitchell, above n 6.

15 See the discussion in Walker, above n 6, 209-218; Rosalie Balkin, 'International Law and Domestic Law' in Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) 119, 122, 132-135.

16 *Minister for Immigration and Ethnic Affairs (Australia) v Teoh* (1995) 183 CLR 273 ('*Teoh*').

II INTERNATIONAL LAW IN CONSTITUTIONAL CASES: 1901-1996

International law has been raised in various constitutional cases over the years in relation to diverse issues, including:

(a) international law as a limitation on legislative power:[17]
(b) international law as a source of legislative power;[18]
(c) the determination of the existence of a sufficient nexus between a State and the subject matter of a State law:[19]
(d) the interpretation of section 44 of the Constitution:[20]
(e) the determination of the constitutionality of legislation regulating New Guinea (and later Papua and New Guinea) under the League of Nations mandate system (and later the United Nations trusteeship system);[21] of
(f) the freedom of political communication cases:
(g) and the interpretation of Chapter III of the Constitution.[22]

I will not consider all of these areas in detail - suffice it to say that international law was, as we know, rejected as a limitation on legislative power in both *Polites* and *Horta*, with the exception of some legislation enacted under the external affairs power.[23] Evatt J's attempts to confine the Commonwealth's power over trust and mandated territories failed.[24] Constitutionally, of course, international law has proved significant as a source of legislative power because of the Commonwealth Parliament's capacity to legislate to give effect to Australia's

[17] *Polites v The Commonwealth* (1945) 70 CLR 60; *Horta v The Commonwealth* (1994) 181 CLR 183 ('*Horta*'); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*').
[18] *Roche v Kronheimer* (1921) 29 CLR 329; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634; *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54; *The Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmania Dam Case*'); *Kioa v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351; *Gerhardy v Brown* (1985) 159 CLR 70; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v The Commonwealth* (1989) 167 CLR 232 ('*Queensland Rainforest Case*'); *Victoria v The Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Case*').
[19] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.
[20] *Sykes v Cleary* (1992) 176 CLR 77.
[21] *Jolley v Mainka* (1933) 49 CLR 242; *Trust v Stevenson* (1937) 58 CLR 528; *Fishwick v Cleland* (1960) 106 CLR 186.
[22] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 ('*Australian Capital Television*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 ALR 104.
[23] That is, legislation enacted in reliance on a treaty must be 'reasonably capable of being considered appropriate and adapted' to implementing the treaty: *Industrial Relations Case* (1996) 187 CLR 416, 508-9.
[24] See above n 21.

international obligations. That has been much written about elsewhere[25] and thus will not be addressed here. Rather, I will focus on two areas where international law has been used in determining a constitutional issue: Chapter III of the Constitution and the implied freedom of political communication.

1. Chapter III of the Constitution

Chapter III of the Constitution may not appear at first glance to be fertile ground for arguments based on international law. However, international law has had some relevance in determining whether Chapter III precludes the enactment of ex post facto criminal laws and, if it does, precisely what amounts to such a law. These issues were raised in *Polyukhovich*, which concerned the validity of the Commonwealth *War Crimes Act 1945* (Cth). Deane J concluded that Chapter III did preclude ex post facto criminal laws[26] and, although his Honour's decision was based primarily on his conception of the nature of the judicial process, he also drew support from international human rights conventions, such as the *European Convention* for the *Protection of Human Rights ('ECHR')* and the *American Convention on Human Rights*, which provided protection against the imposition of retrospective criminal guilt.[27] Australia is not a party to either of these conventions, but Deane J used them to support his conclusion that 'ex post facto criminal legislation lies outside the proper limits of the legislative function'[28] as a matter of principle.

Both Deane J and Gaudron J also made use of principles of international law in their application of the prohibition on ex post facto criminal laws stemming from Chapter III of the Constitution. Because they concluded that such a prohibition existed, it was necessary for them to establish whether the *War Crimes Act 1945* (Cth) violated the prohibition. It was accepted that the conduct criminalised by the Act was not criminal in domestic law at the time of its commission: however, both judges considered it necessary to determine whether the conduct was criminal at international law at that time, in order to determine whether the legislation was truly retrospective.[29] They concluded that the relevant conduct

[25] See, for example, Andrew Byrnes and Hilary Charlesworth, 'Federalism and the International Legal Order: Recent Developments in Australia' (1985) 79 *American Journal of International Law* 622; M Kidwai, 'External Affairs Power and the Constitutions of British Dominions' (1976) 9 *University of Queensland Law Journal* 167; J T Ludeke, 'The External Affairs Power: Another Province for Law and Order?' (1994) 68 *Australian Law Journal* 250; Brian Opeskin and Donald Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27 *Case Western Journal of International Law* 1; Donald Rothwell, 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits' (1993) 15 *Adelaide Law Review* 209; Crawford and Edeson, above n 6, 71; Geoffrey Sawer, 'Australian Constitutional Law in Relation to International Relations and International Law' in K W Ryan, *International Law in Australia* (2nd ed, 1984) 35; Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992).
[26] *Polyukhovich* (1991) 172 CLR 501, 611-2.
[27] Ibid 612.
[28] Ibid 611.
[29] Ibid 627-8, 631, 699-700, 707.

was not criminalised in international law at the time it occurred, and thus the legislation was retroactive in nature.

Worth mentioning, too, are some obiter comments of Deane J to the effect that, if Australia was participating in the establishment and functioning of an international tribunal for the trial and punishment of international crimes, Chapter III of the Constitution would be inapplicable because the judicial power of the international community, rather than that of the Commonwealth, would be involved.[30] In addition, he foreshadowed a possible further exception to the applicability of Chapter III, where a local tribunal is vested with jurisdiction in relation to an alleged crime against international law:

> It may be arguable that, in such a case, the judicial power of the Commonwealth is not involved for so long as the alleged crime against international law is made punishable as such in the local court. Alternatively, at least where violations of the laws and customs of war are alone involved, analogy with the disciplinary powers of military tribunals and largely pragmatic considerations might combine to dictate recognition of a special jurisdiction standing outside Chapter III.[31]

This comment on the potential for international law to take a criminal prosecution outside the protection afforded by Chapter III is surprising, as Deane J has been one of the leaders of the High Court in developing Chapter III as a protective mechanism, particularly in the area of military courts-martial.[32] These comments are of particular interest given that Australia has ratified the *Rome Statute of the International Criminal Court*.

2. The Implied Freedom of Political Communication

Several members of the High Court have also referred to international conventions in decisions concerning the implied freedom of political communication. In *Australian Capital Television* and in *Nationwide News*, Mason CJ, Brennan J and Gaudron J used the *ECHR* in support of the fundamental importance of freedom of communication to representative democracy.[33] These judges did not engage in any in depth discussion or analysis of the freedom of expression as guaranteed by the *ECHR*; rather, they merely used the *ECHR* (to which, of course, Australia is not a party) to demonstrate that other representative democracies value freedom of expression.

30 Ibid 627.
31 Ibid.
32 See, for example, *Re Tyler: Ex parte Foley* (1994) 181 CLR 18; *Re Nolan: Ex parte Young* (1991) 172 CLR 460; *Re Tracey: Ex parte Ryan* (1989) 166 CLR 518.
33 *Nationwide News* (1992) 177 CLR 1, 47 (Brennan J); *Australian Capital Television* (1992) 177 CLR 106, 140 (Mason J), 211 (Gaudron J).

The *ECHR* was also used by Brennan J in *Australian Capital Television* in his assessment of whether the freedom of political communication had been violated. He noted that in *X and the Association of Z v United Kingdom*[34] a challenge under the *ECHR* to a ban on political advertisements on British television had failed.[35] Brennan J paid some attention to this case, which was directly on point, although it was not referred to by Mason CJ or Gaudron J. Ultimately, Brennan J concluded that the ban on paid political advertising did not violate the implied right to freedom of political expression, and the European case, although not decisive, was influential in reaching that conclusion.

McHugh J, too, considered the *ECHR*, but found it unnecessary to discuss *X and the Association of Z* because he concluded that the constitutional context in which the guarantee of freedom of expression operated in Australia meant that there was no valid analogy between the international instruments and the Commonwealth Constitution.[36] Curiously, in the next freedom of expression case, *Theophanous v Herald & Weekly Times Ltd*,[37] Brennan J approached the relevance of the *ECHR* in the same way as McHugh J had in *Australian Capital Television*.[38] It is difficult to reconcile Brennan J's use of the *ECHR* in *Australian Capital Television* and his rejection of it in *Theophanous*.

3. Conclusion

Up to 1996, the High Court had referred to international law in various cases involving constitutional issues, though such references had not been very frequent. However, it cannot be said that there was any coherent approach to the use of international law in constitutional interpretation, other than in relation to the external affairs power. There was no in-depth discussion of the role that international law might play in the determination of constitutional issues or why international law might be relevant. Apart from section 51(xxix), the Court was largely reluctant to allow international law to play a significant role, though there were some areas where it had been drawn on in aid of particular conclusions. When international law was used, it was generally as an indication of international values, to give added legitimacy to the right being implied into the Constitution, rather than in any determinative way.

Kirby J's interpretive principle would give international law a greater role to play in constitutional questions, and it is to a discussion of that approach that I will now turn.

34 (1971) EHRR.
35 *Australian Capital Television* (1992) 177 CLR 106, 154.
36 Ibid 240.
37 (1994) 124 ALR 1 ('*Theophanous*').
38 Ibid 44.

III JUSTICE KIRBY'S INTERPRETIVE PRINCIPLE

The first case in which Kirby J used international law in the resolution of a constitutional issue was *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.[39] The case concerned the separation of powers and the tasks that might legitimately be conferred upon a judge of the Federal Court as a persona designata. The question for the court was, in Kirby J's words, to 'decide where "the constitutional wall" that separates the exercise of judicial power from the other powers of government stands'.[40] This task, he acknowledged, involved a question of judgement drawing on the 'language and design of the Constitution, past authority of the Court and an understanding of the legal principles and policy which that authority upholds'.[41] He then used international law to assist in determining the content of those 'legal principles and policy' - specifically, the *Universal Declaration on Human Rights ('UDHR')*, the *International Covenant on Civil and Political Rights ('ICCPR')* and the *Draft Universal Declaration on the Independence of Judges*. These were used to support the proposition that part of the 'principles and policy' is the 'fundamental right of every individual ... to have access to courts which are "competent, independent and impartial" and "established by law"'.[42]

Of course, Kirby J could quite easily have obtained these principles from more local sources than international law - there are various domestic authorities in support of the importance of judicial independence. However, he chose to use international law to support his argument on this point. Thus, while not determinative of the outcome, international law played a role in legitimating Kirby J's approach. At this point, however, he had not formulated any general statement about the use of international law in constitutional interpretation. This was to come in *Newcrest*.[43]

Newcrest concerned the operation of section 51(xxxi) of the Constitution: the acquisition of property on just terms. The Commonwealth had enacted legislation (the *National Parks and Wildlife Conservation Amendment Act 1987* (Cth)) in reliance on both the external affairs power and, in so far as the territories were concerned, on section 122 of the Constitution. Newcrest argued that the legislation amounted to an acquisition of property other than on just terms and was thus invalid. One question for the Court was whether section 51(xxxi) fettered the Commonwealth's power under section 122. Three judges - Gaudron, Gummow and Kirby JJ - concluded that it did. In reaching this conclusion, Kirby J called in aid international law and articulated his interpretive principle.

[39] (1996) 189 CLR 1.
[40] Ibid 40.
[41] Ibid.
[42] Ibid.

Kirby J began with the proposition that '[w]here the Constitution is ambiguous, [the High Court] should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights'.[44] This proposition does not, of itself, relate specifically to international law, but the context of Kirby J's discussion made it clear that international human rights law was central to the issue. He acknowledged that, where the Constitution is clear, 'the Court must (as in the interpretation of any legislation) give effect to its terms'.[45] The Court should not 'adopt an interpretative principle as a means of introducing, by the backdoor, provisions of international treaties or other international law concerning fundamental rights not yet incorporated into domestic law'.[46] However, he went on to adapt Brennan J's comments from *Mabo*, quoted in the Introduction to this paper, to recognise that international law, particularly international human rights law, is 'a legitimate (and important) influence on the development of ... constitutional law'.[47] Kirby J stated that 'to the extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law'.[48]

In his judgment, Kirby J described the role of international law in the specific case as 'one final consideration which reinforces the view to which I am driven [for other] reasons'.[49] It is also an approach applicable only where there is ambiguity in the terms of the Constitution - in that sense, international law does not control the meaning to be given to the text of the Constitution.

Kirby J relied upon Article 17 of the *UDHR* in support of an internationally recognised right to own property and not be deprived of it arbitrarily.[50] This is an interesting, if not controversial, application of Kirby J's interpretive principle, as the *UDHR* is not in its own terms binding on nations and there is no equivalent of Article 17 in the ICCPR or the *International Covenant on Economic, Social and Cultural Rights ('ICESCR')*, which are binding. And while much of the *UDHR* is now accepted as reflecting customary international law, it is by no means universally accepted that the property rights mentioned in Article 17 have crystallised into a norm of customary international law, particularly given their absence from the *ICCPR* and *ICESCR*,[51] although Kirby J states confidently, but

[44] Ibid, 657.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid 657-8.
[49] Ibid 657.
[50] Ibid 658.
[51] See, for example, Richard B Lillich, *International Human Rights: Problems Of Law, Policy And Practice* (3rd ed, 1995) 163ff; Richard B Lillich, 'Civil Rights' in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (1984) 156ff; Louis Henkin et al, *Human Rights* (1999) 1118, 1124. As Henkin *et al* note, the right to property is included in all the regional human rights instruments, and it may well be that such a right has now emerged as a norm of customary international law, but this has certainly been controversial over the years.

without international authority, that there is such a norm.[52] I would suggest that, if international law is to be given a more robust role in constitutional interpretation, then reliance on particular international legal norms needs to be more rigorous than this.

Kirby J also expounded his interpretive principle in *Kartinyeri*,[53] which concerned the interpretation of the races power in section 51(xxvi) of the Constitution. Again, he used international law to reinforce a conclusion he had reached on other grounds.[54] The broad statement of the principle was similar to that in *Newcrest*, and thus need not be set out in full. Kirby J also noted that to draw on international law in this way

> [d]oes not involve the spectre, portrayed by some submissions in these proceedings, of mechanically applying international treaties, made by the Executive Government of the Commonwealth, and perhaps unincorporated, to distort the meaning of the Constitution. It does not authorise the creation of ambiguities by reference to international law where none exist. It is not a means for remaking the Constitution without the 'irksome' involvement of the people required by section 128.[55]

Once again Kirby J emphasised the need for ambiguity before recourse to international law is appropriate, but had no difficulty discerning ambiguity in relation to the races power.[56] In this case, Kirby J's use of international law - specifically the prohibition of discrimination on the basis of race - was more rigorous, as he relied upon numerous international treaties and the decision of Judge Tanaka of the International Court of Justice in the *South West Africa Cases (Second Phase)*.[57]

In a series of other cases - *Levy v Victoria*,[58] *Re East; Ex parte Nguyen*,[59] *Sinanovic v R*[60] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*[61] - Kirby J made passing reference to the role of international law in constitutional adjudication. These references might be termed simply 'regard courteous', to use Crawford's term,[62] or they might be viewed as an attempt to build up a body of case law in support of Kirby J's approach. In any event, they need not be discussed in detail.

From Kirby J's judgments, one can draw several conclusions about the application of his interpretive principle. First, there are in my view, two different formulations of the role of international law in constitutional interpretation in Kirby J's judgments that need to be considered. On the one hand, there is the adaptation of *Mabo*; the statement that international law is a 'legitimate *influence* on constitutional law' but that constitutional law does not 'necessarily conform with international law'[63]. This approach gives international law a role, but a relatively minor one in most cases - there is no imperative to interpret the Constitution consistently with international law. On the other hand, there is the stronger approach to the use of international law; that, where there is an ambiguity, the Constitution *should* be interpreted consistently with international law. This approach gives international law a more significant role to play, though it still does not allow international law to override the clear words of the Constitution. Kirby J does not directly distinguish between these two approaches; rather, he uses them both together.

Second, Kirby J's approach is rights focused - that is, it is concerned with ensuring that, where the Constitution is ambiguous, it is interpreted so as to protect fundamental human rights, not to violate them. The content of fundamental human rights is then ascertained from examining international law, which 'expresses universal and basic rights'.[64] This suggests that Kirby J's principle may not extend to the use of general international law in constitutional interpretation, though this remains to be tested.

Third, there needs to be an ambiguity before international law can be used in this way. The clear words or meaning of the Constitution cannot be displaced by international law. This is consistent with the approach to the uses of international law in statutory interpretation and also with extensive High Court authority on the interaction between international law and domestic law beginning with *Polites*. The ambiguity cannot be created by reference to international law - it must be otherwise apparent.

52 *Newcrest* (1997) 190 CLR 513, 660. Kirby J cites the provision of various domestic constitutions in support of his conclusion. These might provide evidence of state practice, but this is not discussed in detail and there is no evidence of *opinio juris*.
53 *Kartinyeri* (1998) 195 CLR 337.
54 Ibid 417.
55 Ibid 417-8.
56 Ibid 418.
57 [1996] ICJR 3. Kirby J does not acknowledge, however, that Judge Tanaka was in dissent in that case.
58 (1997) 189 CLR 579, 645: 'Whenever possible, Australian law on such subjects should be developed in harmony with such universal international principles to which Australia has given its concurrence.'
59 (1998) 196 CLR 354, 380-1: 'Treaties may influence Australian domestic law in other ways. This is particularly so where they declare fundamental human rights as recognised by international law and accepted by civilised countries. In such circumstances the provisions of treaties expressing international law may, by analogy, contribute to judicial reasoning to resolve ambiguities in the Australian Constitution.'
60 (1998) 154 ALR 702, 708: '[C]ourts may be assisted by ... universal principles [of international law] when constitutional or other rights are involved which are ambiguous and which may be made clear by reference to such principles.'
61 (2001) 179 ALR 296, 314: 'It is also inevitable as the influence of international law spreads, that decisions on the requirements of [human rights] treaties (and like requirements of regional and national instruments) will come to influence the interpretation of relevant Australian legislation and even of the Constitution itself.'
62 James Crawford, 'General International Law and the Common Law: A Decade of Developments' (1982) 76 *Proceedings of the American Society of International Law* 232.
63 *Mabo [No 2]* (1992) 175 CLR 1, 42.
64 *Kartinyeri* (1998) 195 CLR 337, 418.

Fourth, it seems to me that international law has not been the determining factor in Kirby J's judgments - rather, it has been used as an additional legitimating argument to support a conclusion already reached. In this respect, Kirby J's use of international law is not dissimilar from the uses to which it has been put in previous cases - what is different is that Kirby J has articulated a principle to guide the use of international law, rather than simply referring to international law in an ad hoc fashion where convenient.

Judicial Responses to Kirby J's Approach

There have been few direct responses to Kirby J's new interpretive principle from the other judges of the High Court. However, in two cases other members of the Court have expressly rejected the proposition that the Constitution should be interpreted, so far as its language permits, in conformity with international law. In *Kartinyeri*, Gummow and Hayne JJ spent several pages discussing the question. They noted that, although there is a principle to that effect where statutory interpretation is concerned, 'the legislative powers of the Parliament given by the Constitution itself stand in a special position'.[65] They quoted Dixon J in *Polites* on the application of the principle of statutory interpretation to the Constitution itself:

> Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the power that the Constitution derives its force from an Imperial enactment. It is nonetheless a Constitution.'[66]

They also referred to the Court's rejection of international law as a limitation on legislative power in *Horta*. Thus, because of the special nature of the Constitution, Gummow and Hayne JJ rejected any interpretive principle that *requires* the Constitution to be interpreted consistently with international law. This does not seem to preclude judges from using international law in deciding on the meaning of the Constitution, and certainly Gummow and Hayne JJ did not suggest that earlier cases where judges used international law, discussed above, were incorrect in that respect. But they certainly rejected a robust role for international law in the sense of a presumption or rule of construction.

Subsequently, in *AMS v AIF*,[67] Gleeson CJ, McHugh and Gummow JJ reiterated, more briefly, the comments made in *Kartinyeri* by Hayne and Gummow JJ. They stated simply that:

[65] Ibid 384.
[66] *Polites* (1945) 70 CLR 60, 78.
[67] [1999] HCA 26 (17 June 1999).

> As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.[68]

Hayne J agreed.

These comments indicate that it is unlikely that a majority of the High Court will adopt Kirby J's approach in the near future. However, in a recent speech McHugh J seemed to leave room for international law to influence the interpretation of Chapter III of the Constitution in its protection of a right to a fair trial.[69] Thus it may be that a majority could accept a less robust use for international law - as a legitimate influence, but without a presumption of conformity. That is, Kirby J's approach may state the case for international law too highly in so far as it suggests that international law could be used to compel a particular interpretation. But a lesser role, in simply providing an additional reason for a particular interpretation, may be acceptable. This appears to be the way in which earlier judges, including Mason CJ, Deane J, Brennan J, Dawson J and Gaudron J, used international law in constitutional cases. Indeed, it is in this way that Kirby J himself appears to have used international law, rather than in the more robust way his formulation of principle seems to suggest.

IV A NORMATIVE ANALYSIS OF THE ROLE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

It is appropriate to consider the normative question concerning the role that international law should play in the interpretation of the Constitution, if any. Kirby J did not engage in extensive consideration of this issue. He primarily asserted that international law is a legitimate influence on the development of constitutional law. However, he also stated that:

> [t]he Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community.[70]

This appears to be offered as a justification for the use of international law in constitutional interpretation, although ultimately I do not find it particularly convincing. The fact that Australia's Constitution 'speaks to' the international community as the basic law of Australia does not logically require that the

[68] Ibid 50.
[69] Justice McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21 *Australian Bar Review* 235, 241.
[70] *Kartinyeri* (1998) 195 CLR 337, 418.

Constitution be interpreted in accordance with international law. Rather, it seems to me, the question is to what extent does international law 'speak to' Australian constitutional law?

Gummow and Hayne JJ, in their rejection of Kirby J's approach, did not deal directly with the normative basis for rejecting international law as an interpretative tool, but they did make reference to comments of Scalia J in the US context.[71] Scalia J has rejected reliance upon international law in interpreting the US Constitution, emphasising that it is *American* conceptions of decency, not international law or values, that must inform the Supreme Court's approach to the Eighth Amendment (prohibiting cruel and unusual punishment).[72] In this regard, Scalia J in fact departed from earlier cases where the Supreme Court had used international standards in determining 'evolving standards of decency'.[73] It is not clear, however, that Gummow and Hayne JJ cited Scalia J with approval, as they also referred to the contrasting practice of the Canadian Supreme Court.[74]

What, then are the arguments for and against international law being used in constitutional interpretation? Arguments against include that made by Scalia J - that what is paramount in constitutional interpretation are the values of the community whose constitution is being interpreted, not those of outsiders. I will return to this issue - to whose values should judges look - later. In the Australian context, there is also the fact that treaties are entered into by the executive without any substantive parliamentary involvement[75] and without the possibility of judicial review.[76] It is thus possible for Australia to enter into a treaty that is illegal under international law, - an example being the Timor Gap Treaty[77] between Indonesia and Australia, considered by the High Court in *Horta*. It does not seem to me to be appropriate that such a treaty should be used to inform constitutional interpretation. Indeed, the mere fact that the executive has chosen to enter into

71 Ibid 383.

72 *Stanford v Kentucky* 492 US 361, 369 (1989).

73 See, for example, *Trop v Dulles* 356 US 86 (1958); *Estelle v Gamble* 429 US 97 (1976). *Thompson v Oklahoma* 108 S Ct 2687 (1988) cited in Richard Lillich, 'The United States Constitution and International Human Rights Law' (1990) 3 *Harvard Human Rights Journal* 53, 77-8.

74 *Kartinyeri* (1998) 195 CLR 227, 383, referring to *R v Rahey* [1987] 1 SCR 588 at 633 and to two academic commentators. Notably, the Canadian use of international law in constitutional interpretation has largely been confined to interpretation of the Charter, which was enacted in part to give effect to Canada's international human rights obligations. The use of international law in this way is thus not of direct relevance to the Australian position.

75 Although the Parliament now has a much greater role in treaty-making than it once had, via the Joint Standing Committee on Treaties (see Daryl Williams, 'Treaties and the Parliamentary Process' (1996) 7 *Public Law Review* 199), that role does not extend to a power to veto an executive decision to enter into a treaty.

76 See the discussion in *Thorpe v Commonwealth of Australia [No 3]* (1997) 144 ALR 677, 690.

77 *Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia*, ATS 1991 No. 9 (entered into force 9 February 1991).

certain contractual arrangements[78] with another nation or nations does not seem of itself to require any strong principle that the Constitution should be interpreted in conformity with such arrangements. It is possible to argue that ratification of a treaty reflects values accepted in Australian society and thus a treaty may be relevant to constitutional interpretation in that way. This was the approach taken by Gaudron J to the use of the *United Nations Convention on the Rights of the Child in Teoh* in the area of administrative law. There her Honour stated that:

> The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries. And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives rise to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations.[79]

Gaudron J here seems to give primacy to Australian community values, using the treaty to confirm those values. However, she acknowledges that some treaties may diverge from Australian community values and, if so, they would not be of use in the administrative law area. This points to one of the problems with the use of treaties as an influence on constitutional interpretation - ratification of a treaty by the executive is no guarantee that the treaty will reflect the values of the Australian community, though it is possible that the greater involvement of the parliament in the treaty-making process[80] improves the chances of this being so.

78 Treaties are often described as a 'source' of international law as a result of being included in Article 38(1) of the Statute of the International Court of Justice (ICJ). This, it might be argued, means that treaties are more than simply contractual arrangements between states. However, I disagree with such an argument. Article 38(1)(a) directs the ICJ to apply various rules of law, including 'international conventions, whether general or particular, *establishing rules expressly recognised by the parties*'. Article 38(1) does not state that treaties are a 'source' of law in any general sense, as opposed to a source of international legal obligation adopted by states through mutual agreement. Thus some commentators have suggested that use of the term 'source' be abandoned: Georg Schwarzenberger, *International Law* (3rd ed, 1957), vol 1, 27, cited in David Harris, *Cases and Materials on International Law* (4th ed, 1991) 23-24. Sir Gerald Fitzmaurice also took the view that treaties 'are a source of obligation rather than law. The law is that the obligation must be carried out, but the obligation is not, in itself, law.': 'Some Problems Regarding the Formal Sources of International Law' (1958) *Symbolae Verzijl* 153, cited in Harris, ibid, 46.

Article 38(1)(a) does not negate the fundamental principles governing treaties - in particular, that treaties bind only the parties to the treaty and create obligations for a state only vis-a-vis other parties. In this respect, a treaty is aptly described as a contractual obligation between states (see Vienna Convention on the Law of Treaties (VCLT), Article 34). A treaty to which a state is not a party cannot be applied by the ICJ to a dispute involving that state under Article 38(1)(a). It is of course possible that a treaty reflects customary international law and thus non-parties may be bound by a rule included in a treaty (VCLT, Article 38) - but then non-parties are bound not by the treaty *qua* treaty, but by the rule of customary international law.

79 *Teoh* (1995) 183 CLR 273, 304-5.

80 Discussed above n 75.

It may be, too, that a distinction should be drawn between bilateral treaties, or treaties involving only a small number of states, and multilateral treaties involving many states that can be said to represent the views of the international community, or a significant sector thereof. I suggest that this distinction will not always easily be drawn, and that even multilateral treaties are, in a technical sense, simply contractual arrangements between states. What a multilateral treaty will often do, however, is reflect or generate customary international law, and it is to the use of customary international law in constitutional interpretation that I now turn.

I argue that a stronger case for the use of international law in constitutional interpretation may be made with respect to customary international law than for treaties. Customary international law - be it in the area of human rights or elsewhere - is more than a mere contractual arrangement between nations. Rather, it consists of principles of near universal acceptance, principles derived not from the mere decision of the executive but from state practice demonstrated over time, which will include not only executive action but also parliamentary and judicial action. Thus the relevance of customary international law is in its reflection of essentially universal values, rather than simply (a) the decision of the executive or (b) the values of the Australian community.

Of course, it might be argued that the use of treaties in the domestic legal system is of greater legitimacy than the use of customary international law, as treaties set out obligations voluntarily assumed by Australia. For example, in *Nulyarimma*, when dealing with the question whether customary international law was directly incorporated into Australian law, Wilcox J thought it would be 'curious' if 'an international obligation incurred pursuant to customary international law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention'.[81] With respect, his Honour seems to have overlooked the fact that the reason that treaties require legislation to have direct effect in Australian law is precisely because they are entered into by the executive, an arm of government that in our constitutional system has no independent law-making power. The crucial aspect of customary international law is that it is not developed through the unilateral action of the executive and is thus more apt for direct application in Australian law without legislative transformation. Furthermore, in the context of constitutional interpretation, the question is not one of direct application but of influence. My argument is that it is preferable to rely on customary international law as a tool of constitutional interpretation, as it will reflect the near universal values of the international community. On the other hand, those treaties that do not reflect customary international law[82] will reflect only the values of the parties - which could be as few as two states.

[81] *Nulyarimma* [1999] FCA 1191 (1 September 1999), 162.

[82] Treaties that do reflect customary international law will of course be legitimately used under my approach.

The question remains, of course, as to why internationally accepted values should be relevant, particularly if they conflict with Australian community values. And if they do not conflict with Australian values, then one may ask what customary international law adds to the argument. To these questions, two answers may be made. First, 'Australian community values' will be notoriously difficult to demonstrate, if they indeed exist as a coherent concept. In contrast, customary international law, while often difficult to prove, is nonetheless proved by way of objective actions undertaken by states, coupled with a requirement of *opinio juris*.[83] In that sense, the universal values of customary international law can be ascertained, while the values of the Australian community may not be able to be ascertained or, if they can be, may be various and divergent. Second, if it can be satisfactorily demonstrated that a norm of customary international law exists (and I do not deny that this can be difficult), then the fact that there is near universal acceptance of such a norm gives it, I argue, great moral weight that can translate into legal weight in constitutional interpretation (though only, of course, as an influence, not as a superior rule of law). Further, as Hughlett argues:

> Because the interpretative norm has reached the level of an international rule of law, the use of the norm decreases the judge's subjectivity in interpreting constitutional provisions. The international norm is tied to demonstrable state practice and agreements which articulate the principle.[84]

If one accepts this, there remains of course the difficulty of proving the norm of customary international law in question. Yet in many areas of international law, that is not difficult. There is general acceptance that genocide is contrary to customary international law.[85] Likewise there is general acceptance that many articles of the *UDHR* and *ICCPR* reflect customary international law.[86] It is in this way that many multilateral treaties become relevant to constitutional interpretation - not as treaties *qua* treaties, but as reflections of customary international law. Thus I argue it is appropriate for domestic courts to have regard to many major international treaties - including the human rights treaties - in interpreting the Constitution.

There is also the question of how strong a role customary international law should play in constitutional interpretation. That is, should customary international law

[83] This is the classic formulation of customary international law: see, for example, *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 1, para 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, para 184; J G Starke, *Introduction to International Law* (10th ed, 1989), 35-41.

[84] Tamela Hughlett, 'International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution' (1992) 45 *Oklahoma Law Review* 169, 182.

[85] *Nulyarimma* [1999] FCA 1192 (1 September 1999); Mitchell, above n 6, 24-5.

[86] See, for example, Henry Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, 2000) 143.

simply be one tool of interpretation among many that can assist the Court in reaching a conclusion, of which seems to be the role that international law has played to date? Or should there be a stronger principle that, in the case of ambiguity, the Court should prefer the interpretation that is consistent with customary international law, as Kirby J suggests? I would suggest that the latter is an appropriate interpretive principle, one that gives significant weight to customary international law but does not allow international law to override the clear terms of the Constitution. If an ambiguity exists, then the judges need some tools to assist them in deciding which interpretation to prefer. Rules of near universal acceptance in the international community are a useful way to resolve such a problem - and arguably more useful than the views of the framers, which reflect views from the 19th century.

V CONCLUSION

International law is of increasing importance in Australian law, though its relevance to constitutional interpretation is only recently being articulated. Kirby J, in his interpretive principle is, I argue, building on (though not expressly) existing uses of international law in constitutional cases. But he is the first judge to have explored in any depth the appropriate role of international law. Other judges have remained hostile to Kirby J's approach, but I suggest that, in its weaker form (the modified *Mabo* statement) that approach reflects what judges have been doing for many years and may yet gain explicit acceptance.

I also suggest that this is a positive development, at least in relation to customary international law, which reflects near universal consensus on particular issues. However, this approach is unlikely to give international law a decisive role in constitutional cases - rather, it may support conclusions reached on other grounds, as has occurred to date. What seems unlikely to occur is the judicial acceptance of a stronger presumption that, in cases of ambiguity, the Constitution should be interpreted consistently with international law.

New Crimes or New Responses?: Future Directions in Australian Criminal Law

RICHARD G FOX *

Australian criminal law has to respond to new technology, social conditions, and threats. The opening decades of the twenty-first century will see an accelerated shift from local, to national and international sovereignty over the criminal law; an expansion of Federal criminal power; a continuing struggle to apply substantive criminal law and appropriate penal sanctions to corporate wrongdoing; greater use of civil sanctions to supplement criminal ones; increased emphasis on regulatory rather than punitive modes of responding to breaches of the law; managerial approaches to court procedure; and a rethinking of the values, doctrines and purposes of the criminal law.

I INTRODUCTION

In 1967 a book entitled *The Year 2000: A Framework for Speculation for the Next Thirty Three Years*[1] was published. It was prepared in the United States by the prestigious Hudson Institute Think Tank as part of a series on *Alternative World Futures*. Its authors, Kahn and Weiner, sought to explore in a disciplined fashion the prospects for the beginning of the new millennium. They accurately predicted the accumulation of scientific and technological knowledge and the rapid increase in industrialisation and modernisation which have rendered production less labour intensive. They were less prescient about shifts in global politics. But they foresaw globalisation, computerisation, the increased surveillance of citizens and the new opportunities for genetic manipulation of human beings. Nevertheless, they allocated no space in their lengthy text to crime as a significant factor likely to call for innovative responses.

Was that a significant omission in their speculation? Or was it a pragmatic recognition that crime and communal responses to crime were permanent and largely unchanging features of the social and legal landscape? Did they think that the deviance expected in the next century would be essentially no different from that of the last, and that the settings of criminal law in the twentieth century would suffice for the twenty-first? Were they unaware of the dramatic changes that had occurred in criminal law and procedure in the eighteenth and nineteenth

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1 H Kahn and A J Weiner (1967).