

THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2004 TERM

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Constitutional lawyers and international lawyers in Australia tend to see themselves as inhabiting different spheres. The self-image of constitutional lawyers is that of guardians of a distinct text tied to Australian history and territory, while international lawyers regard themselves as concerned with a set of norms and traditions associated with ‘the international community’.¹ The separation of the two disciplines has, for many years, attracted little attention. Australian international lawyers have extensively investigated the links between international law and the domestic legal order, often with a sense that the former is a superior form of law,² but there has been little reciprocity of interest in international law by constitutional lawyers.³ The relationship between the two disciplines remains uneasy. This paper focuses on the way that the tensions between constitutional law and international law were manifested in the 2004 High Court term. I argue that the approach to international law favoured by the majority of the High Court – the maintenance of a strict separation between domestic and international systems – is outmoded, and will reduce the ability of Australian legal institutions to respond to the challenges of this century.

The Australian Constitution does not contemplate a large role for international law because at the time of Federation it did not appear to be significant for Australia.⁴ Moreover, it was accepted that Australia did not have the power to enter into treaties itself, and that Great Britain would act on its behalf in this respect. The Constitution contains only two references to international law: the external affairs power in section 51(xxix), and the ineffective section 75(i) grant of jurisdiction to the High Court in matters ‘[a]rising under any treaty’. The 1891

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1 The ambiguity of this term is discussed in Don Greig, “‘International Community’, “Interdependence” and All That ... Rhetorical Correctness?” in Gerard Kreijen (ed), *State, Sovereignty and International Governance* (2002) 521.

2 See, eg, K W Ryan (ed), *International Law in Australia* (2nd ed, 1984); Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997).

3 Geoffrey Sawer was a notable exception. See Geoffrey Sawer, ‘Australian Constitutional Law in Relation to International Relations and International Law’ in Ryan (ed), above n 2, 35.

4 James Crawford, ‘International Law and Australian Federalism: Past, Present and Future’ in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 325, 325–6.

draft of the Constitution however included a broad provision, adapted from the *Constitution of the United States*, that would have made all treaties entered into by the Commonwealth 'binding on the courts, judges and people of every State, and of every part of the Commonwealth' and capable of overriding inconsistent state law. This provision did not survive into the final version of the Constitution because it implied that Australia had the power to enter into international agreements independently of Great Britain.⁵

The High Court has given a series of explanations of the relationship between the Australian legal system and international law. With respect to international agreements to which Australia is a party, the Court has generally insisted that, for a treaty or convention to have any direct domestic effect, the agreement must have been adopted into Australian law through legislation. This is often described as the 'transformation' approach to international law.⁶ In the case of customary international legal principles, the High Court has wavered on whether there needs to be specific domestic legislative implementation or whether Australian law already incorporates such principles. In *Chow Hung Ching v The King*,⁷ ('*Chow Hung Chin*') for example, both Latham CJ and Dixon J described customary international law as a source, rather than as a part, of Australian law, although as Geoffrey Sawer pointed out, they did not elaborate on the distinction between a source and a part of law.⁸ Justice Starke implied a closer relationship by suggesting that a universally recognised rule of custom should be applied by Australian courts, unless it was in conflict with statute or the common law (the 'incorporation' approach).⁹ The High Court has considered the problems of determining the status of an asserted norm of custom in both *Chow Hung Ching* and *Polyukhovich v Commonwealth*,¹⁰ indicating that an uncontroversial, widely accepted norm of custom will be more readily regarded as part of Australian law by the High Court.

Overall, then, the High Court has adopted a 'dualist' approach to international law, which regards national and international legal systems as quite distinct.¹¹ *Horta v Commonwealth*¹² is a good illustration of this method. The case involved a challenge to Commonwealth legislation implementing a bilateral maritime boundary treaty with Indonesia, on the ground that the treaty was invalid at international law and thus not properly a matter under the external affairs power. It was argued that the treaty, which created a regime for exploitation of the seabed between Australia and East Timor, contravened the basic international law principle that territory could not be acquired through the use of force. Indonesia's 1975 invasion of East Timor thus could not give it valid title over the East Timorese seabed. The High Court unanimously and briefly dismissed the

5 Ibid 326–7.

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

7 (1948) 77 CLR 449.

8 Sawer, above n 3, 50.

9 *Chow Hung Ching v The King* (1948) 77 CLR 449.

10 (1991) 172 CLR 501.

11 Brownlie, above n 6, 31–3.

12 (1994) 181 CLR 183.

challenge. It held that the external affairs power did not require that the treaty being implemented be consistent with international law.

The High Court has encountered international law in an increasing range of contexts. Much of this has been in its jurisprudence on the external affairs power, which I will not deal with here. International law has also been invoked by members of the Court in the contexts of the common law and of techniques of statutory and constitutional interpretation.

In *Mabo v Queensland (No 2)*,¹³ international law's effect on the development of the common law was given particular prominence by Brennan J. Drawing on both the transformation and incorporation approaches, he said:

The common law does not necessarily conform to 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.¹⁴

This statement was tempered by the qualification that international law could not be used to interfere with the 'skeleton of principle which gives the body of our law its shape and internal consistency'.¹⁵

In *Dietrich v The Queen*,¹⁶ the High Court discussed the possibility of a common law right to a fair trial based on international standards. Chief Justice Mason and McHugh J (who identified such a common law right) rejected the idea that international guarantees of legal representation were part of the Australian common law in the absence of specific legislation. Justice Brennan, by contrast, presented international law as a 'legitimate influence' on the common law, useful as a method of tapping into the contemporary values of the community, although in the end he found no common law right to a fair trial existed.¹⁷

In 1995, in *Minister for Immigration and Ethnic Affairs v Teoh*¹⁸ ('*Teoh*'), a narrow majority of the High Court decided that international treaties to which Australia was a party but which were not specifically incorporated in Australian law could create a legitimate expectation that they would be considered in administrative decision-making. *Teoh* prompted an intense political and legal controversy that still echoes today,¹⁹ but to an international lawyer it reads as a modest and cautious development. For example, Mason CJ and Deane J stated that the influence of international legal principles on the common law would depend on factors such as the nature and purpose of the international legal norm, its degree of international acceptance and its relationship with existing principles of domestic law. In any event, *Teoh* now appears vulnerable as a precedent: in

13 (1992) 175 CLR 1.

14 Ibid 42.

15 Ibid 29.

16 (1992) 177 CLR 292.

17 Ibid 321.

18 (1995) 183 CLR 273.

19 In 1995, the Minister for Foreign Affairs, Gareth Evans, and the Attorney-General, Michael Lavarch, sought to override the impact of the decision in a formal statement, a move emulated in 1997 by their Liberal Party successors, Alexander Downer and Daryl Williams. Both the Keating and Howard Governments unsuccessfully attempted to legislate to overcome the effect of the decision.

2003 in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*²⁰ the current High Court sent a strong signal that it was keen to overrule *Teoh*.²¹

Another role for international law contemplated by members of the High Court over the years has been in the interpretation of legislation and the Constitution. In *Polites v Commonwealth*,²² a majority of the Court accepted that statutes should be interpreted in accordance with international law, unless Parliament clearly shows a contrary intention. This rule of statutory construction is based on the presumption that Parliament will legislate consistently with international law. A weaker version of this principle was endorsed in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, where Brennan, Deane and Dawson JJ referred to the use of treaty provisions accepted by Australia in the case of statutory ambiguity.²³ In *Teoh*, Mason CJ and Deane J reiterated the principle and gave it greater impact by arguing that the notion of ambiguity should be broadly understood. They stated that '[i]f the language of the legislation is susceptible of a construction which is consistent with [international law], then that construction should prevail'.²⁴

Justice Kirby has extended this principle of construction to constitutional interpretation, although he is invariably alone on this issue. For example, Kirby J's dissent in *Kartinyeri v Commonwealth*²⁵ ('*Kartinyeri*') accepted the plaintiff's argument that the Commonwealth's power to legislate with respect to the 'people of any race'²⁶ should be read in light of international standards of non-discrimination. He proposed an interpretative principle that, where the Constitution is ambiguous, the High Court 'should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights'.²⁷ The 'Kirby approach' goes further than the accepted principle of construction to preserve rights in the case of ambiguity. In *Newcrest Mining (WA) Ltd v Commonwealth*, Kirby J said: 'To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights'.²⁸ He also articulated the idea, repeated in *Kartinyeri*, that the Constitution spoke not just to the people of Australia but also to the international community. Justice Kirby is not, however, a radical incorporationist. He has consistently reiterated the dualist basis of the Australian legal system vis-à-vis international law and the 'interstitial' process by which international treaty norms may affect the

20 (2003) 214 CLR 1.

21 See the discussion in Wendy Lacey, 'Case Commentary: A Prelude to the Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*' (2004) 26 *Sydney Law Review* 131.

22 (1945) 70 CLR 60.

23 (1992) 176 CLR 1, 38.

24 *Teoh* (1995) 183 CLR 273, 287.

25 (1998) 195 CLR 337.

26 *Australian Constitution*, s 51(xxvi).

27 *Kartinyeri* (1998) 195 CLR 337, 417.

28 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8.

interpretation of ambiguities in the Constitution, statutes and the development of the common law.²⁹ Justice Kirby also typically invokes international law principles as subsidiary arguments, presenting them as mere adjuncts to a decision based on Australian legal principles.³⁰

The assertion that the Constitution has an international dimension has not been met with enthusiasm by other members of the High Court. In *Kartinyeri*, although Gaudron J was prepared to acknowledge the inherent claim to human rights of all people and the fundamental nature of the international law prohibition on racial discrimination, she argued that the norm could not restrain Commonwealth legislative power.³¹ In the same case, Gummow and Hayne JJ accepted that Australian laws should be interpreted as far as possible in conformity with international law, but held that 'unmistakeable and unambiguous' language will override international law.³² The tensions created by references to the international context of the Constitution have become more evident over time. For example, in *AMS v AIF*, Gleeson CJ and McHugh and Gummow JJ wrote: 'As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.'³³ Justice Callinan has directly refuted Kirby J's approach.³⁴

At the start of the 21st century, then, the High Court appears in a very wary phase of its interest in international law. International law is presented as a potentially chaotic source of norms whose impact on the Australian legal system needs to be closely confined. This has also generally been the approach of the academic constitutional law community. For example, Amelia Simpson and George Williams have cautioned against too eager an embrace of international law in constitutional interpretation because of international law's vagueness.³⁵ While they see the use of international law as inevitable and are sympathetic to this project, Simpson and Williams describe many international legal standards as indeterminate and lacking concreteness and recommend that they be used only in relatively limited circumstances. In an analysis of the High Court under Mason CJ, Greg Craven strongly criticised the effect of 'internationalism' as an influence on an ethically suspect institution.³⁶ Such reservations about the use of international law are perhaps reinforced by politicians and media commentators who depict international law as the frolic of a jet-setting, lotus-eating judiciary. For example when Gleeson CJ made a reference to international law in a speech to the International Bar Association conference in 2002, he was upbraided in a

29 See, eg, *Kartinyeri* (1998) 195 CLR 337, 417–18; *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 380–1.

30 For Justice Kirby's own account of some of these cases see 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 109.

31 (1998) 195 CLR 337, 365, 366.

32 *Kartinyeri* (1998) 195 CLR 337, 381 (citing *Coco v The Queen* (1994) 179 CLR 427, 437).

33 *AMS v AIF* (1999) 199 CLR 160, 180.

34 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 389–91.

35 Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205. See also Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (forthcoming).

36 Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (Thirty-First Alfred Deakin Lecture) (1999) 22 *University of New South Wales Law Journal* 216.

national newspaper for being '[l]ike some rich kid discovering the Church of Scientology'.³⁷

Many of the constitutional cases decided by the High Court in 2004 touched on questions of international law: for example, the international law relating to jurisdiction over extra territorial offences,³⁸ sentencing,³⁹ mandatory detention,⁴⁰ nationality and the meaning of the term 'alien',⁴¹ elections,⁴² extradition,⁴³ and private international law. Justice Kirby was often the only member of the Court to point out the international legal dimensions of a case,⁴⁴ but much of this discussion was uncontroversial. The major area of contention was the invocation of international human rights principles by Kirby J, typically to bolster a dissenting position. International law in High Court jurisprudence is thus regularly associated with the outlier view, exacerbating its already marginalised image in the Australian legal system.

A significant number of the constitutional cases in which international law was raised before the High Court in 2004 feature Middle Eastern names – Iranian, Iraqi, Palestinian, Afghani – and involve questions of the interpretation of the *Migration Act 1958* (Cth). For example, in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*⁴⁵ ('Behrooz') an Iranian man was charged with the offence of escaping from immigration detention under section 197A of the *Migration Act*. He argued that he could not be held guilty of such an offence because the harsh conditions of the centre from which he had escaped meant that it could not qualify as an immigration detention centre. The majority of the High Court had little difficulty in concluding that, whatever the conditions, Mr Behrooz could be said to have escaped from immigration detention within the meaning of the legislation. Justice Kirby was the only member of the High Court in *Behrooz* to discuss international legal standards on conditions of detention.⁴⁶ He drew on the international law relating to arbitrary detention to reinforce his preferred interpretation of provisions of the *Migration Act*, arrived at through domestic law principles.

37 Janet Albrechtson, 'Justices Leave the Door Wide Open to Killers', *The Australian* (Sydney), 4 December 2002, 15.

38 *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311.

39 *Baker v The Queen* (2004) 210 ALR 1.

40 *Al-Kateb v Godwin* (2004) 208 ALR 124; *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji* (2004) 202 ALR 201.

41 *Singh v Commonwealth* (2004) 209 ALR 355.

42 *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582.

43 *Truong v The Queen* (2004) 205 ALR 72.

44 See, eg, *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, 660: Justice Kirby noted that his interpretation of the Constitution's protection of the implied freedoms of political communication and political association was consistent with art 25 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See also *Fardon v Attorney-General for Queensland* (2004) 210 ALR 50, 100, where Kirby J argues that the *International Covenant on Civil and Political Rights* supports the double jeopardy rule). Chief Justice Gleeson referred to international human rights law to confirm the 'fundamental importance' of the principle of judicial independence and impartiality in *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 206 ALR 315, 317.

45 (2004) 208 ALR 271.

46 *Ibid* 301–4.

Although Kirby J continued to insist on the relevance of international law in statutory interpretation, arguing that there was no need to locate an ambiguity in legislation before interpreting it to be consistent with both treaty and customary international law,⁴⁷ his use of international law remains relatively conservative. Kirby J always acknowledges the dualist mantra that international norms do not bind Australian courts unless incorporated by domestic law, but emphasises the value of these norms as providing the context for the High Court's interpretative and constitutional functions. Thus in *Baker v The Queen* Kirby J argued that, given the accepted rule of statutory construction that ordinary statutes should be construed as far as possible to ensure that they do not operate in breach of international law, there is no reason why the Constitution itself should be construed in a more parochial way.⁴⁸ He made the same point in *Fardon v Attorney-General for the State of Queensland*⁴⁹ and *Re Colonel Aird; Ex parte Alpert*.⁵⁰ This argument was rarely responded to by the other members of the High Court.

An example of direct engagement between the Chief Justice and Kirby J over the significance of international law is *Coleman v Power*.⁵¹ In interpreting Queensland legislation that prohibited the use of insulting words in a public place, Kirby J argued that international law supported a narrow understanding of the provision.⁵² Without specific reference to Kirby J, Gleeson CJ noted that, first, this argument had not been raised by counsel during the appeal.⁵³ Second, he offered a much more restrictive formulation of the principle that statutes should be construed as far as possible to be consistent with international law than that of Kirby J.⁵⁴ He argued that the principle would apply only where the statute in question was intended to give effect to international legal obligations. Justice Kirby responded directly to the Chief Justice, writing that there was 'no substance' in the latter's criticisms.⁵⁵ He referred to his own use of the principle as 'frequent, consistent and of long standing. It preceded my service on this Court'.⁵⁶ Justice Kirby went on to justify relying on a legal principle that had not been raised by the parties,⁵⁷ and to predict that 'the present resistance to the interpretive principle that I favour will pass'⁵⁸ and that indeed the rule would become 'orthodox'.⁵⁹

Justice Kirby recognised limits to the impact of international law in statutory interpretation in two cases in 2004. In *Minister for Immigration and*

47 Ibid 302.

48 (2004) 210 ALR 1, 38.

49 (2004) 210 ALR 50.

50 (2004) 209 ALR 311.

51 (2004) 209 ALR 182. See also *Baker v The Queen* (2004) 210 ALR 1, 7–8 (Gleeson CJ), 36–8 (Kirby J).

52 *Coleman v Power* (2004) 209 ALR 182, 241–2.

53 Ibid 189.

54 Ibid 189–91.

55 Ibid 243.

56 Ibid.

57 Ibid.

58 Ibid 243–4.

59 Ibid 245.

Multicultural and Indigenous Affairs v B,⁶⁰ he noted that the High Court cannot invoke international law to ‘override clear and valid provisions of Australian national law’.⁶¹ Again, in *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)*⁶² (*‘Re Woolley’*), Kirby J acknowledged that the provisions relating to mandatory detention in the *Migration Act 1958* (Cth), as applied to children, might be inconsistent with international law, but that the wording was so clear, that ‘a national court, such as [the High Court], is bound to give it effect according to its terms. It has no authority to do otherwise’.⁶³ Justice Kirby’s penultimate paragraph in *Re Woolley*, however, distanced him from the outcome of the case:

recent authority of this Court repeatedly confirms the lawfulness and validity of the applicants’ detention. It does so notwithstanding the extended duration of the detention, the status of the respondents as children, the arguable breach of international obligations and the unfortunate consequences that I would be prepared to assume such prolonged detention of children occasions.⁶⁴

The most dramatic High Court interaction with international law in 2004 came in *Al-Kateb v Godwin*⁶⁵ (*‘Al-Kateb’*). Mr Ahmed Ali Al-Kateb was born in Kuwait in 1976 to Palestinian parents. He arrived by boat in Australia in December 2000 claiming refugee status and was placed in detention. There was no dispute that he was a stateless person – an individual ‘who is not considered a national by any State’ under the *International Convention Relating to the Status of Stateless Persons*⁶⁶ – because Kuwait did not consider him a citizen and Palestine did not have the capacity to grant citizenship. Mr Al-Kateb applied for, but was refused, a protection visa to stay in Australia. After failed legal challenges to this decision, he wrote to the Minister for Immigration in 2002 asking to be sent back either to Kuwait or to Gaza. However, no country would accept him. The *Migration Act 1958* (Cth) states that a non-citizen unlawfully in Australia who asks to be removed from Australia must be removed ‘as soon as reasonably practicable’.⁶⁷ It also requires the continued detention of such a person ‘until’ they are removed.⁶⁸ The High Court had to determine whether or not, under the *Migration Act*, the Minister for Immigration could detain an individual in Mr Al-Kateb’s situation until another country would be prepared to accept him. Members of the High Court conceded that the likelihood of Mr Al-Kateb’s acceptance by another country was remote in current circumstances and that his detention in Australia would be indefinite.

60 (2004) 206 ALR 130.

61 Ibid 173.

62 (2004) 210 ALR 369.

63 Ibid 423.

64 Ibid 425–6.

65 (2004) 208 ALR 124.

66 Opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

67 *Migration Act 1958* (Cth) s 198.

68 *Migration Act 1958* (Cth) s 196(1).

One of Mr Al-Kateb's arguments related to statutory interpretation.⁶⁹ He contended that the wording of the *Migration Act* implied that, when it became clear that his removal from Australia was not practicable, the Minister could not continue to hold him in detention. Three members of the High Court, Gleeson CJ and Gummow and Kirby JJ, agreed (in separate judgments) with this interpretation, on the basis that the possibility of indefinite detention was not expressly contemplated by the legislation. The Chief Justice argued that Mr Al-Kateb's situation was not covered by the *Migration Act*, and that the legislation thus should be read in light of the principle that 'courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language'.⁷⁰ Justice Gummow read the relevant provisions of the *Migration Act* as inapplicable to Mr Al-Kateb's circumstances. Justice Kirby took a similar approach to Gummow J, but gave considerable prominence to the fact that this construction was supported by the principles of international law. The majority of the Court, McHugh, Hayne, Callinan and Heydon JJ, found the *Migration Act* was unambiguous in its application to Mr Al-Kateb. In the words of McHugh J, the outcome for Mr Al-Kateb was 'tragic', but the provisions of the *Migration Act* clearly required it. Justice Kirby was the only member of the minority to consider the international law relating to indefinite detention.⁷¹

From the perspective of international law, the facts in *Al-Kateb* clearly involve breaches of human rights: indefinite detention because of bureaucratic failures cannot be justified. The type of constitutional analysis favoured by the High Court majority, however, illustrates the difficulties of the Australian legal system in responding to these human rights concerns.

The case is striking because of the charged debate between McHugh and Kirby JJ on the relevance of international law to Australian law. The Judges engage with each other's arguments in an unusually direct and passionate manner.⁷² Justice Kirby has described the rather combative drafting of the opinions in *Al-Kateb* in the following way:

My judgment was in. Then Justice McHugh came in later. My judgment was uncharacteristically extremely brief, but then Justice McHugh took the occasion to express his views on the use of international law in the construction of the Australian Constitution. I then responded. He then answered back and ultimately we had a resolution: each of us believing that we had sufficiently expressed our

69 Other aspects of the *Al-Kateb* case are discussed in a draft paper: Arthur Glass, *Al-Kateb and Behrooz* (2005) Gilbert + Tobin Centre of Public Law <<http://www.gtcentre.unsw.edu.au/Arthur-Glass-Paper.doc>> at 20 July 2005.

70 (2004) 208 ALR 124, 130.

71 *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976). For a summary of the international jurisprudence see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004) 206–43.

72 Justice Hayne also disagreed with Kirby J about the relevance of international law but did not linger on this point: *Al-Kateb* (2004) 208 ALR 124, 183.

point of view.⁷³

The style of the debate between the two Judges is asymmetrical: Kirby J adopted a more mollifying tone, seemingly intent on demonstrating that his and McHugh J's views were not so far apart, while McHugh J appeared keen to demolish Kirby J's arguments once and for all. Justice McHugh employed rather bald and dismissive language, reminiscent of that of Scalia J of the United States Supreme Court,⁷⁴ to respond to Kirby J. Justice Kirby, by contrast, emphasised McHugh J's inconsistency in adopting an approach to statutory construction that gave priority to the subjective intentions of legislators, citing previous judgments of McHugh J that supported a purposive approach to statutory interpretation.⁷⁵

Justice Kirby's arguments about international law in *Al-Kateb* did not differ to those he has made many times previously. He cited many of his regular sources: Professor Harold Koh of Yale Law School;⁷⁶ the United States Supreme Court in *Atkins v Virginia*⁷⁷ and *Lawrence v Texas*;⁷⁸ the Bangalore Principles;⁷⁹ and international and regional human rights treaties.⁸⁰ He repeated his view that international law rules are not binding on Australian courts, but that they can influence the understanding of the law. International legal arguments, for Kirby J, are simply additional to those of the more familiar statutory interpretation techniques and constitutional principles which were used, for example, by Gummow J to interpret the *Migration Act* in Mr Al-Kateb's favour.

Justice McHugh accepted (rather grudgingly) the principle that a statute should be interpreted to be consistent with international law unless its wording was clear.⁸¹ However, he voiced strong practical and theoretical objections to the use of international law in constitutional interpretation. He presented the rules of international law as numerous and difficult to locate⁸² – an impossibly large set of principles for legislators to be aware of. As a matter of principle, use of international law developed since 1900 would, according to McHugh J, constitute an illicit judicial amendment of the Constitution.⁸³ He argued that

73 Andrew Fraser, 'The Legal-Eye View: Interview with Michael Kirby' *The Canberra Times* (Canberra) 23 April 2005, B06.

74 An example of such language is Scalia J's response to Steven J's reference to the critical views of the 'world community' on the imposition of the death penalty on offenders with a mental disability in *Atkins v Virginia*, 536 US 304, 347 (2002), as meriting a 'Prize for the Court's Most Feeble Effort to fabricate "national consensus"'.

75 *Al-Kateb* (2004) 208 ALR 124, 167, 173.

76 *Ibid* 172.

77 536 US 304 (2002), cited in *Al-Kateb* (2004) 208 ALR 124, 171, 172.

78 539 US 558 (2003), cited in *Al-Kateb*, (2004) 208 ALR 124, 171, 172.

79 *Al-Kateb* (2004) 208 ALR 124, 169.

80 *Ibid* 171.

81 *Ibid* 140–1. Justice McHugh there observed that the *Polites v Commonwealth* principle of statutory construction may have been valid 'when the rules of international law were few and well-known'. He argued however that: 'Under modern conditions ... this rule of construction is based on a fiction. Gone are the days when the rules of international law were to be found in the writings of a few well-known jurists.' Justice Hayne (at 183) and Callinan J (at 199) took similar positions. Justice Heydon signalled a doubt about whether the principle applied to treaties to which Australia was a party but which had not been incorporated by legislation into Australian law (at 200).

82 *Ibid* 140–1.

83 *Ibid* 142–3.

there was a difference between taking into account political, social and economic developments since 1900 in constitutional interpretation, on the one hand, and what he characterised as binding *rules* of international law on the other.⁸⁴ This was a heretical view⁸⁵ and would lead, McHugh J remarked dismissively, to judges requiring a loose-leaf copy of the Constitution.⁸⁶ This does not seem a persuasive argument in a constitutional court that has developed evolving understandings of the constitutional text, not least in the implied rights cases. Justice Kirby provided the obvious response that in fact judges do have such copies of the Constitution, elaborating the text by historical materials, judicial decisions and so on.⁸⁷

In a remarkable passage at the end of his judgment, McHugh J offered the lack of an Australian bill of rights as a justification for his narrow reading of the *Migration Act*, implying that an Australian bill of rights would provide authority for the judiciary to look beyond Australia's borders and to take international human rights law into account in interpreting domestic law.⁸⁸ There is little doubt that some form of bill of rights can affect the development of the law. The United Kingdom's *Human Rights Act 1998* (UK), for example, has changed the approach of United Kingdom courts to issues of human rights. The House of Lords' decision in *A (FC) v Secretary of State for the Home Department*,⁸⁹ a challenge to Part 4 of the *Terrorism Act 2000* (UK) which provided a much harsher regime for non-British nationals suspected of being engaged in terrorist activities than for British nationals in the same position, illustrates the impact of the *Human Rights Act*. Baroness Hale of Richmond said:

It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.⁹⁰

This judicial approach is in marked contrast to the Australian High Court's approach to the detention provisions of the *Migration Act 1958* (Cth) in *Al-Kateb*, where the majority was unwilling to scrutinise Parliament's power to detain people indefinitely and did not regard such detention as punitive. While a bill of rights would require consideration of international human rights standards, McHugh J's proposition that the High Court must await an Australian bill of rights before it can take international law into account in construing statutes is an extraordinarily narrow understanding of the interpretative task.

84 Ibid 143–4.

85 Ibid 140–1.

86 Ibid 145.

87 Ibid 170.

88 Ibid 144–5.

89 [2004] UKHL 56.

90 Ibid.

CONCLUSION

The High Court's understanding of international law, particularly human rights law, in 2004 is inherently vague, uncertain and open-ended. It is true that some international law principles are expressed in general terms, but there are also many forms of international jurisprudence that can assist in interpreting international standards.⁹¹ The internet now allows easy access to such materials, whereas even a few years ago they were quite difficult to track down.⁹² The fears of the uncertainty of international law are overstated. Concepts regularly used in domestic law, such as 'reasonableness', or 'foreseeability', are no less vague and require considerable interpretation in context. The anxious reference made by McHugh J in *Al-Kateb* to the fact that there are 900 treaties to which Australia is a party⁹³ gives an inaccurate sense of the breadth of international law. Only a small number of treaties will be relevant to any particular decision. There are indeed more High Court decisions than there are treaties that bind Australia and yet no one suggests that it is unreasonable to refer to them in litigation.

Members of the current High Court appear to assume that, if international law is accepted as a serious source of law, the floodgates will be opened to a wave of vague and foreign norms at odds with Australia's legal culture. There has been a sense that it is 'all or nothing' with respect to international law – it either binds fully or it does not bind; it is either relevant or irrelevant. The reaction of most members of the High Court has thus been one of maintaining a clear divide between the national and international legal systems. There is also a sense in the 2004 judgments of the High Court that international law is somehow a source of law that sneaks up behind innocent Parliaments to thwart their democratic will. This is a difficult proposition to maintain since the 1996 treaty reforms, which gave Parliament a much greater role in decisions about treaty participation.⁹⁴

A more productive way to understand the potential of international law in Australian law may be as 'influential authority' rather than as part of a binary system of 'binding' or 'non-binding' norms. Canadian academics have developed the idea of 'influential authority' in the context of the Canadian Supreme Court decision in *Baker v Canada*.⁹⁵ They argue that this points to the imperative exerted by international norms although they are formally non-binding: 'rather than demanding that their actual terms be enforced [as rights], these influential

91 For example, Justice L'Heureux-Dubé of the Supreme Court of Canada drew on a variety of international materials in *R v Ewanchuk* [1999] 1 SCR 330, 361–79 to discuss the scope of common law defences to sexual assault charges. She looked at treaty texts, general recommendations of United Nations treaty bodies and resolutions of the United Nations General Assembly.

92 See, however, Stephen Toope's caution about the overly limited use of materials by Canadian judges to assist in treaty interpretation: 'The Uses of Metaphor: International Law and the Supreme Court of Canada' (2001) 80 *Canadian Bar Review* 534.

93 *Al-Kateb* (2004) 208 ALR 124, 141. This information was taken by McHugh J from argument in the *Teoh* case.

94 See Minister for Foreign Affairs, Alexander Downer, and Attorney-General, Daryl Williams, 'Government Announces Reform of Treaty-Making' (Press Release, 2 May 1996), <<http://www.dfat.gov.au/media/releases/foreign/1996/fa29.html>> at 20 July 2004.

95 [1999] 2 SCR 817.

sources instead insist that they be addressed, considered, weighed in the course of justifying a decision upon which they might rightly be thought to bear. They demand, one might say, respect as opposed to adherence with their terms.⁹⁶ This approach allows a more fluid, flexible and subtle approach to international law.⁹⁷

For the High Court to take international law seriously in this way will not require some sort of definitive international interpretation of international legal standards. It rather requires understanding the use of international law in domestic courts as a process of translation.⁹⁸ In other words, the outcome of the translation of international law may not always be the same in different legal cultures. Karen Knop quotes J B White, who describes 'translation as owing fidelity to the other language and text but requiring the assertion of one's own as well'.⁹⁹

The High Court will continue to encounter questions of international law. Few areas of political, social and commercial life are untouched by international standards and norms. The Court's current approach excludes a valuable source of principles. In this era of a semi-permanent war against terror, and the trend of the executive government to assert self-defining powers, it is especially important that Australia's highest court develop a less parochial, less deferential sensibility to government action if it is to give any substance to the idea of the rule of law. The war on terror is, above all, a war of ideas.¹⁰⁰ As Thomas Friedman noted recently, '[t]he greatest restraint on human behavior is not a police officer or a fence – it's a community and a culture'.¹⁰¹ There is a risk that Australian law-makers will respond to the global threat of terror by enacting more and more laws that erode our commitment to individual rights. The High Court has an important role in strengthening our legal culture so that it can resist the excesses of unchecked governmental power. International law can make a significant contribution to this task.

96 Mayo Moran, 'Influential Authority and the Estoppel-Like Effect of International Law' (forthcoming in Hilary Charlesworth et al, *The Fluid State: International Law in National Legal Systems* (2005) 4).

97 In *Baker v Canada* [1999] 2 SCR 817, [70], for example, L'Heureux-Dubé J wrote that 'the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review'.

98 Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501.

99 Ibid 506.

100 Thomas Friedman, 'Calling All Democrats', *The New York Times* (New York), 10 February 2005, 23.

101 Ibid.