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## International Law-The Impact on National Constitutions

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# INTERNATIONAL LAW—THE IMPACT ON NATIONAL CONSTITUTIONS\*

MICHAEL KIRBY\*\*

“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

—Justice Kennedy<sup>1</sup>

“[W]e should not be surprised to find congruence between domestic and international values . . . expressed in international law or in the domestic laws of individual countries . . . .”

—Justice O’Connor<sup>2</sup>

“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”

—Justice Scalia<sup>3</sup>

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\*\* Justice of the High Court of Australia. The author acknowledges the assistance of his senior associate (law clerk) 2004, Sarah Knuckey, in the preparation of this Lecture.

1. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005).
2. *Id.* at 1216 (dissenting).
3. *Id.* at 1226 (dissenting).

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## I. ARRIVAL AT A "GROTIAN MOMENT"<sup>4</sup>

In the first Grotius Lecture in 1999, Judge Christopher Weeramantry reminded us of the special contribution that Hugo de Groot (Grotius) made to the discipline of international law when he wrote *De Jure Belli ac Pacis* in 1625:

It was an unprecedented situation that faced the newly emerging states of Grotius's time. Detached from their traditional moorings to church, empire and a higher law, they were groping for new principles of conduct and inter-relationship to provide a compass for the tempestuous waters that lay ahead. Grotius rose to the occasion—a towering intellect with a passionate vision of an ordered relationship among nations—a relationship based not on the dogma of religion or the sword of conquest, but on human reason and experience.<sup>5</sup>

The transitions and perils, challenges and opportunities of the present age require of lawyers everywhere an equal freshness of

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4. Richard Falk, *On the Recent Further Decline of International Law*, in LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE 264, 272 (A. R. Blackshield ed., 1983).

5. Christopher Weeramantry & Nathaniel Berman, *The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1515, 1516 (1999). This phrase was also quoted by Moisés Naím in the Fourth Grotius Lecture. Moisés Naím, *The Fourth Annual Grotius Lecture: Five Wars of Globalization*, 18 AM. U. INT'L L. REV. 1, 17-18 (2002).

thinking and a willingness to consider not only the economics and politics of globalization but also the values and ethics “that shape our conception of the global world.”<sup>6</sup> In a time of cyberspace, genomics, satellites, jumbo jets and global perils such as AIDS and SARS, continuing to view international law and municipal law as almost wholly separate is as inappropriate to our era as was the notion that the law of nations was derived from God’s will, defined by a global Church or by a King ordained by God, rather than by human rationality, as Grotius declared.

This is a time to acknowledge the role that international law plays, and will increasingly play, in the constitutional jurisprudence of nation states. If it is true that the courts of the international legal order have not yet sufficiently adapted to the challenges and opportunities to hold a dominant role in the application of international law,<sup>7</sup> the answer to this predicament is neither despair nor contempt about international law. It is not a retreat behind the exclusive walls of local jurisdiction. It is to put to work, in new and proper ways, the established courts of municipal jurisdiction. They will then realize, in cases where it is relevant and appropriate to do so, that they are sometimes exercising not only national, but also a kind of international jurisdiction. This will require attention on their part to international law.<sup>8</sup>

Drawing upon sources found in international law, not as binding rules but as contextual principles, judges of municipal courts in this century will assume an important function in making the principles of international law a reality throughout the world. We cannot leave this function to international courts and tribunals alone. To survive, humanity must globalize and diversify. But we must do so, as Grotius taught, building on the jurisprudence of the past and adapting it to the world in which we now find ourselves.

This is the thesis that I have come to propound. In many countries it is noncontentious. In some of these, this may be because their

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6. Mary Robinson, *Shaping Globalization: The Role of Human Rights*, 97 AM. SOC’Y INT’L L. PROC. 1, 1 (2003) (quoting Amartya Sen).

7. See Eric A. Posner, *All Justice, Too, Is Local*, N.Y. TIMES, Dec. 30, 2004, at A23.

8. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 584 (5th ed. 1998).

national constitutions expressly require courts, in deciding local cases, to pay regard to the provisions of international law.<sup>9</sup> In some, the change has come about because of the adoption in the last fifty years of many constitutions containing explicit provisions for the protection of human rights and fundamental freedoms.<sup>10</sup> These invite direct attention to the growing body of international jurisprudence about those rights and freedoms. In some, it has come about as a result of the adoption of regional statements of human rights and fundamental freedoms.<sup>11</sup> The persuasive (and in some cases coercive) decisions of regional courts and other bodies, deciding complaints about national departures from the fundamental principles of human rights and freedoms, has had a increasing impact on the ordinary work of judges in countries subject to such legal regimes.<sup>12</sup> In some, it has also occurred because of the "inevitable" influence in common law nations of international law, operating through analogous reasoning and the candid disclosure of intellectual influences on decision-making.<sup>13</sup> Although not incorporated in domestic law, international law may sometimes afford an individual the right to communicate complaints to international treaty bodies. This too subjects the national legal system and its rules to the critical influence of international scrutiny.<sup>14</sup>

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9. See, e.g., INDIA CONST. pt. IV, sec. 51(c); CONST. PAPUA-N.G. pt. III, div. 3, sub. C, sec. 39(3); S. AFR. CONST. 1996, ch. 3, sec. 39(1)(b).

10. See, e.g., CONSTITUCIÓN [C.E.] pt. I (Spain).

11. See, e.g., Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1998).

12. A recent example is *X(FC) v. Sec. of State*. [2005] 2 A.C. 68 (H.L.) (U.K.). The decision upheld an appeal by a group of detainees under the Antiterrorism, Crime and Security Act, 2001, c. 24 (Eng.). A declaration was made under Section 4 of the Human Rights Act, 1998, c. 42 (Eng.), that Section 23 of the Antiterrorism Act was incompatible with Articles 5 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention].

13. See generally Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998) (explaining that the Constitutional Court of South Africa has embarked on a mission to erect a new jurisprudential path, and looks in part to international law to accomplish this).

14. See *Mabo v. Queensland* (1992) 175 C.L.R. 1, 42.

All of these developments, happening in the space of a relatively short period, constitute a significant and interesting legal story. But it is not the subject of this lecture. It may be taken as a given. It represents the context in which the topic that I will tackle has to be understood.

In two countries, at least, in constitutional elaboration, there is strong resistance and vigorous controversy concerning the use that may be made of international law (and in particular the international law of human rights). Those countries are the United States of America and Australia. The world could probably survive resistance to a global trend in Australia: ascribing it to an antipodean self-satisfaction derived from general economic prosperity and geographical remoteness. However, this cannot be said of the United States and of the debates that have occurred in and outside its Supreme Court. Self-evidently, the resolution of these debates is of vital importance not just for the American legal system but also for the likely change, and pace of change, in the inter-relationship between international and municipal law everywhere.

In addressing this issue, I mean to make no impertinent comment upon domestic topics that are sensitive and that fall for resolution in a country other than my own. However, the issue at stake is an important one, occurring in intellectual discourse. As I shall show, it is a lively topic in my own Court. This is a fact that focuses my attention on the arguments and how they should be resolved. In the United States, these issues are fought out not only in the pages of the reports of courts of high authority,<sup>15</sup> but also in countless academic articles and comments in the popular media.<sup>16</sup> They have been the subject of a lively and entertaining public exchange between two Justices of the Supreme Court (Justices Scalia and Breyer) explaining to law students—and thus in simple language—the

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15. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

16. See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Sarah H. Cleveland, *Is There Room for the World in Our Courts?*, WASH. POST, Mar. 20, 2005, at B4.

competing views that they hold.<sup>17</sup> So far, in Australia, the debates have been more low-key. However (as I will show), the temperature was recently raised by the publication of a decision of the High Court of Australia containing somewhat sharp exchanges between myself and one of my colleagues (Justice McHugh).<sup>18</sup> Our words resonate with the American controversy.

The conflicting views of a few national judges about the proper approach to constitutional interpretation could usually be allowed to pass without troubling a conference dedicated to the study of international law. However, the resolution of this conflict goes to the very heart of the relationship between international and municipal law in the current age. Because it is significant for the likely future impact of international law in domestic jurisdiction in and beyond the countries of the controversy, it is timely to consider the issues and arguments and to reflect upon their probable outcome.

## II. THE BANGALORE PRINCIPLES AND THEIR APPLICATION

Although it may be heretical to say so in this city, the American Revolution of 1776 had certain disadvantages for the development of legal doctrine in the United States, including in constitutional theory. In countries of the British Empire (later the Commonwealth of Nations) that theory continued to evolve in a way that was arrested in America by the adoption of the revolutionary Constitution. The evolution in Britain and its Empire affected the respective functions of the head of state, the head of government, the parliamentary system, the cabinet and the judiciary.<sup>19</sup> For many countries of the Commonwealth, the evolution is continuing, including in the United Kingdom itself, with its belated adoption of the Human Rights Act in

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17. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005) [hereinafter Scalia & Breyer Discussion].

18. See *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562.

19. For comments critical of the evolution, see Suri Ratnapala, *Sri Lanka at the Constitutional Crossroads: Gaullist Presidentialism, Westminster Democracy or Tripartite Separation of Powers?*, 2003/2004 LAWASIA J. 33, 41.

1998 linking its law to that of the European Convention.<sup>20</sup> That Convention, in turn, parallels many of the principles of international human rights law.

The dark side of British imperial history was described by Judge Weeramantry in the first Grotius Lecture.<sup>21</sup> He did this in the course of criticizing the failure of traditional Grotian law to recognize, and give an appropriate respect for, the laws of the traditional societies conquered by the Western empires. It was an appeal to avoid similar errors today—and to overcome the “poverty of the international order”<sup>22</sup>—that was the main point of that Lecture. There have been similar reflections in several of the Grotius Lectures since.<sup>23</sup>

The sunny side of the imperial experience was, as Judge Weeramantry explained, the establishment of independent courts comprising “an excellent judicial system modeled on the British tradition.”<sup>24</sup> Until recent decades, the link to the Judicial Committee of the Privy Council helped to infuse in judges of Commonwealth countries a global outlook about the basic principles of the law, an interest in comparative law and a conviction that wisdom was not necessarily local but that sometimes help could be found in difficult problems by looking beyond one’s own borders.<sup>25</sup> The contrast with the intellectual insularity of most U.S. judges and lawyers, when compared to their counterparts in Commonwealth countries, is striking. It can be seen even in a superficial glance at the citations in the authorized reports of the final courts in the United Kingdom, Canada, Australia, South Africa, India, Singapore, New Zealand and elsewhere. They are full of references to transnational and even international law.

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20. Human Rights Act, 1998, c. 42, sched. 1; European Convention, *supra* note 12.

21. Weeramantry & Berman, *supra* note 5, at 1520, 1558.

22. *Id.* at 1564 (citing MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979)).

23. *E.g.*, Naím, *supra* note 5, at 17; Robinson, *supra* note 6, at 7.

24. Weeramantry & Berman, *supra* note 5, at 1555.

25. See Sandra Day O'Connor, *Keynote Address: Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 351 (2002).



Another feature of law in the Commonwealth is the global network of professional bodies that continue to exchange ideas and experiences through meetings organized by the Commonwealth Secretariat. One such meeting, relevant to this lecture, was convened in Bangalore, India, in February 1988. It was chaired by Justice P. N. Bhagwati, former Chief Justice of India, later chairman of the United Nations Human Rights Committee.

I attended that meeting, as did Commonwealth judges from India, Malaysia, Mauritius, Pakistan, Papua New-Guinea, Sri Lanka, the United Kingdom and Zimbabwe. Although my education in international law, at the University of Sydney under Professor Julius Stone, had been of the highest order, my views about that body of law, and its relationship with municipal law, were wholly orthodox. As I can now see, they were trapped, as is the case with so many middle aged judges and lawyers, in the ideas of their law school lecture notes, written decades earlier.

The Bangalore meeting helped to rescue my mind from the rigid dualism developed by the English common law. This was that, save for the statutory incorporation of a rule of international law into municipal law, international law was a subject between nation states. It was not, as such, part of municipal law. It could therefore usually be ignored by national courts.<sup>26</sup> This viewpoint over-simplified a complex subject.<sup>27</sup> But it was the opinion conventionally held by most common law practitioners at the time. I was one of them.

In the course of the Bangalore meeting, the scales were lifted from my eyes by the discovery of the growing role that international law was playing, and could play, in the municipal legal systems of the Commonwealth of Nations, including Australia. At the end of the meeting, the participating judges accepted the so-called *Bangalore*

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26. See, e.g., *Koowarta v. Bjelke-Petersen* (1992) 153 C.L.R. 168, 224; *Kioa v. West* (1985) 159 C.L.R. 550, 570-71, 603-04; *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 286-87, 298-99, 304-05.

27. Cf. *Playa Larga v. Congreso del Partido* [1981] 1 A.C. 244, 265 (H.L.) (U.K.); T.H. Bingham, "There is a World Elsewhere": *Changing Perspectives of English Law*, 41 INT'L COMP. L.Q. 513 (1992).

*Principles on the Domestic Application of International Human Rights Norms.*<sup>28</sup>

For what was to happen subsequently, it is relevant to this occasion that at Bangalore, almost uniquely, one non-Commonwealth judge was participating in our meeting. This was the Honorable Ruth Bader Ginsburg. Like me, she had not, at that stage, been appointed to the final court. She was a member of an intermediate appellate court. She was a practical working judge, used to discharging a heavy caseload, acting under pressure and bound in the exercise of her jurisdiction by the rulings of the apex court of the nation. Nonetheless, it is part of the genius of the common law that it addresses, and resolves, the “central problem” of modern Anglo-American constitutional theory and does so in a multitude of individual decisions.<sup>29</sup> That problem consists “in devising means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions.”<sup>30</sup>

The crucial idea of the *Bangalore Principles* was that international human rights law might sometimes provide guidance to judges in cases concerning human rights and fundamental freedoms. The *Principles* noted the “growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law—whether, constitutional, statute or common law—is uncertain or incomplete.”<sup>31</sup> They welcomed this tendency, whilst acknowledging the need to take fully into account “local laws,

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28. See Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, reprinted in *The Bangalore Principles on “The Domestic Application of International Human Rights Norms,”* 14 COMMONWEALTH L. BULL. 1196 (1988) [hereinafter *Bangalore Principles*]. The Bangalore meeting was followed by seven later meetings of Commonwealth judges. Human rights decisions of Commonwealth courts are now shared widely through the work of Interights, an international centre based in London, and the publication of the *Law Reports of the Commonwealth* series. See The International Centre for the Legal Protection of Human Rights, <http://www.interights.org> (last visited Nov. 19, 2005).

29. See Michael Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514 (1988).

30. T. R. S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111, 111 (1985).

31. *Bangalore Principles*, *supra* note 28, princ. 4.

traditions, circumstances and needs.”<sup>32</sup> They accepted that, where national law was clear and inconsistent with the international obligations of the State concerned, national courts in common law countries were obliged to give effect to their local laws, although they might call the disparity to notice. Nevertheless, the *Bangalore Principles* called for redress of the situation where “by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms” and of the jurisprudence gathering about them.<sup>33</sup>

This international declaration of judges, each one of them imbued with practical realities and alert to the limited functions of the judiciary in the common law tradition, accompanied me on my return to my then office of President of the New South Wales Court of Appeal. This was, and still is, the busiest general appellate court in Australia. Australia’s Constitution, then as now, had no general Bill of Rights entrenched in a document that otherwise copied many of the features of its American predecessor. The protection of human rights was largely left to ordinary legislation, administrative action and judicial decision.

As cases came before me in my Court, I began to see the way in which a reference to international law, specifically as that law concerned fundamental human rights, could sometimes cast light on the workaday problems that confronted me in my role as a judge. Eventually, other Australian judges shared this insight, although it must be said that most of the early cases concerned common law elaboration or statutory construction, short of the exposition of the national Constitution.

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32. *Id.* princ. 6.

33. *Id.* princ. 2-6, 9; cf. Michael Kirby, *The Impact of International Human Rights Norms—A “Law Undergoing Evolution,”* 22 COMMONWEALTH L. BULL. 1181, 1183-84, 1189-91 (1996).

### III. THE INCORPORATION CONTROVERSY IN AUSTRALIA

Soon after returning from Bangalore, cases arose for decision by me for which there was no constitutional rule. Any legislation was ambiguous and the common law was expressed in unilluminating terms. In such cases I began to reach for, and to find useful, the developments of international law concerning human rights. These were developments that had occurred in courts or other bodies concerned with a principle germane to the problem in hand. The earlier work sometimes afforded practical help in resolving the controversy before me in a normative way.

An early instance was *Gradidge v. Grace Bros. Party Ltd.*<sup>34</sup> There, the applicant before a compensation court was a deaf mute. A member of the government panel of interpreters had been provided for the hearing of her evidence. During that hearing, an argument arose between the lawyers. It concerned a point of law. The insurers' lawyer indicated that the exchange did not need to be interpreted. The applicant's legal representative raised no objection. The trial judge told the interpreter that he did not require interpretation. When the interpreter persisted in her translation, the judge directed her to desist. She refused, saying that she would continue to interpret for the applicant so long as she was in open court. The judge declined to continue the proceedings. He insisted on his control of the hearing. There was no statutory or common law *right* to interpretation. There was a discretion in the trial judge to permit it where necessary in the interests of justice.<sup>35</sup> There were strong common law principles defensive of a trial judge's control of the proceedings.

On an urgent motion for relief in the Court of Appeal, the resolution of the case took me, in default of a clear local rule, to the *International Covenant on Civil and Political Rights* ("ICCPR").<sup>36</sup> Australia had ratified that treaty and, in any case, it probably stated

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34. (1988) 93 F.L.R. 414, 415-22.

35. See *Dairy Farmers Co-operative Milk Co. v. Acquilina* (1964) 109 C.L.R. 458, 464.

36. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

customary international law in this respect. I held that, in developing the Australian common law in a novel case, it was desirable that such law should, so far as possible, be in harmony with the ICCPR provisions, including Article 14<sup>37</sup> and the jurisprudence gathered around it.<sup>38</sup> The two other judges sitting with me agreed. One of them pointed to the fact that, although not expressly incorporated into Australian law, the ICCPR was scheduled to a federal statute defining the powers and duties of the national Human Rights and Equal Opportunity Commission.<sup>39</sup>

Thereafter, in later cases, where I reached a point of decision upon which any local statute or subordinate statutory rule were ambiguous or the common law was obscure and unilluminating, I reached for the statement of basic principles about universal human rights and fundamental freedoms expressed in the ICCPR and like instruments.<sup>40</sup> And as a busy working judge, I quite often found these sources to be extremely helpful. After all, until shortly before that time, Australian courts, bound by the Privy Council, were not unused to looking to the elucidations of general legal principle by the judges of England upon matters such as procedural fairness, natural justice and the protection of basic common law rights. Now, in a new era, a fresh and different source of exposition of fundamentals and stimulus to consistency was available. Unsurprisingly, that source commonly proved quite helpful.<sup>41</sup> Occasionally, other judges would content themselves with references to the old Australian, English and other cases as a more traditional source of legal authority. For me, the particular advantage of the international jurisprudence was often, as I

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37. Article 14.1 provides that "all persons shall be equal before the courts and tribunals." *Id.* art. 14.1. It also provides for a "fair and public hearing" and requires that the decision-makers be "competent, independent and impartial." *Id.* Article 14.3, whilst specifically related to criminal process, includes a specific requirement that the party be "informed promptly and in detail in a language which he understands" the nature and cause of the matter. *Id.* art. 14.3(a).

38. See, e.g., *Jago v. Dist. Court of New S. Wales* (1988) 12 N.S.W.L.R. 558 (applying an earlier consideration of the *Bangalore Principles*).

39. *Gradidge*, 93 F.L.R. at 425-26.

40. E.g., *Young v. Registrar, Court of Appeal*, (1993) 71 A. Crim. R. 121.

41. See Michael Kirby, *The Australian Use of International Human Rights Norms: From Bangalore to Balliol—A View from the Antipodes*, 16 U. N.S.W. L.J. 363, 377-83 (1993).

discovered, that it addressed more precisely the exact issue before my Court. That issue was of a kind that was occurring in many contemporary societies. It involved conflicts between competing fundamental principles upon which international legal developments were often very useful.

Whereas, at first, my approach seemed quite heretical to many Australian lawyers, the tide turned in 1992 when the High Court of Australia decided *Mabo v. Queensland*.<sup>42</sup> That case related to the question whether the common law of Australia gave any recognition to the title to land of indigenous people, derived from a time prior to the British acquisition of Australia. The conventional view to that time, supported by nineteenth century court decisions, was that it did not. The key that unlocked the door that permitted the Court to overcome these decisions was a recognition that they were fundamentally incompatible with universal principles, accepted by international law, denying prejudicial deprivation of basic rights on the grounds of race or ethnic origin.

Between Bangalore and *Mabo*, Australia had acceded to the First Optional Protocol to the ICCPR.<sup>43</sup> That instrument gives individuals the right to communicate with the United Nations Human Rights Committee about alleged non-conformity between Australia's domestic law and the principles accepted in the ICCPR. It was this legal development that caused Justice F. G. Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in the leading opinion in *Mabo*, to say of the ICCPR so enhanced:

[It] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on

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42. (1992) 175 C.L.R. 1, 1. The significance was noted at the time. See P.W. Wong, *Current Topics*, 66 AUSTL. L.J. 551, 551-52 (1992).

43. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, at 59, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

unjust discrimination in the enjoyment of civil and political rights demands reconsideration.<sup>44</sup>

This was a crucial legal development in harmony with the essential idea of the *Bangalore Principles*. Adaptation of the common law in Australia, by having regard to principles of international law, is now generally uncontroversial.<sup>45</sup> So, at least in many cases, is the interpretation of legislation which is ambiguous and which, interpreted one way, will conform to international law and avoid needless disharmony.<sup>46</sup> Of course, there remain controversies about the extent to which this interpretative technique will be used where the statute in question was enacted before the adoption and general acceptance of the norm of international law.<sup>47</sup> It is unnecessary to explore that matter of detail. The international law of human rights is undoubtedly seeping into Australian judicial elaborations of statute and common law. Indeed, this is something that is now happening in courts throughout the Commonwealth of Nations.

I now reach the question whether, in some way, constitutional law is disjoined for this purpose; from this evolution of the common law and statute law. The *Bangalore Principles* asserted that every part of law, including constitutional law, is open to the propounded use of international law in shaping basic legal principles. After my appointment to Australia's highest court in 1996, this question was soon posed for me.

In 1997, in a closely divided decision, a question arose concerning the resolution of an ambiguity in the Australian Constitution about whether one of the few express rights, dealing with the necessity to

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44. *Mabo*, 175 C.L.R. at 42.

45. See, e.g., *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 360-61, 372-73 (reasoning that where the common law is ambiguous the court may use international law for guidance).

46. See *Commissioner of Stamps (SA) v. Telegraph Inv. Co. Pty.* (1995) 184 C.L.R. 453, 479; *Plaintiff S157/2002 v. Commonwealth of Australia* (2003) 211 C.L.R. 476, ¶ 29; *Coleman v. Power* (2004) 220 C.L.R. 1, ¶¶ 17-19, 240-49.

47. Cf. *Morris v. KLM Royal Dutch Airlines*, [2002] 2 A.C. 628, 657, 678-79 (H.L.) (struggling with the question of whether to interpret documents according to their founding intent or according to present circumstances and norms).

pay just terms for federal acquisitions of property,<sup>48</sup> extended to public acquisitions by the government of a federal territory. The Australian Constitution could be read either way. There were conflicting holdings over the century of its existence. In expounding the way that I came to my conclusion as part of the majority in the Court, favorable to the right to just terms, I invoked the *Bangalore Principles* in the resolution of the constitutional ambiguity.<sup>49</sup>

I later repeated the same approach in resolving what seemed to me to be an ambiguity in the “races” power in the Australian Constitution.<sup>50</sup> Doing so avoided an interpretation of the Constitution which, if adopted, would permit the enactment by the Australian Parliament of laws not for the *benefit* and *protection* of persons of particular “races” but also laws to the *disadvantage* of those of a particular race. The Nuremburg laws of Nazi Germany and the apartheid laws of unreformed South Africa stood as a warning against such an interpretation. I said:

Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that would involve a departure from such rights. . . . There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it. . . . Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity. . . . Likewise, the Australian 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

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48. AUSTL. CONST. c. 1, pt. V, sec. 51(xxxi).

49. *Newcrest Mining (WA) Ltd. v. Commonwealth of Australia* (1997) 190 C.L.R. 513, 657-58, 661.

50. *See* AUSTL. CONST. c. 1, pt. V, sec. 51(xxvi) (allowing Parliament to make laws with respect to “the people of any race for whom it is deemed necessary to make special laws”).



law of the Australian nation which is a member of that community.<sup>51</sup>

None of the six current members of the High Court of Australia has so far accepted this principle of constitutional interpretation. Observations exist in cases before the Second War that reject the notion that the national Constitution contains an implication that it should be construed to conform with the rules of international law.<sup>52</sup> Antipathetic views have been stated in more recent times,<sup>53</sup> including (as I shall show) in response to my own remarks in recent cases.<sup>54</sup>

In many decisions over the past decade, I have referred to the relevant principles of the international law of human rights in expounding the meaning and operation of the Australian Constitution.<sup>55</sup> In most such cases the other members of my Court have not found such considerations to be of assistance. For the most part, they have ignored them. Sometimes, as in a recent case involving the long-term detention of alien children in secure facilities in remote areas of Australia, I have concluded that the challenged conduct may be inconsistent with binding obligations of international law but that there was nothing that the Court can do about it. This was because an express head of constitutional power was unambiguous and the legislation was within that power, without uncertainty, and hence valid.<sup>56</sup> On such matters, my Court has been unanimous.

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51. *Kartinyeri v. Commonwealth of Australia* (1998) 195 C.L.R. 337, ¶ 166.

52. *See, e.g., Polites v. Commonwealth of Australia* (1945) 70 C.L.R. 60, 69, 74-75, 79, 82-83.

53. *See, e.g., Horta v. Commonwealth of Australia* (1994) 181 C.L.R. 183, 195.

54. *See Kartinyeri*, 195 C.L.R. ¶ 101 ("The Bridge Act is to be interpreted and applied in conformity and not in conflict with any relevant established rules of international law only in so far as its language permits.").

55. *See, e.g., Austin v. Commonwealth of Australia* (2003) 215 C.L.R. 185, ¶¶ 253-57.

56. *See Minister for Immigration & Multicultural & Indigenous Affairs v. B* (2004) 219 C.L.R. 365, ¶¶ 169-71; *Re Woolley, Ex parte Applicants M276/2003* (2004) 79 A.L.J.R. 43, ¶¶ 173-75.

The *Bangalore Principles* themselves confirm the duty of the municipal judge to give effect to domestic law in such a case.<sup>57</sup> In this respect, they adopt a principle different from the rule of international law that holds that a “state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of the obligations under international law.”<sup>58</sup> The authority of a municipal judge derives from the national Constitution. He or she must therefore uphold its rules, although it is always permissible to call attention (as I have done) to any discordancy between the two legal systems. If the judge cannot, in conscience, act in this way, the only proper course is resignation. It is not disobedience to, or manipulation of, a constitutionally valid law, challenged within its own system.<sup>59</sup>

The non-dialogue between judges of different persuasions on this subject might have continued in Australia but for developments in the U.S. discourse on the same topic. According to a commentator, the *Bangalore Principles* are “immensely popular in the law schools, and with many barristers . . . . Nothing is more predictable than that

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57. *Bangalore Principles*, *supra* note 28, princ. 8; see Kirby, *supra* note 29, at 532.

58. Free Zones, 1932 P.C.I.J. (ser. A/B) No. 46, at 167; see also Treatment of Polish Nationals in Danzig, 1932 P.C.I.J. (ser. A/B) No. 44, at 24; Anglo-Norwegian Fisheries, 1951 I.C.J. 116, 181; cf. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 584 (6th ed. 2003); Gerald Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 1, 68 (1957 II).

59. Cf. Norman L. Greene et al., *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1121, 1141-44 (1995) (explaining that in Nazi Germany the judiciary practiced positivism, which allowed them to ignore fundamental rights violations in Germany's laws); Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199, 233 (1997) (“The vast amount of jurists thus unceremoniously ceded their independence and lent their prestige, power, and reputation to the Hitlerian regime.”); Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 169-71 (2002) (claiming that judges in Nazi Germany dealt with ambiguity in the law not by looking to relevant international law, but by equating Jews with the dead in violation of fundamental rights). I am indebted to Justice B. M. Selway of the Federal Court of Australia for his unpublished 2005 paper, *The Role of Judges in Protecting Human Rights*, where there is discussion of this topic.

[they] will have many future outings.”<sup>60</sup> However, getting them adopted by the current generation of judges is another matter.

In *Al-Kateb v. Godwin*,<sup>61</sup> late in 2004, one of my colleagues, Justice McHugh, responded to this question. In language reminiscent of that voiced by Justice Scalia for the dissenters in the U.S. Supreme Court in *Atkins v. Virginia*,<sup>62</sup> *Lawrence v. Texas*<sup>63</sup> and most recently in *Roper v. Simmons*,<sup>64</sup> Justice McHugh entered the debate. He rejected the suggestion that the Constitution could be read by reference to the provisions of international law adopted after the Australian Constitution came into force in 1900.<sup>65</sup> He declared that this was heresy so far as past Australian authority was concerned.<sup>66</sup> He expressed concern at the possibility of the huge body of treaty and other law being used to introduce “general principles of law recognised by civilised nations” into Australian constitutional elaboration.<sup>67</sup> He acknowledged that the Constitution could sometimes have meanings different from those accepted in earlier times.<sup>68</sup> However, it was one thing to take into account “political, social and economic developments” in the intervening period and quite another to accept the authority of “rules” of international law.<sup>69</sup> He said that it was arguable that the Australian Constitution *should* contain a Bill of Rights; but stated that it was not the function of judges to adopt a “loose leaf” approach to the Constitution, inserting

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60. Greg Craven, *Judicial Activism: The Beginning of the End of the Beginning*, in 16 UPHOLDING THE AUSTRALIAN CONSTITUTION 72, 78 (Samuel Griffith Society, 2004), available at <http://www.samuelgriffith.org.au/papers/pdf/vol16.pdf>.

61. (2004) 219 C.L.R. 562.

62. 536 U.S. 304, 347-48 (2002).

63. 539 U.S. 558, 586 (2003).

64. 125 S. Ct. 1183, 1226 (2005).

65. *Al-Kateb*, 219 C.L.R. ¶ 62.

66. *Id.* ¶ 63.

67. *Id.* ¶¶ 64-65.

68. *Id.* ¶ 69.

69. *Id.* ¶ 71 (emphasis added).

basic rights in the text without the authority of the people expressed in a formal constitutional change at referendum.<sup>70</sup>

The case of *Al-Kateb* concerned the power of the Australian Parliament, and Executive, to detain indefinitely a stateless person who, as an alien, had entered the country unlawfully. The issue was whether the federal Migration Act 1988 should be read down to avoid such a consequence or whether the Constitution itself reserved prolonged detention to the cases of those whose imprisonment was ordered by a court, in application of the law. My Court divided on the outcome. The lawfulness of the detention was upheld by the narrowest margin.<sup>71</sup> In my reasons, I sought to respond to Justice McHugh's criticisms. In doing so, I invoked the way in which successive majorities in the Supreme Court of the United States, in recent times, have used the universal principles of human rights and fundamental freedoms to confirm the judges' understandings of the meaning of the U.S. Constitution. They have done so, as we know, using the light thrown by what Justice Kennedy, for the Court, in *Lawrence* has described as "a wider civilization."<sup>72</sup> In *Al-Kateb*, I said:

[T]he willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years. There are many illustrations in the decisions of the courts of, for example, Canada, Germany, India, New Zealand, the United Kingdom and the United States.<sup>73</sup>

With reference to the dissents of Justices McLean and Curtis in *Dred Scott v. Sandford*, both of whom had strongly invoked

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70. *Id.* ¶ 73. Section 128 of the Australian Constitution provides for formal amendments. It mandates passage of the proposal through the Federal Parliament and an affirmative vote nationally and in a majority of the States.

71. Acting in the majority were Justices McHugh, Hayne, Callinan and Heydon, with Chief Justice Gleeson, Justice Gummoo and myself dissenting.

72. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

73. *Al-Kateb*, 219 C.L.R. ¶ 185 (footnotes omitted) (citing Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999), for the proposition that this paradigm shift has begun to occur in the United States).

international law to support the conclusion that the appellant was not a slave but a free man,<sup>74</sup> I observed: "[t]he fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a 'wider civilisation.'"<sup>75</sup>

What is being attempted by this form of reasoning is not an amendment of the Constitution but an elaboration and enforcement of it, properly understood in the context of the world of today in which any national constitutional text must now operate: "[w]e should not declare interpretations impermissible just because we do not agree with them."<sup>76</sup>

Those who tire of the vigorous debates in the United States over this subject—including in the recent exchanges in *Roper*—or have read it all before and want still more to stimulate their conflicting opinions, are invited to plunge into the Australian discourse. The issues are much the same. They are equally important for the future of the law. The only difference is that in the U.S. Supreme Court the majority presently favors the general approach of the *Bangalore Principles*. Enlightenment in Australia has been slower in coming.

#### IV. THE ARGUMENT AGAINST INTERPRETIVE INCORPORATION

Any large development in legal thinking and judicial technique will be controversial in some circles. Lawyers tend to be cautious people. They are often resistant to new ideas. Moreover, at least to varying extents, the jurisdiction-bound way of thinking has tended, in the past, to make most lawyers satisfied with the law as found within their own system, if not sometimes positively xenophobic.

In the days of the British Empire, it was not at all unusual for British subjects, including those appointed to judicial office, to view

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74. *Dred Scott v. Sandford*, 60 U.S. 393, 534, 556-57 (1856) (McLean, J., dissenting) (relying on examples from European countries, where no man remained a slave when taken across borders, with particular reference to the French, who set all men free when they relinquished Louisiana); *id.* at 594-97, 601 (Curtis, J., dissenting) (stating that nations should take into account the effect of international law and foreign law on the status of a slave taken across borders unless domestic law provides otherwise).

75. *Al-Kateb*, 219 C.L.R. ¶ 190.

76. *Id.* ¶ 191.

foreign systems of law (including, dare I say it, that of the United States) as necessarily inferior to the common law of England, at the time applicable throughout its imperial domain.<sup>77</sup> In practice, there might be grave inequalities, such as Judge Weeramantry witnessed.<sup>78</sup> But in theory, there was a strong sense of superiority, self-satisfaction and sharing within this imperial hegemony. Whilst in Commonwealth countries where “[p]rovincialism in the development of the common law is no longer an option,”<sup>79</sup> these views now seem outdated, and even embarrassing; ever so often, one detects in contemporary rhetoric about international human rights law, written by foreigners, remnants of the same imperial attitude of superiority. As a child of the last decades of the British Empire, I am alert to these signals. I recognize them instantly when I see them.<sup>80</sup>

Setting aside such considerations, and the view that would confine all constitutional elaboration to the original intentions of the Founders (an American theory regarded in most countries as a form of ancestor worship),<sup>81</sup> there remain serious arguments that need to be considered in pursuing the course of having regard to international law, and other foreign sources of ideas, when elaborating the meaning of a national constitution, particularly as they concern human rights.

First, there is the view espoused by opponents of the idea in the United States, that of its nature, a national constitution is a unique document, designed specifically for the governance of the people of the nation to which it applies and only them. Thus, Judge Posner has argued that “the judicial systems of the rest of the world are

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77. See, e.g., *Riley v. Attorney-Gen. of Jamaica* [1983] 1 A.C. 719, 729 (P.C.).

78. See Weeramantry & Berman, *supra* note 5, at 1520.

79. MURRAY GLEESON, THE CENTENARY OF THE HIGH COURT: LESSONS FROM HISTORY 18 (13th Australian Institute of Judicial Administration Oration, 2003).

80. See JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 48-68 (1992).

81. See, e.g., Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 2 (2000) (quoting Canadian Supreme Court Justice Binnie’s description of U.S. Supreme Court constitutional interpretive philosophy).

immensely varied.”<sup>82</sup> They give rise to foreign judicial decisions that “emerge from a complex socio-historico-politico-institutional background of which our judges . . . are almost entirely ignorant.”<sup>83</sup> This view has led such writers as Michael Wells to argue that “it is better for courts . . . to focus on resolving conflicts by paying close attention to the history and culture of the society in which they act, rather than to try to identify and apply trans-cultural principles of morality.”<sup>84</sup>

Taken at face value, there is force in these arguments. If constitutional provisions are different and if societies are distinguishable, the utility of international law sources will frequently be confined. But this does not mean that they need be ignored.<sup>85</sup> The United States, Australia and other countries share the common law “heritage, tradition and history with many foreign constitutional systems.”<sup>86</sup> Furthermore, the U.S. Constitution, including the Bill of Rights, has itself greatly influenced foreign constitutional texts.<sup>87</sup> Courts around the world use American judicial elaborations all the time.<sup>88</sup> In the current era of globalism, why should the process not be reciprocal?<sup>89</sup>

Secondly, concern is sometimes expressed that international law is used selectively, merely to support the subjective opinions of the judges invoking it. Thus, Justice Scalia takes his colleagues to task for failing to utter “a whisper about foreign law in the series of

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82. Richard Posner, *Could I Interest You in Some Foreign Law? No, Thanks We Already Have Our Own Laws*, LEGAL AFF., July-Aug. 2004, at 40, 41.

83. *Id.* at 42.

84. Michael Wells, *International Norms in Constitutional Law*, 32 GA. J. INT'L & COMP. L. 429, 436 (2004).

85. See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 87 (2004).

86. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47 (2004).

87. See, e.g., James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 J. MARSHALL L. REV. 627, 666 (1997).

88. See Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis*, 58 N.Y.U. ANN. SURV. AM. L. 67, 70-71 (2001).

89. See Wells, *supra* note 84, at 429-30.

abortion cases.”<sup>90</sup> He suggests that reference to foreign judges and their opinions “looks lawyerly” but “lends itself to manipulation.”<sup>91</sup> Judge Posner argues that the free citation of such law “would mean that any judge wanting a supporting citation has only to troll deeply enough in the world’s corpus juris to find it.”<sup>92</sup> He declares that it is a form of “judicial fig-leafing.”<sup>93</sup>

This criticism is rightly targeted at any unbalanced use of international law. However, the answer to this argument is that a proper use of this source can sometimes actually help to reduce subjectivity. In his recent public conversation, Justice Breyer answered this concern: “Of course, I hope that I, or any other judge, would refer to materials that support positions that the judge disfavors as well as those that he favors.”<sup>94</sup>

To similar effect, Dean Harold Koh of the Yale Law School points out that the use of international law and foreign constitutional law does not involve a global “nose count.” Still less does it involve direct application of foreign rules, as such, or deference to foreign and international judges. What is at stake is a wider pool of source material, where the new sources are directly relevant and may be helpful.<sup>95</sup>

Thirdly, opponents have suggested that reference to international law may involve, or lead to, a loss of national sovereignty.<sup>96</sup> Thus, Justice Scalia has denied emphatically that “we want to be governed by the views of foreigners.”<sup>97</sup> In some of his judicial opinions he is

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90. Scalia & Breyer Discussion, *supra* note 17, at 521. Justice Scalia addresses this point elsewhere. See *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting); *Roper v. Simmons*, 125 S. Ct. 1183, 1227-29 (2005) (Scalia, J., dissenting).

91. Scalia & Breyer Discussion, *supra* note 17, at 531.

92. Posner, *supra* note 82, at 41-42.

93. *Id.* at 42; see also Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 67 (2004).

94. Scalia & Breyer Discussion, *supra* note 17, at 523.

95. See Koh, *supra* note 86, at 56.

96. See, e.g., Madelaine Chiam, *Evaluating Australia’s Treaty-Making Process*, 15 PUB. L. REV. 265 (2004).

97. Scalia & Breyer Discussion, *supra* note 17, at 522.



dismissive of the writings on common constitutional questions of other courts and scholars ("thankfully" different).<sup>98</sup>

There are many answers to this attitude. I will confine myself to four. If one accepts a precondition of constitutional ambiguity, the invocation of international law is self-limiting.<sup>99</sup> In any case, as technology and the economy are internationalized, it is both inevitable and desirable that the same development should happen in the law.<sup>100</sup> By the act of municipal judges utilizing and explaining applicable principles of international and comparative law, the process derives its municipal legitimacy.<sup>101</sup> Moreover, it involves participation within one's own constitutional discourse in an interactive dialogue now occurring between the constitutional courts of many countries.<sup>102</sup> It is from such a dialogue that a transnational law is emerging, especially on common issues about human rights. Over time, such a law may help to merge the national and the international, in some areas at least.<sup>103</sup>

Fourthly, opponents point to the fact that the making of international law is substantially in the hands of the executive government, which ordinarily initiates involvement in the process of treaty negotiation and commences or controls the procedures of ratification. It was this concern that led Justice Iacobucci in the Supreme Court of Canada to express reservations about incorporating international law by the "back door" without parliamentary endorsement.<sup>104</sup> Similar views have been expressed in Australia, defensive of the legislature's veto over incorporation into

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98. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002).

99. See Amelia Simpson & George Williams, *International Law and Constitutional Interpretation*, 11 PUB. L. REV. 205, 225 (2000).

100. See *id.*

101. See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 505-06 (2000).

102. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 27 (1995).

103. See Koh, *supra* note 86, at 53.

104. Cf. *Capital Cities Commc'ns, Inc. v. Canada Radio-Television & Telecomms. Comm'n*, [1978] S.C.R. 141, ¶¶ 52-61.

municipal law of treaty provisions ratified by the executive.<sup>105</sup> Particularly in countries which, unlike the United States, have no constitutional provision for a legislative veto over treaties, this can be a very practical consideration.<sup>106</sup>

In part, the answer to this concern is the improvement in national procedures for the ratification of treaties. In any case, courts are aware that it is not their role to incorporate an entire treaty, or body of international law, into municipal law, still less into constitutional interpretation “by the back door.”<sup>107</sup> However, to deny courts any role in having regard to evolving treaty standards represents a negation of the legitimate, but limited, lawmaking role of the courts, certainly in common law countries; the accepted utilization of these sources in developing the common law; and the assumption that the nation means what it says when it ratifies a treaty. If it does not, a judicial practice of taking the country’s practice at its word may have the beneficial effect of putting a brake on ill-considered ratifications.

Fifthly, it is argued by critics that international law is usually ambiguous and therefore unhelpful.<sup>108</sup> Whilst this is sometimes true, in many cases the applicable principles of international law are detailed, clear and well reasoned. This is particularly so in many areas the subject of decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. The “judicial dialogue” that is already occurring between such courts and national constitutional courts is one from which the hold-outs should not cut themselves off.

Sixthly, it is certainly the case that interpreting a constitution in the light of the developing principles of international law may sometimes involve conflict with other interpretative principles.<sup>109</sup> Yet

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105. See, e.g., Ryszard Piotrowicz, *Unincorporated Treaties in Australian Law*, PUB. L., Summer 1996, at 190, 195; Gareth Evans, *The Impact of Internationalisation on Australian Law: A Commentary*, in COURTS OF FINAL JURISDICTION 236, 240 (Cheryl Saunders ed., 1996); Minister of State for Immigration & Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273, 313 (McHugh, J., dissenting).

106. See Chiam, *supra* note 96, at 265.

107. See Teoh, 183 C.L.R. at 288.

108. Simpson & Williams, *supra* note 99, at 218.

109. *Id.* at 222.

all interpretative principles are simply guides to the decision-maker. They are not, as such, binding rules that solve every problem. Most, if not all, interpretative principles have a counterpart, in recognition of the elements of evaluation and judgment that are inescapable in the interpretation of contested language. Thus, an approach of deference to originalism conflicts with the perception of a constitution as a "living tree," whose meaning necessarily varies from age to age. Conflicts of principles in this area are normal. The function of courts is to choose or to bring all of the relevant principles into reconciliation in a judgment.

Seventhly, a more weighty criticism concerns the so-called "democratic deficit." In part, this involves acknowledgment of the typical lack of legislative participation in the treaty-making process in most countries.<sup>110</sup> But in part, this objection rests on a broader footing. Judge Posner complains that "the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here [in the United States]."<sup>111</sup> Similarly, Michael Wells points out that "international courts, committees and other groups are not at all accountable to the American electorate for the norms they generate."<sup>112</sup> Jed Rubenfeld describes international law as "antidemocratic" and its organs as "famous for their . . . opacity, remoteness from popular or representative politics, elitism and unaccountability."<sup>113</sup>

Whilst few, if any, countries have gone to the lengths of Jacksonian democracy evident in the election and recall of many judges in the United States (commonly viewed as extreme elsewhere), the force of this consideration in America, at least as a matter of rhetoric, cannot be denied. Constitutions are typically difficult to amend. Giving any constitutional status to the rules of international law may remove the product from legislative

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110. Michael Kirby, *The Role of International Standards in Australian Courts*, in *TREATY-MAKING AND AUSTRALIA* 81, 87 (Philip Alston & Madelaine Chiam eds., 1995).

111. Posner, *supra* note 82, at 42.

112. Wells, *supra* note 84, at 433.

113. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2017-18 (2004); see Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT'L L. 751, 775 (2004).

lawmaking and thus from democratic influence.<sup>114</sup> This is a serious objection. It is necessary to respond to it.

There are many answers to these anxieties. The function of a judiciary is inescapably elitist, at least to some extent. Like it or not, judges' values are shaped and influenced by a huge range of information, bombarding them from many sources. Thus, Justice Breyer, not wholly in jest, gave this answer during his recent conversation: "It is common for an opinion to refer to material that . . . has no 'democratic provenance.' Blackstone had no democratic provenance. Law professors have no democratic provenance. Yet I read and refer to treatises and I read and refer to law review articles."<sup>115</sup>

More fundamentally, Dean Koh denies the role of judges as imputed oracles for the majoritarian will: "[T]heir long-settled role (which, of course, gives rise to domestic counter-majoritarian difficulty) has been to apply enduring principles of law to evolving circumstances without regard to the will of shifting democratic majorities."<sup>116</sup>

Citing Justice Breyer, Dean Koh describes the messy way in which, in a representative democracy, law is typically made. It is a "dialogic process" and the judicial decision-making part of it is informed and improved by contributions and debates from many sources.<sup>117</sup> It is not, as such, democratic although the independent judiciary is an essential, often counter-majoritarian, element in a modern democratic state whose members are usually selected by elected politicians. The transnational legal dialogue that links rules of democratic national and international law is simply the latest element in this process of reconciling popular will and enduring values. It is stimulated and carried further by new information technology.

It is inevitable that contemporary and future judges will be more aware of developments of international law and of international and foreign courts and other bodies of high authority explaining and applying that law. If this is so, the real issue is not whether such

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114. See Wells, *supra* note 84, at 432.

115. Scalia & Breyer Discussion, *supra* note 17, at 541.

116. Koh, *supra* note 86, at 55.

117. *Id.* at 56.

sources will inform municipal judges in their decision-making. Of course, they will. It is whether such judges should disclose—and be ready to debate—this operation on their thinking or keep it secret. In the conversation between the Justices, Justice Scalia gave the game away when he said that, so far as he was concerned, it was all right for Justice Breyer to inform himself on international legal developments; but he should just keep it out of his opinions.<sup>118</sup> For many judges, such a course is both inconsistent with the commitment to intellectual honesty and to transparent processes for argument, reasoning and decision-making.

Eighthly, some critics deny that human rights are universal or founded on a higher principle, such as human dignity or natural law. They see this as a discredited theory, incompatible with national sovereignty. They view it as an impermissible check on democratic accountability.<sup>119</sup>

It is true that there are many debates about the ultimate foundations of the moral values expressed in international law. It is ironic that this objection should be expressed in the United States, given the developed jurisprudence of this country and the profound impact that it had on the role of the United Nations in declaring human rights and fundamental freedoms. From Mrs. Roosevelt's *Universal Declaration on Human Rights* to the present day, American law and values have been profoundly influential in these developments.

Nevertheless, there are other responses to this complaint. It always remains for the municipal judge to evaluate the utility that will be derived from the jurisprudence of international courts and treaty bodies. Even if the character of human rights as “natural” or “innate” is disputable, the international law of human rights is already having a large impact on the values and ideals of judges, lawyers and other citizens in many countries. As Justice Breyer has said:

[There is a] “globalization” of human rights, a phrase that refers to the ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as

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118. Scalia & Breyer Discussion, *supra* note 17, at 534.

119. See Wells, *supra* note 84, at 433-34.

national constitutions and international treaties, and the related decisions to enlist independent judiciaries as instruments to help make that protection effective in practice.<sup>120</sup>

Given especially the contributions of the United States and Australia to these global developments, it is somewhat surprising to read a judicial view urging judges to apply “blinkers” to the outcomes of legal doctrine, reject them as irrelevant to our own national tasks of analysis and problem solving, and above all to keep these influences to ourselves.

Ninthly, critics point to the lack of knowledge of international law amongst the personnel of domestic courts and thus to the risk of mistakes and misunderstandings, or selective and incomplete presentations of the “true state of international and foreign affairs.”<sup>121</sup> An institutional incapacity to engage in scrutiny of such materials does indeed present risks. However, an increasing number of judges are embarking on the task. Given the extensive use of international and transnational law in most courts of the world, it could not be maintained persuasively that judges are unable to learn how to find applicable sources of international law on a given matter where those sources are deemed relevant and helpful. Succinct texts are available to help in this task so far as the international law of human rights is concerned.<sup>122</sup>

Tenthly, there is a counterpoint argument that needs to be noticed. Some commentators, generally sympathetic to the use of sources founded in international human rights law, have expressed concern at the risks of arming an increasingly conservative judiciary with broadly stated principles of international human rights law with which they may inflict on the Constitution wounds that may be

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120. Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003).

121. Alford, *supra* note 93, at 64.

122. See, e.g., HUMAN RIGHTS LAW AND PRACTICE (Lord Lester & David Pannick eds., 2d ed. 2004); SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY (2d ed. 2004); H. STEINER & P. ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (2d ed. 2000).

difficult to repair.<sup>123</sup> Whilst this argument introduces an element of *Realpolitik* into the debate, it founders on its assumption of judicial dishonesty. Judges, if they like, can use *any* source materials dishonestly. We assume that they will not do so. The overwhelming force of the judicial and other discourse in the elaboration of the international law of human rights has been one sensitive to minorities and protective of the basic rights and fundamental freedoms of the individual. The discourse has often been helpful in its elaboration of the freedoms that human beings hold in common, simply because they are human. The contemporary body of international human rights law has grown out of Anglo-American jurisprudence, which dominated the United Nations in the years in which the basic instruments were drafted and adopted. It is there to be used. Courts in many lands are now using it. They are doing so in reasoning in constitutional cases. The resulting question is whether some courts should continue to hold out and to treat such materials as irrelevant *per se*.

## V. ARGUMENTS FOR THE INTERPRETIVE PRINCIPLE

So far, I have responded to the critics. Now let me say, in conclusion, some affirmative things. There are strong reasons why courts, interpreting municipal constitutions, should inform themselves of the content of any relevant international law, and especially as that law relates to human rights and fundamental freedoms. It does not usually bind them, as such.<sup>124</sup> But it often “provides respected and significant confirmation” for our conclusions.<sup>125</sup>

First, it has now been accepted by courts in many countries that, where their constitutional text itself refers to fundamental rights and freedoms, it is proper, and useful, to have access to expert

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123. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 164 (2003).

124. I leave aside serious crimes of universal jurisdiction. See Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points,”* in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 240, 259 (Stephen Macedo ed., 2004).

125. *Roper v. Simmons*, 125 S. Ct. 1183, 1186 (2005).

elaborations of the same, or like, provisions in other national constitutions and in international courts and tribunals. That great judge, Chief Justice Dickson, in the Supreme Court of Canada, in the early years of the *Canadian Charter of Rights and Freedoms*, said that such access would provide “relevant and persuasive sources for interpretation.”<sup>126</sup> So it has been ever since.<sup>127</sup>

An identical approach has been taken to the elucidation of human rights provisions in the national constitutions (or equivalent documents) by the Judicial Committee of the Privy Council, for example, in respect of Trinidad and Tobago<sup>128</sup> and by the final appellate courts of Germany,<sup>129</sup> India,<sup>130</sup> Papua-New Guinea,<sup>131</sup> Hong Kong,<sup>132</sup> Namibia,<sup>133</sup> Zimbabwe<sup>134</sup> and doubtless many other countries.

In constitutional interpretation, especially, the courts of most countries have accepted, in the words of Justice Aharon Barak, President of the Supreme Court of Israel, that “the constitution is intended to solve the problems of the contemporary person, to

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126. *Alberta Union of Provincial Employees v. Attorney Gen. of Alberta*, [1987] S.C.R. 313, 348.

127. See Knop, *supra* note 101, at 518 (quoting Antonio Lamar, Address at the International Conference on Enforcing International Human Rights Law: The Treaty System in the 21st Century 7 (June 22, 1997)) (“[T]he Charter can be understood to give effect to Canada’s international legal obligations, and should therefore be interpreted in a way that conforms to those obligations.”); Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 24-25 (1998).

128. See *Matthew v. State of Trinidad & Tabago*, [2004] 3 W.L.R. 812, 819.

129. See *Presumption of Innocence and the European Convention on Human Rights* (1987) B ver f Ge 74, 358, 638, translated in 1/II DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (1992).

130. See *Vishaka v. State of Rajatan*, A.I.R. 1997 S.C. 3011, 3015. See generally GURU PRASANNA SINGH, *PRINCIPLES OF STATUTORY INTERPRETATION* 524 (9th ed. 2004).

131. See *Haiveta, Leader of Opposition v. Wingti, Prime Minister*, [1994] P.N.G.L.R. 197.

132. See *Shum Kwok Sher v. HKSAR*, [2002] 2 H.K.L.R.D. 793, 810.

133. See *Ex parte Attorney-General (Namibia): In re Corporal Punishment*, 1991 (3) S.A. 76, 86.

134. See *Catholic Comm’n for Justice & Peace in Zimbabwe v. Attorney-Gen., Zimbabwe*, 1993 (4) S.A. 239, 247-48.



protect his or her freedom.”<sup>135</sup> To ignore international developments because the constitutional Founders of one’s own country did not know of them, or contemplate their precise form, would be to deny to a national constitution important contemporary sources for the constitution’s practical and moral force.<sup>136</sup>

Final courts, like the other branches of government of the nation state today, operate in a world of close inter-relationships. As Dean Koh has put it, “consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but would also diminish that nation’s ability to invoke those international rules that served its own national purposes.”<sup>137</sup>

In constitutional elaboration, international law, like the law of foreign states, does not control the decisions of municipal judges. It is left to them to decide whether they can derive assistance from its exposition and reasoning. Many fine judges in many countries have found such assistance useful. Thus, Chief Justice Dickson in Canada declared that “international law provides a fertile source of insight.”<sup>138</sup> Chief Justice Chaskalson in South Africa has said that “international and foreign authorities are of value because they analyse arguments . . . and show how courts of other jurisdictions have dealt with this vexed issue.”<sup>139</sup> To like effect, President Barak has written how “comparing oneself to others allows for greater self-knowledge. . . . Examining a foreign solution may help a judge choose the best local solution. . . . The benefit of comparative law is in expanding judicial thinking about the possible arguments, legal trends, and decisionmaking structures available.”<sup>140</sup>

135. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 69 (2002).

136. See Hilary Charlesworth, *Dangerous Liaisons: Globalisation and Australian Public Law*, 20 ADELAIDE L. REV. 57, 66 (1998).

137. Koh, *supra* note 86, at 44; see Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT’L & COMP. L. 421, 427 (2004).

138. *Alberta Union of Provincial Employees v. Attorney Gen. of Alberta*, [1987] S.C.R. 313, 348.

139. *S. v. Makwanyane*, 1995 (3) SA 391, 413 (CC) (discussing the constitutionality of the death penalty).

140. Barak, *supra* note 135, at 110-11.

When the opinions of other courts on international and transnational law are read, it can be seen that the approach to this subject, taken by a growing number of Justices of the Supreme Court of the United States,<sup>141</sup> and by other distinguished American judges,<sup>142</sup> is far from idiosyncratic. Even some critics of the use of international law in constitutional interpretation are forced to concede that American judges should not “deprive themselves of reasons, arguments, distinctions, rhetoric and other helpful tools just because they find them in international materials.”<sup>143</sup> If they “illuminate common concepts, and challenge us to think more clearly about our own legal questions,”<sup>144</sup> they can be useful tools of analysis. To forbid their use is revealed as founded in insular self-satisfaction and national or imperial hubris or an unintellectual demand that a potentially useful source be suppressed, simply because it is written by foreigners.

A lot of very clever people, in many lands and sometimes in international courts and tribunals, are now engaged in elucidating the meaning and application of common or identical principles in the case of social problems that have a tendency to present themselves, in different countries, at the same time. So far as international and regional human rights law are declared by such people, in principled decisions supported by detailed reasons, it is unconvincing to suggest that they should be ignored in an unworthy self-denying ordinance of intellectual restriction.<sup>145</sup>

Far from enhancing idiosyncratic decision-making, the reference to such sources in international law is a check against “strong passion or momentary interest.”<sup>146</sup> It is surely preferable that judges

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141. *E.g.*, *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

142. *E.g.*, Margaret H. Marshall, ‘Wise Parents Do Not Hesitate to Learn from Their Children’: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1647 (2004).

143. Wells, *supra* note 84, at 429-30.

144. Vicki Jackson, *Could I Interest You in Some Foreign Law? Yes Please, I'd Love to Talk with You*, LEGAL AFF., July-Aug. 2004, at 43.

145. See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3, 17 (1983).

146. Bodansky, *supra* note 137, at 421.

should have regard to such sources where they are relevant than that they should rely solely upon their own personal preferences and beliefs or on expositions written decades before by judges having no understanding of the society in which the law must operate.<sup>147</sup> The use of such materials, far from undermining the legitimacy of municipal constitutional jurisprudence, contributes to "greater legitimacy by virtue of having paid due respect to the decisions of others"<sup>148</sup> and this is so even if those others happen to be foreigners and the conclusion is different.

It follows that engaging in the analysis of analogous points, with the opinions of judges and other writers in many countries, helps ensure a national supreme court against intellectual isolation and, consequentially, a diminished influence of its own in the world of ideas.<sup>149</sup> Of course, this objective may be of no interest to those who are satisfied to live within their own national intellectual cocoon. But it hardly accords with the world trends of globalism in economics, transport and communications (largely American interventions) that have contributed so significantly to the advance of freedom in every corner of the planet.<sup>150</sup>

Because national constitutional courts are State organs, and because States are themselves (often by specific treaty) obliged to conform with international law, the failure of courts to give meaning to the law and the Constitution that accord, so far as possible, with international law, may itself contribute needlessly to State failures in that regard.<sup>151</sup> Occasionally, disconformity will be unavoidable and under domestic law lawful. Municipal courts must then give effect to it. But in the contemporary world, it may be hoped that this will be

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147. See Simpson & Williams, *supra* note 99, at 217.

148. Diane Marie Amann, 'Raise the Flag and Let It Talk': On the Use of External Norms in Constitutional Decision Making, 2 INT'L J. CONST. L. 597, 606 (2004).

149. See Clair L'Heureux-Dubé, *Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective*, 1 INT'L J. CONST. L. 35, 36 (2003).

150. See Clifford Wallace, *Globalization of Judicial Education*, 28 YALE J. INT'L L. 355, 360 (2003).

151. See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 160 (1993).

relatively rare and that courts will play a part in avoiding unnecessary instances. The adaptation of their judicial techniques to this end is no more than a rational contemporary response to the accommodation of the nation, and its laws, to the environment of international law in which every nation now operates.<sup>152</sup>

It is impossible to expect the relatively small numbers of international and regional courts and tribunals to carry the entire burden of upholding the rapidly developing corpus of international law. That is why national courts have an increasing role to play in this regard.<sup>153</sup> In the U.S. Supreme Court, Justice Blackmun put it well when he explained how, in the contemporary world, American courts must look beyond narrow national interests to the “mutual interests of all in a smoothly functioning international legal regime.”<sup>154</sup> He said whenever possible they should, “consider if there is a course that furthers, rather than impedes, the development of an ordered international system.”<sup>155</sup> Even Justice Scalia has favored this approach in respect of the domestic application of international law having no constitutional or human rights content.<sup>156</sup>

One of the few real innovations in the Australian Constitution’s treatment of the judicial branch was a provision permitting State courts to exercise federal jurisdiction.<sup>157</sup> Australian lawyers are thus familiar with the express sharing of jurisdiction and power between courts within the one polity, federal, State and territory. Professor Ian Brownlie has suggested that, in determining matters upon which international law speaks, municipal courts are now to be seen as

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152. See Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, in 34 CANADIAN YEARBOOK OF INTERNATIONAL LAW 89, 100-01 (1996).

153. See Knop, *supra* note 101, at 517; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

154. *Société Nationale Industrielle Ae Rospatiale v. U.S. Dist. Ct. S.D. Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part, dissenting in part).

155. *Id.* at 567.

156. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

157. AUSTL. CONST. c. 3, sec. 77(iii) (“[A]ny court of a State [is invested] with federal jurisdiction.”).

exercising a kind of international jurisdiction.<sup>158</sup> In the end, they must normally resolve any conflict between international and municipal law in favor of valid and binding domestic laws. But international law would be grievously injured if national courts, out of a sense of their own superiority or proclaimed ignorance, were to reject the rules and influence of the international legal order.

To the greatest extent possible, in constitutional as in other branches of the law, domestic courts should seek a reconciliation of the international and municipal legal regimes. After all, as Daniel Bodansky put it: "Even the United States . . . is a part of the globe, connected to other countries in myriad ways."<sup>159</sup> The same is certainly true of Australia.<sup>160</sup> Increasingly, it is true for the courts of every nation. And a great part of the explanation for this originates in the United States itself and in the ideas and inventions that have propelled us into the era of globalization, where we are at once freer but more inter-dependent.

## VI. A TIMELY ACQUAINTANCE

The outcome of the controversy that I have outlined, concerning the relationship between international law and municipal courts, is still to be written. At least, it is still to be written in countries such as my own and in the United States. This is an important debate because, as the international legal order is enlarged, as its subject matter comes increasingly to concern individuals, as it increasingly provides machinery for scrutiny of complaints and findings, the expectations of an accommodation with international law are increased.

The dangers to the planet render more urgent the building of the international rule of law. No country, however wealthy and powerful in arms and economics, can shoulder, single handedly, the burdens of being the effective world policeman. The diversity of humanity

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158. BROWNLIE, *supra* note 8, at 584; *see also In re Secession of Quebec from Canada* [1985] S.C.R. 217, 234-35; GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 44-45 (2002); Daniel Turp & Gibran van Ert, *International Recognition in the Supreme Court of Canada's Quebec Reference*, in 36 CANADIAN YEARBOOK OF INTERNATIONAL LAW 335, 335-46 (1998).

159. Bodansky, *supra* note 137, at 421; *see* Neuman, *supra* note 85, at 87.

160. *See* Charlesworth, *supra* note 136, at 66.

demands diversification of our responses to the opportunities and perils of the time. It also demands utilization of established national courts in spreading, where appropriate, any emerging consensus of humanity, that international law expresses and reinforces.

It is possible, in the end, that the rhetorical contests over these questions display less real division about utilization of international law in domestic jurisdiction than might sometimes appear on the surface of the competing judicial and academic opinions.<sup>161</sup> For some, the debate is a battle over transparency in judicial reasons. For others, it involves clarification of the limited function of international borrowings. Still others require reassurance that domestic law, with its longer history and its democratic foundations, will ultimately prevail within its own country. But, particularly in the world of human rights and fundamental freedoms, there is a need to engage in a global dialogue. Increasingly, such a dialogue is happening amongst judges of final courts. They meet in person. Their minds meet through the Internet. They read each other's opinions. Their discourse about international law is no longer an indulgence or an esoteric legal specialty. As Justice O'Connor has said, it is now "becoming a duty."<sup>162</sup>

What I have described in this lecture is an intellectual movement. It is a source of analysis and ideas. It is a font of shared wisdom. It is irreversible, as human reason itself is.<sup>163</sup> Its momentum is unstoppable. It identifies the next phase in the advancement of international law and the international rule of law.

What carries us forward is the memory of the terrible wrongs to human rights and knowledge of the dangers for the world we live in, absent international law. It is not too much to say that the interaction of international and national law constitutes one of the largest challenges for the law in the century ahead. Its outcome is critical for the future of international law.<sup>164</sup> That future is, in turn, critical for

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161. See *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, ¶ 173.

162. O'Connor, *supra* note 25, at 353.

163. See OWEN FISS, *THE LAW AS IT COULD BE* 228 (2003).

164. See David Kennedy, *The Twentieth-Century Discipline of International Law in the United States*, in *LOOKING BACK AT LAW'S CENTURY* 386, 410 (Austin Sarat et al. eds., 2002).

the future of human life. It is vital that national judges should be aware of this challenge, and alert to the need, individually and institutionally, to respond. We will not in our lifetimes resolve these questions finally. Indeed, it is not our duty to finish the task. But neither are we free of the moral obligation to try.<sup>165</sup>

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165. See LEONIE STAR, JULIUS STONE xii (1992).