International Law and Australian Law in the 21st Century

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I was really delighted and very honoured by the invitation to deliver this lecture. First, it gives me the opportunity to visit the young and lively Law School here in Newcastle and to check up on the progress of an esteemed former colleague, Professor Ted Wright.

Second, it allows me the chance to pay tribute to Sir Ninian Stephen, a man who has had considerable impact on Australian law and public life and on me personally.

Regular attenders at these lectures will all probably know by now the major features of Ninian Stephen's brilliant career. But for those of you who are new law students, it may be worth highlighting some of them because it reminds us that you can make a wonderful career from quite humble beginnings.

Ninian Stephen arrived in Australia as a school boy from the United Kingdom in 1940. He did not have any legal connections at all. His father, a poultry farmer, had been gassed in the first World War and then died when Ninian Stephen was still a baby. His mother was a paid companion to a wealthy Queensland woman living in London who took a great interest in the young boy. They all came out to Australia to avoid the worst of the war in Europe.

Ninian Stephen became an articled clerk in 1940, but this was interrupted by war service. After completing his articles, and practising as a solicitor in Melbourne, he joined the Bar and quickly developed a

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reputation as an outstanding barrister. After a brief stint on the Victorian Supreme Court, he was appointed to the High Court of Australia in 1972. He served on the High Court for a decade, until his appointment as Governor-General in 1982.

One of the best jobs I have ever had was as Associate to Ninian Stephen in the last 18 months of his time at the High Court in 1981 and 1982. He was a wise and good humoured employer and generous and patient with his last and most disorganised Associate. Unlike many lawyers of his generation, he assumed women were just as capable as men. He was - and is - utterly without pomposity, much keener to ask questions than to talk about himself.

The only time I saw Sir Ninian even slightly ruffled was during the preparation of the landmark judgment in the case of *Koowarta v. Bjelke-Petersen*[1]. The case had attracted a lot of public attention and there was much speculation on the way it would be decided. Inside the Court also, all the Associates keenly anticipated the outcome. At one point, six judges had circulated their draft decisions. The Court was evenly split. Three judges (Chief Justice Gibbs, Justices Aickin and Wilson) accepted Queensland's arguments that the *Racial Discrimination Act 1975* (Cth) was outside Commonwealth power. Three judges found the *Racial Discrimination Act* valid (Justices Stephen, Brennan and Murphy). We all realised that the judgment of Justice Mason would decide the case. One day, Justice Mason's Associate, Alec Leopold, appeared in our chambers to distribute the judgment we had all been waiting for. It was one sentence long: "I have read the reasons for judgment of the Chief Justice and I agree with them and have nothing further to add.' I took the judgment in to Sir Ninian with a heavy heart. He looked at it with surprise and then puffed wistfully on his pipe. He rarely expressed any emotion about the outcome of a case, but this time he appeared uncharacteristically subdued. Suddenly, Sir Ninian threw his head back and started laughing. He pointed to the desk calendar – it was of course April Fool's day! As many of you will know Justice Mason in fact wrote a lengthy judgment upholding the validity of the *Racial Discrimination Act.*

I hope Sir Ninian would approve the topic I have chosen for this lecture. He would sometimes recall his legal studies at the University of Melbourne, done part time and after hours as an articled clerk. He was proud of the fact that he had won the prize for International Law, then seen as a rather marginal subject. His interest in and sympathy for this area can be seen, I think, in his judgment in the *Koowarta* case.

After his term as Governor-General, Sir Ninian has played a prominent role in international law. He became Australia's first Ambassador for the Environment in 1989 and then in 1992 was called upon by the United Kingdom and Northern Irish governments to chair Strand Two

[1] (1982) 153 CLR 168 ('*Koowarta*').

of the talks on Northern Ireland. He was elected by the United Nations General Assembly as a member of the International Criminal Tribunal for the former Yugoslavia in 1993 and in 1995 served as a judge ad hoc on the International Court of Justice (appointed by Australia in the case brought by Portugal over East Timor). More recently, he has been called upon by the United Nations Secretary-General, Kofi Annan, to chair a commission on how to deal with war crimes in Cambodia.

Sir Ninian's career, then, has moved from one steeped in Australian law to one at the cutting edge of international law. In his honour, my theme tonight is the relationship between Australian law and international law – an area of continuing controversy and dispute. Our political landscape currently features a number of areas where international laws and principles are declared to be antithetical to the Australian ethos.

The enactment of federal legislation late last year to validate the practice of towing boatloads of asylum seekers away from Australian territorial waters (in violation of both the law of the sea and refugee law) is a dramatic example of the way that short-term national political agendas can trump international legal principles.

Another example is Australia's refusal to join the *Kyoto Protocol*[2] which would limit our emission of ozone-depleting substances on the grounds that this would adversely affect Australia's economy. Yet another example is the opposition to the International Criminal Court expressed by some politicians and commentators on the basis that participating in such an international court would somehow infringe Australia's sovereignty.

I want to first outline the jurisprudential history of the rather ambiguous and fraught relationship between international law and Australian law, then I'll consider the standard objections made to developing a closer relationship. My central argument is that the Australian legal system will be impoverished unless it becomes more receptive to international law in the twenty-first century.

What is international law?

International law takes two major forms: treaties and customary international law. Treaties, or conventions, can be analogized to written contracts: they bind states that accept them. Customary international law is more like the common law: it is derived primarily from the practice of states.

International law used to be defined as the law that governed relations between nation states (e.g. boundary demarcation, exchange of diplomats, declarations of war and peace). Throughout the twentieth century, the scope of international law has considerably broadened. It now delves into

[2] Kyoto Protocol to the United Nations Convention on Climate Change, adopted in New York on 9 May 1992 ('the Kyoto Protocol').

areas typically considered far from inter-state relations: human rights, the protection of the environment, indigenous rights, labour relations, even the regulation of tobacco. So a once fairly specialized area of law now has increasing relevance to all areas of life. Indeed, it is difficult to think of an area now untouched by international law.

The growth of international law has been accompanied by a developing anxiety about its proper place in national legal systems. At the political level, there is considerable ambivalence about international law. Indeed, in Australia there is a Janus-faced approach. (Janus of course was the Roman god of doorways who had two faces, allowing him to observe both the exterior and interior of buildings at the same time).

On the one hand, foreign ministers and foreign ministries are often interested in the international cachet attached to participation in treaties and so the internationally-turned face smiles broadly.

The nationally-turned face typically frowns however. Once the treaty is signed, there is usually some reluctance to actually implement the treaty into domestic law. A popular concern expressed by politicians is that the excellence of the local legal order is being usurped by standards devised by foreigners. This concern is typically expressed about international legal standards relating to the environment or human rights, but it is much more rarely articulated about international laws relating to trade and business.

In the United States, by contrast, there is greater political consistency: there is both a considerable reluctance to enter into treaties (to some extent the result of the constitutional procedure for treaty participation) and similar reluctance to seriously implement the treaties.

Australia's general enthusiasm for international regulation has caused some tension in the Australian legal system. This is partly because of the lack of attention to the relationship between international law and Australian law in the *Australian Constitution*. At federation, 101 years ago, international law did not appear to be an important source of law. Moreover, it was accepted that Australia did not have the power to enter into treaties itself, and that in this respect Great Britain would act on its behalf.

The *Constitution* contains only two references to international law: the external affairs power in section 51(xxix) and the ineffective grant of jurisdiction to the High Court by section 75(i) in matters 'Arising under any treaty'. The 1891 draft of the *Constitution*, however, included a startlingly broad provision (adapted from the United States Constitution) 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 was thought to have the unacceptable implication that Australia had the power to enter into international agreements independently of Great Britain.

Australia's acquisition of full international status occurred gradually over the first part of the century, culminating in the *Statute of Westminster* (UK) in 1931 and legitimating Australia's capacity to enter into treaties. Although the *Constitution* does not provide explicit authority for the Commonwealth to be the only Australian entity to enter into treaties, the general executive power in section 61 has been accepted as including this function.

As a corollary of Australia's development of full international status, the Australian states are assumed to lack international personality and thus to lack any independent treaty-making capacity. This effectively gives the Commonwealth exclusive power to represent the nation in international affairs.

What is the precise relationship between the Australian legal system and international law? The High Court has given a series of rather confused answers to this question. With respect to international agreements to which Australia is a party, it has generally insisted that, for a treaty or convention to have any domestic effect, the agreement must have been adopted into Australian law through legislation (international lawyers refer to this as the 'transformation' approach).

In the case of customary international legal principles, the 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* (1948)[3] Chief Justice Dixon spoke of customary international law as a source rather than a part of Australian law, but Justice Starke implied a closer relationship by suggesting that a universally recognised rule of international custom should be applied by Australian courts, unless it was in conflict with statute or the common law (the 'incorporation' approach).

The High Court wrestled with the problems of determining the status of an asserted norm of customary international law also in the *War Crimes Act Case* (1991)[4], indicating that an uncontroversial, widely accepted norm of custom (such as the prohibition of war crimes) will be more readily regarded as part of Australian law by the High Court.

Overall, the High Court has adopted what international lawyers like to term a 'dualist' approach, which regards national and international legal systems as quite separate. An example of this dualist approach is the case of *Horta v Commonwealth*[5] in 1994. East Timorese resistance leader Jose Ramos Horta challenged 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 Commonwealth's external affairs power.

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3 (1948) 77 CLR 449.

4 *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501 ('War Crimes Act Case').

5 (1994) 181 CLR 183.

It was argued that the treaty, which created a regime for exploitation of the sea bed 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 sea bed. The High Court unanimously and briefly dismissed the challenge. It held that the external affairs power did not require that the treaty being implemented be consistent with international law.

I should note that both the Federal Court and the High Court have developed some expertise in interpreting those few international treaties that have direct effect in Australian law. The best example of such a treaty is the *Convention on Refugees* of 1951[6]. Its definition of who can claim refugee status is effectively incorporated into Australian law by the *Migration Act 1958* (Cth). In April this year, the High Court handed down a significant judgment in *Khawar*[7]. The question was whether a woman who was the alleged victim of violence by her husband and his family in Pakistan could claim to fit within the terms of the Refugee Convention. Traditionally such familial violence has not been regarded as giving rise to a 'well-founded fear of persecution' because the state is not directly involved. Ms Khawar argued that the failure of Pakistan's police and legal system to offer her any effective protection meant that Pakistan could be said to have sanctioned the violence. The majority of the High Court accepted Ms Khawar's arguments, providing a broad interpretation of the Convention.

International law has also been invoked in the context of the common law and of techniques of statutory interpretation and constitutional interpretation. *Mabo* (1992)[8] emphasised the significance of international law in the development of the common law. Justice Brennan described the relationship in this way, drawing on both the transformation and incorporation approaches:

> "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".

He argued that if a common law doctrine was based on an outdated notion of international law (such as *terra nullius*), the common law could lose its legitimacy.

The influence of international human rights law on the common law

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6 United Nations Convention relating to the Status of Regugees, adopted 28 July 1951('Convention on Refugees').

7 Minister for Immigration and Multicultural Affairs v Khawar (2002) 187 ALR 574 ('Khawar').

8 *Mabo v Queensland* (No. 2) (1992) 175 CLR 1 ('Mabo').

is also evident in cases such as *Dietrich v The Queen* (1992)[9], in which the Court discussed the possibility of a common law right to a fair trial based on international standards. Chief Justice Mason and Justice McHugh (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 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.

In *Teoh*[10] the Mason Court identified a significant role for treaties in the context of administrative law. At issue was the status of the Convention on the Rights of the Child, a treaty ratified by Australia but not specifically incorporated into Australian law. A majority of the Court (Justice McHugh dissenting) held that there was a 'legitimate expectation' that administrative decision makers would consider the treaty in reaching their decisions.

Various members of the Court have articulated a role for international law both in statutory interpretation and in interpreting the *Constitution*. In *Polites v Commonwealth* (1945)[11], a majority of the Court accepted that statutes should be interpreted in accordance with international law, unless Parliament clearly indicates a contrary intention. This principle of construction has a long history in British courts and is based on the presumption that Parliament will legislate consistently with international law.

In *Teoh*, Chief Justice Mason and Justice Deane reiterated the principle and gave it greater impact by arguing that the notion of ambiguity should be broadly understood. They stated that 'if the language of the legislation is susceptible of a construction which is consistent with [international law], then that construction should prevail'.

In this new century, by far the keenest exponent of the value of international legal principles in High Court jurisprudence is a former Ninian Stephen lecturer, Justice Michael Kirby. Influenced by his extensive experience working with the United Nations and other international organisations, Justice Kirby has argued for recourse to international law particularly in cases involving gaps in the common law or textual ambiguity in statutes or the Constitution. This approach was evident in a series of decisions made while Justice Kirby was President of the NSW Court of Appeal. Justice Kirby's appointment to the High Court has given his views a broader stage and allowed him to apply them in constitutional interpretation. However, he remains a lonely voice on the High Court on these issues.

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9 (1992) 177 CLR 292.

10 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ('Teoh').

11 (1945) 70 CLR 60 ('*Polites*').

Justice Kirby's interest in international law is particularly strong in the area of international human rights law. For example, his dissent in the *Hindmarsh Island Bridge Case* (1998)[12] accepted the plaintiff's argument that the federal races power should be read in the light of international standards of non-discrimination. He spoke of an interpretive principle that, where the Constitution is ambiguous, the High Court 'should adopt the meaning which conforms to the principle of universal and fundamental rights rather than an interpretation which would involve a departure from such rights'.

The Kirby approach goes further than the accepted principle of construction in the case of ambiguity. In *Newcrest Mining v Commonwealth* (1997)[13] Kirby 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'.

And in *Hindmarsh*, Justice Kirby referred to a 'strong presumption' that the Constitution is not intended to violate fundamental human rights and human dignity, implying that the *Constitution* should be interpreted in light of international law whether or not an ambiguity could be identified.

The radical nature of this approach emerges in contrast with that of members of the majority. Although Justice Gaudron 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. For their part, Justices Gummow and Hayne accepted that Australian laws should be interpreted as far as possible in conformity with international law, but held that 'unmistakable and unambiguous' language will override international law.

While Justice Kirby has been the most enthusiastic member of the High Court with respect to international law, other members of the Court have sometimes portrayed international law as dangerous and uncertain. Even Chief Justice Mason, who demonstrated a willingness to use international legal principles in his judgments, has recommended a conservative approach to the engagement with international law. Since leaving the Bench, he has written that international law should be used, not to impose new or imported values on Australian law, but as an expression of existing common law principles or community values. Justice Brennan's bold use of international law in *Mabo* was similarly tempered by his statement 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'.

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[12] *Kartinyeri v The Commonwealth of Australia* (1998) 195 CLR 337 ('Hindmarsh').
[13] (1997) 71 ALJR 1346 ('*Newcrest*').

The High Court has certainly displayed more interest in international law than is evident in the isolationist tradition of the United States Supreme Court. By comparison with other courts, such as the Indian and Canadian Supreme Courts[14] and the New Zealand Court of Appeal, however, the High Court has been relatively wary of the international legal system. The Court is yet to establish a clear framework for the use and interpretation of international legal principles.

I want now to articulate and weigh up some of the major objections regularly made to the use of international law doctrines in national legal systems.

Overall, in many contexts, international law is seen as a problematic and subversive influence on national legal orders, introducing chaos and uncertainty.

Let me discuss three typical moves in the debate in Australia about the role of international law.

1. International law is a vague and unclear set of standards, capable of endlessly malleable interpretation

This objection is raised both in the context of treaty law and customary international law. It is certainly connected to the fact that it is regarded as the creation of entities outside the national legal system, but the charge is basically that there is a qualitative difference in domestic and international legal norms.

An Australian example of this criticism is in the *Tasmanian Dams case* in 1983.[15] The international treaty at issue was the World Heritage Convention. The Chief Justice of the High Court, Sir Harry Gibbs, almost lampooned the advisory, persuasive, language in the Convention and contrasted it with the much firmer binding language of national legal commitments.

More recently, Amelia Simpson and George Williams have argued that the vagueness of international legal standards, whether conventional or customary, is a reason for considerable caution in using them in Australian constitutional interpretation.[16] They describe many international legal standards as indeterminate and lacking concreteness and recommend that they be used only in very limited circumstances.

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 the international standards. For example, Justice L'Heureux-Dubé of the Supreme Court of Canada drew on a variety of

[14] S. Toope 'Inside and Out: The Stories of International Law and Domestic Law' (2001) 50 *University of New Brunswick Law Journal* 11.

[15] (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

[16] 'International Law and Constitutional Interpretation' 11 *Public Law Review* (2000) 205.

international materials in *Ewanchuk*[17] to discuss the scope of common law defences to sexual assault charges. Her Honour looked at treaty texts, general recommendations of United Nations treaty bodies and resolutions of the United Nations General Assembly. The internet now allows easy access to such materials, whereas even a few years ago they were quite difficult to track down.[18]

Other answers to the objection of vagueness have also been offered by Canadian and Australian judges. *Baker*[19] is a recent Canadian example. There Justice L'Heureux-Dubé wrote that 'the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.'[20] And, as I've said, Justice Michael Kirby has been a consistent exponent of the significance of international human rights law in the Australian legal system. He has also introduced the idea that the Constitution speaks not just to the people of Australia but also to the international community. This has been regarded as a dangerously radical notion, but I think it is in fact a realistic appraisal in a globalised world.

At the same time, I do not think that we should aspire to some sort of homogenous world-wide interpretation of international legal standards. I think it is important to bear in mind the Canadian academic, Karen Knop's, argument that the domestic interpretation of international law is a process of translation.[21] She writes 'Just as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation.'[22] In other words, the outcome of the translation of international law may not always be the same in different legal cultures: 'translation owes fidelity to the other language and text but requires the assertion of one's own as well.'

2. Use of international law undermines more democratically devised forms of law by parliaments

A second major objection to the use of international law in national legal systems is that it usurps the national democratic process. Thus the 1992 *Mabo* decision by the Australian High Court, which stated that the common law must be interpreted in light of international law, attracted

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[17] *R. v Ewanchuk* [1999] 1 SCR 330 ('*Ewanchuk*').

[18] 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' *Canadian Bar Review* (2000) 530.

[19] *Baker v Canada (Minister for Citizenship & Immigration)* [1999] 2 SCR 817 ('Baker').

[20] Ibid. at 70.

[21] 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Policy* 501.

[22] *Ibid* at 506.

tremendous political opposition. It was seen as an improper development of the law on native title.

Another example is the reaction to the *Teoh* case where the High Court identified a significant role for human rights treaties in administrative law[23].

A majority of the Court held that entry into a treaty by Australia creates a legitimate expectation that the government will act in accordance with the treaty provisions whether or not the treaty has been implemented in Australian law. In other words, administrative decision-makers should consider all relevant treaties to which Australia is a party in reaching their decisions. If decision-makers propose to make a decision inconsistent with a treaty obligation, they should allow persons affected by the decision to make submissions on this point. For this reason, the Court decided that the decision to deport Mr Teoh, a convicted drug trafficker with a number of dependent children resident in Australia, should have considered Australia's obligation to give weight to the best interests of children under the *Convention on the Rights of the Child*.

Although the Court emphasised the need for a cautious approach to the use of international treaties in developing the common law, the *Teoh* decision to require the decision-maker to turn her mind to the Convention obligations (but not necessarily to give them precedence) caused an uproar. Politicians condemned it as an inappropriate judicial excursion into the political realm.

The Australian Minister for Foreign Affairs and the Attorney-General in the Labor Keating government immediately sought to override the impact of the decision in an unprecedented formal statement. They asserted that Australia's ratification of a treaty could not give rise to a legitimate expectation that administrative decision-makers would take the treaty obligations into account. This position was repeated and strengthened in 1997 by the Howard government. A joint statement by the Attorney-General and the Minister for Foreign Affairs announced:

"The Government is of the view that [the Teoh principle that entry into a treaty created a legitimate expectation that the treaty obligations would be followed] is not consistent with the proper role of Parliament in implementing treaties in Australian law".

Both the Keating and Howard governments unsuccessfully attempted to legislate to overcome the effect of the decision.

This reaction to the modest use of international law in Australian law was parodied by Chief Justice Mason after his retirement:

> "So when an Australian convention ratification is announced, they may dance for joy in the Halmaheras, while here in Australia we, the citizens of Australia, must meekly await a signal from the legislature, a signal which may never

[23] (1995) 183 CLR 273.

come. Of course', (he added) 'this concept of ratification involving a statement to the international community but no statement to the national community is quite unsupportable".

The Federal Court's decision in *Nulyarimma v Thompson*[24] in 1999 highlights a similar problem in the Australian judicial understanding of customary international law. An Aboriginal plaintiff argued that government policy and legislation on native title contained in the 1998 'Ten Point Plan' and the *Native Title Amendment Act 1998* (Cth) constituted acts of genocide. The central issue in this case was whether a prohibition on genocide was part of Australian law.

Although Australia ratified the *Convention on Genocide* in 1949[25], no legislation has since been enacted to give the international legal standard domestic force. The plaintiff in *Nulyarimma* argued that the prohibition of genocide was a norm of customary international law and, as such, should be considered a principle of Australian law.

This argument has a strong jurisprudential basis, but it was rejected by a majority of the Federal Court bench, who regarded the principles of customary international law as outside our legal system. The idea was that, if Parliament had not acted to formally incorporate customary rules into Australian law, they had no applicability in the national legal system.

The objection that recourse to international law is undemocratic does not take into account the fact that treaties are freely entered into by states and the voluntary nature of international legal system generally. The expectation that the organs of a state will fulfil international obligations does not impinge on democracy. Indeed it is consistent with a broader, global, understanding of democracy. The British political scientist, David Held, has written about the impact of globalisation on democracy and argued that in this new century, 'democracy can only be fully sustained by ensuring the accountability of all related and interconnected power systems' from the local to the national to the regional and global.

In the Australian context, the argument that international law is undemocratic also does not take into account the effect of the 1996 treaty reforms, which gave the Commonwealth parliament and the states an increased role in determining what treaties Australia should accept.

3. Reference to international law will undermine the federal balance

Perhaps the most successful political objection to the use of international law in federal legal systems (particularly in Australia and the United

[24] [1999] FCA 1192 ('*Nulyarimma*').
[25] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 ('The Genocide Convention').

States) is the fear that it is inappropriate when government is decentralised. The idea is that international law can be used as a Trojan horse by the central government to weaken the powers of the federal units, the provinces or the states.

In Australia, the spectre of 'states' rights' was also an effective tactic against attempts in the 1970s and 1980s to introduce legislative catalogues of rights. The protection of states' rights remains a potent argument today, with both major political parties apparently accepting that states and territories should be free to enact legislation that breaches international human rights standards. In the context of the external affairs power, the Australian judiciary has also tackled the issue of the compatibility of international law with a federal system of governance, and it has been considerably more adventurous in this respect than the legislature and executive.[26] By contrast in the United States, a series of recent cases on federalism and the commerce clause have led commentators to suggest that the Supreme Court may rethink *Missouri v Holland*,[27] which held that the treaty power in the United States Constitution was not limited by concerns of federalism.[28] In one sense, the 1937 decision of the Privy Council in the *Labour Conventions Case*[29] is proof of the force of the objection in Canada. In that case it was held that the federal government could not alter the division of powers set out in the Constitution Act through entry into treaties. However recent cases suggest a much more liberal interpretation of the effect of international law.[30]

I want to suggest that to give precedence to the federal division of powers over participation in the international legal order is to mistake means with ends. The rationale for federal systems is to increase the responsiveness of government at a local level, not to isolate federal units from international developments. The precedence accorded to 'states' rights' over human rights impoverishes our social and political culture. For example, the use of the word 'rights' in the slogan 'states' rights' obscures the reality that one major freedom sought by the Australian states over the last century is that to deal unfettered with the human rights of their residents.

The federalism objection also assumes that the balance between local and central governments remains static in a rapidly changing world. We should carefully re-examine the way that we organise power and what the appropriate provinces for local power as opposed to national power are. We should be asking about the type of society we wish to live in and

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[26] For example, the Tasmanian Dams case.

[27] 252 US 416 (1920).

[28] See Thomas Healy, 'Is Missouri v Holland Still Good Law? Federalism and the Treaty Power' 98 *Columbia Law Review* (1998) 1726.

[29] *Attorney-General for Canada v Attorney-General for Ontario* [1937] A.C. 326 ('Labour Conventions Case').

[30] *Spraytech v Town of Hudson* [2001] SCC 40.

how we can best create this, rather than clinging to outmoded concepts of federal spheres.

The Way Ahead

International law is by no means a perfect system of law. It has some gaps and problems. However it has considerable relevance to all areas of law and its creative potential needs to be explored. Judicial decisions that ignore international developments are bypassing an important source of progressive norms. One variable in Australia often appears to be the personal experience and familiarity of individual judges with the international legal system. This suggests that the study of international law should be given more prominence in our law schools and in judicial education.

The absence of any system of rights protection in the *Australian Constitution* is of course a major cause of the national diffidence with respect to international law. It is interesting to observe the way that the British judiciary is coping with the *Human Rights Act*[31], which imports the *European Convention on Human Rights*[32] into British law. Despite dire predictions, the legislation seems to be working well.

An interesting example of the creative use of international law can be found in the 1996 *South African Constitution*. Of particular interest are two decisions of the South African Constitutional Court interpreting constitutional economic and social rights. The first, *Soobramoney*[33] involved the denial of ongoing dialysis treatment to a man suffering renal failure on the basis that there were not enough resources to give such treatment to all patients and that treatment should be reserved for patients who were able to have a kidney transplant. The Court held that the right of access to health care was subject to the availability of resources. It did not see itself as appropriately second-guessing decisions made about the availability of dialysis by the hospital based on its allocated budget.

Grootboom,[34] decided in October 2000, suggests quite a different approach to economic and social rights. A group of 500 children and 400 adults who were squatting on land in the Western Cape brought a case under the Constitution challenging their eviction. They argued that the South African government was required to provide them with adequate basic shelter or housing under the Bill of Rights. The South African Constitutional Court unanimously decided that the Bill of Rights required the state to devise and implement a program to realize progressively the right

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[31] *Human Rights Act* 1998 (U.K.)

[32] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4/11/1950.

[33] *Soobramoney v Minister for Health* (1997) 12 BCLR 1696 ('Soobramoney').

[34] *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 ('Grootboom').

of access to reasonable housing. Given the crisis situation with so many people living in intolerable conditions, the Court held that the programs in place were clearly inadequate. The Court looked to the parallel provisions in the *International Covenant on Economic, Social and Cultural Rights* of 1966 and to international jurisprudence on the right to housing. It decided that there was no doubt that economic, social and cultural rights were justiciable and that the government was required to act to fulfil them. The Court then ordered the government to devise and implement a program within available resources to realise progressively the right of access to adequate housing. This was a landmark, and controversial, decision but it illustrates the way that international law can be used to promote social justice in national contexts.

I should conclude by coming back to Sir Ninian. He has been a model of adaptability in the sense I have been discussing. His life and work shows that a person can be equally at home in the realms of Australian and international law and that these areas can each illuminate the other. In this lecture in Sir Ninian's honour, I want to argue that, as judges make decisions in an increasingly complex world, they need to consider the important source of principles and norms provided by international law. I do not wish to suggest an unthinking embrace of all international legal rules, but rather that they be seriously considered as a resource in the task that faces us all of thinking globally and acting locally.