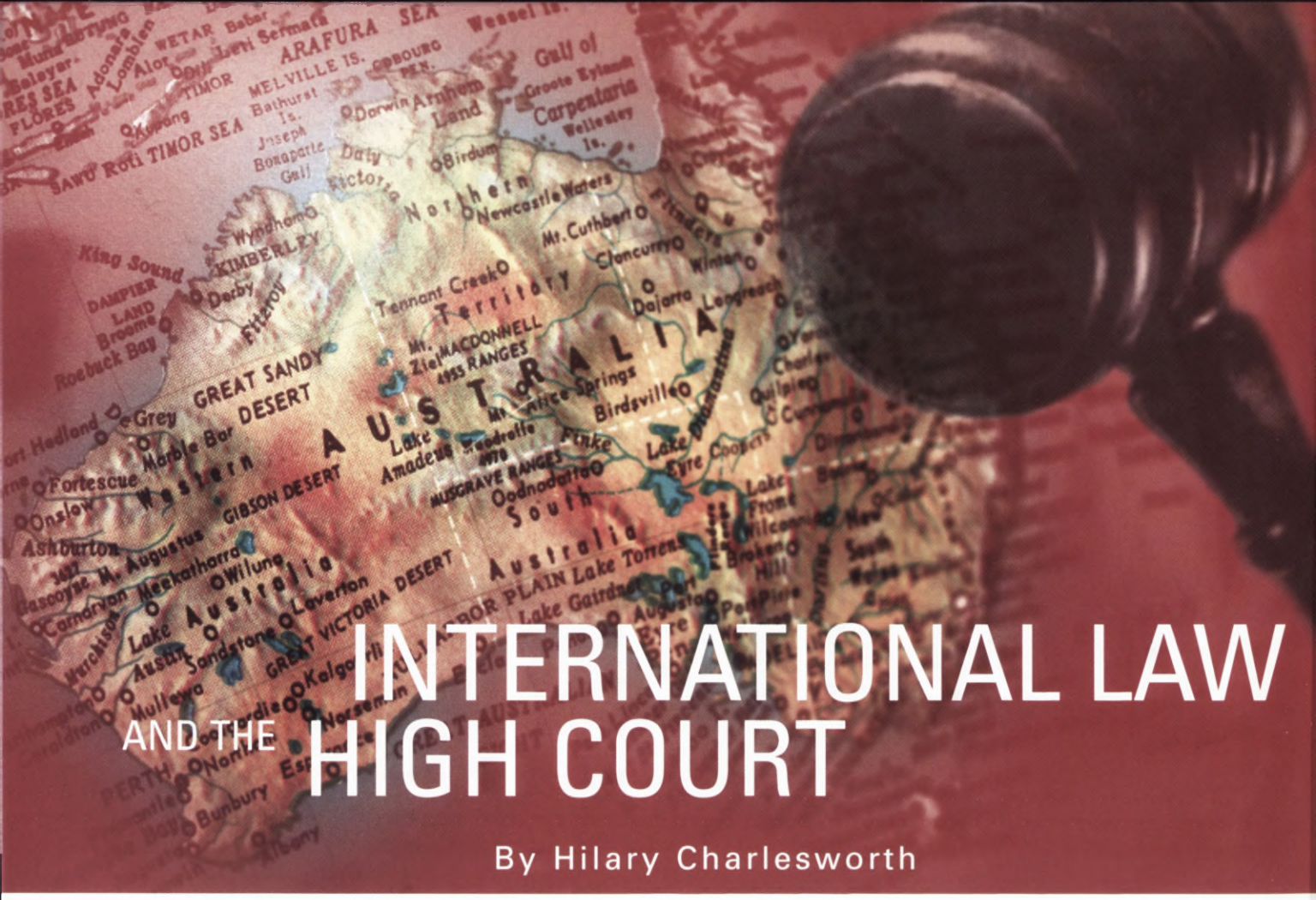


# INTERNATIONAL LAW AND THE HIGH COURT

By Hilary Charlesworth

It is no longer possible to consider international law and national legal systems as distinct and separate. This traditional common law dualist approach, endorsed by the majority of the High Court, is outmoded and threatens to reduce the ability of the Australian legal system to respond to the challenges of this century.

Historically, the High Court's attitude to international law can perhaps best be described as 'romantic', in that it has both embraced and spurned the 'law of nations' at various times. Overall, its attitude has been one of ambivalence; even the moments of embrace have been lacking in passion.

Of course a major issue for the High Court in constitutional cases is that the Constitution does not contemplate a large role for international law. At Federation, international law was not an important source of law. The Constitution contains only two references to international law: the external affairs power in s51(xxix) and the ineffective s75(I) grant of jurisdiction to the High Court in matters '[a]rising under any treaty'.[1]

## THE AUSTRALIAN LEGAL SYSTEM AND INTERNATIONAL LAW

What is the 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 direct domestic effect, the agreement must have been adopted into Australian law through legislation (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* (1949), for example, Chief Justice Dixon spoke of customary international law as a source rather than as a part of Australian law, but Justice Starke implied a closer relationship by suggesting that a universally recognised rule of custom should be applied by Australian courts, unless it was in conflict with statute or the common law (the 'incorporation' approach).[2]

Overall, the High Court has adopted a 'dualist' approach, which regards national and international legal systems as quite distinct. The high watermark of this approach is *Horta*

*v Commonwealth* (1994), a challenge to Commonwealth legislation implementing a bilateral maritime boundary treaty with Indonesia, which created a regime for exploiting the sea bed between Australia and East Timor. The High Court unanimously and briefly dismissed the challenge, holding that the external affairs power did not require that the treaty being implemented be consistent with international law.

The High Court has increasingly encountered international law, mostly in its jurisprudence on the external affairs power, which is not dealt with here. But international law is also invoked in the context of the common law and techniques of statutory and constitutional interpretation.

The closest embrace of international law with respect to the development of the common law is in *Mabo* (1992). Justice Brennan described the relationship in terms of both the transformation and incorporation approaches:

> 'The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'

But this statement was tempered by the qualification that international law could not be used to interfere with the 'skeleton of principle which gives the body of our law its shape and internal consistency'. In other words, Justice Brennan's celebrated words appeared in a limited context: this was clear from the much less ardent approach to international law the same year in *Dietrich*, in which the High Court discussed the possibility of a common law right to a fair trial based on international standards. Mason CJ and McHugh J (who identified such a common law right) rejected the idea that international guarantees of legal representation were part of the Australian common law in the absence of specific legislation. Justice Brennan, by contrast, presented international law as a 'legitimate influence' on the common law as a method of tapping into the contemporary values of the community, although in the end he found that no common law right to a fair trial existed.

In 1995, in *Teoh*, international treaties were given a significant role in administrative law. This decision prompted an intense political and legal controversy that still echoes today[3] but, at least to an international lawyer, it reads as a very modest and cautious precedent. For example, Mason CJ and Deane J stated that the influence of international legal principles on the common law would depend on factors such as the nature and purpose of the international legal norm, its degree of international acceptance and its relationship with existing principles of domestic law. And, of course, the current High Court sent a strong signal in 2003 *Lam* that it was keen to overrule *Teoh*.

Another role for international law contemplated by the High Court has been in interpreting legislation and the Constitution. In *Polites* (1945) a majority of the Court accepted that statutes should be interpreted in accordance with international law, unless Parliament clearly shows its intention otherwise. 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. A somewhat weaker version of this principle was endorsed in *Chu Kheng Lim v Minister for Immigration* (1992) where Brennan, Deane and Dawson JJ referred to the use of treaty provisions accepted by Australia in the case of statutory ambiguity. In *Teoh*, Mason CJ and Deane J reiterated the principle and gave it greater impact by arguing that the notion of ambiguity should be broadly understood. They stated that 'If the language of the legislation is susceptible of a construction which is consistent with [international law], then that construction should prevail.'

Justice Kirby has extended this principle of construction to constitutional interpretation, although he is invariably alone on this issue. For example, Kirby J's dissent in *Kartinyeri* (1998) accepted the plaintiff's argument that the races power should be read in light of international standards of non-discrimination. He spoke of an interpretative 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* (1997) Kirby J said, 'To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights.' He also introduced the idea, repeated in *Kartinyeri*, that the Constitution spoke not just to the people of Australia but also to the international community.[4]

To an international lawyer, these seem quite modest claims: moreover, Justice Kirby has consistently reiterated the dualist principle of the Australian legal system and the 'interstitial' process by which international treaty norms may affect the interpretation of ambiguities in the Constitution and statutes and the development of the common law.[5, 6] He is also always careful to use international law principles as subsidiary arguments, mere adjuncts to a decision based on Australian legal principles.[7]

Despite the caution of the Kirby approach with respect to the interpretation of the Constitution, other members of the High Court have firmly repudiated it. For example, in *AMS v AIF* Chief Justice Gleeson and Justices McHugh and Gummow wrote, 'As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.'[8]

So the High Court's relationship with international law is currently very wary: international law is presented as a potentially chaotic source of norms whose impact on the Australian legal system needs to be closely confined. This view tends to be shared by the academic constitutional law community, and is reinforced by politicians and media commentators who depict international law as the frolic of jet-setting, lotus-eating judges.

## RECENT CASES INVOLVING INTERNATIONAL LAW

International law appeared in some guise in a surprising number of constitutional cases decided by the High Court in >>

2004. For example, international law re jurisdiction over extra-territorial offences (*re Alpert*); international law re mandatory detention; re law of nationality and the meaning of the term 'alien';[9] re elections (*Mulholland*); international law of extradition;[10] and private international law.

Most of these invocations of international law have been controversial, prompting a clear split between Justice Kirby and all the other members of the High Court. In this sense, international law is regularly associated with the dissenting view in cases, perhaps exacerbating its marginalised image.

In one of a number of recent constitutional cases involving interpretation of the *Migration Act*, *Behrooz*, Justice Kirby alone looked at international law standards on conditions of immigration detention. He drew on the international law re arbitrary detention to reinforce his preferred interpretation of provisions of the *Migration Act*, arrived at through domestic law principles. He argued that there was no need to locate an ambiguity in legislation before interpreting it to be consistent with both treaty and customary international law.[11]

But Justice Kirby remained cautious in his use of international law, repeating the dualist mantra that international norms do not bind Australian courts unless incorporated by domestic law, while emphasising the value of these norms in providing the context for the High Court's interpretative and constitutional functions. Thus, in *Baker, Fardon v A-G* and *ex parte Alpert,* Kirby argues that given the accepted rule that ordinary statutes should be construed as far as possible to ensure that they do not operate in breach of international law, there is no reason why the Constitution itself should be construed in a more parochial way. This argument was mainly ignored by other members of the High Court.

In two cases last year, Justice Kirby acknowledged limits to the value of international law in statutory interpretation: in *Minister for Immigration v B* he notes that the High Court cannot invoke international law to 'override clear and valid provisions of the Australian national law'.[12] Again, in *re Woolley*, Justice Kirby acknowledged that the provisions relating to mandatory detention in the *Migration Act* as applied to children might be inconsistent with international law, but the wording was so clear that 'a national court, such as [the High Court], is bound to give effect to it according to its terms. It has no authority to do otherwise.'[13]

But the most striking High Court interaction with international law in 2004 came in the *Al Kateb* case. The *Migration Act* states that a non-citizen unlawfully in Australia who asks to be removed from Australia must be removed 'as soon as reasonably practicable'. The Court found that it also allows the continued detention of a stateless person 'until' they are removed.

The *Al-Kateb* case also raises the scope of the Commonwealth government's power under the Constitution to legislate with respect to 'aliens' or non-citizens. The majority of the High Court decided that this legislative power allowed more than merely determining the status of an alien who entered Australia and holding them for removal if so required. Indeed, the purpose of the power permits the 'exclusion from the Australian community' by 'segregation' of aliens. This expansive reading of the power seems extraordinary. It suggests that the Commonwealth Parliament can place broad restrictions on non-citizens to prevent them from becoming part of the 'Australian community'.

The case is particularly striking because of the direct and lengthy debate between Justices McHugh and Kirby on the relevance of international law. Justice Kirby's arguments about international law in *Al Kateb* are all familiar, and he uses his favourite sources: Dean Harold Koh, US Supreme Court in *Lawrence v Texas*, Bangalore Principles; international and regional human rights treaties. But he reiterates that his international law arguments are simply additional to those of the more familiar statutory interpretation techniques and constitutional principles used by Justice Gummow.

Justice McHugh presents the rules of international law as numerous and difficult to locate,[14] an impossibly large set of principles for legislators to be aware of. Use of international law developed since 1900 would constitute an illicit judicial amendment of the Constitution:[15] there is a difference between taking into account political, social and economic developments since 1900 in constitutional interpretation on the one hand, and what he characterises as binding *rules* of international law on the other.[16] This would lead, McHugh J remarks dismissively, to judges requiring a looseleaf copy of the Constitution. This does not seem a persuasive argument in a constitutional court that has developed evolving understandings of the constitutional text, not least in the implied rights cases. Justice Kirby makes the fairly obvious response that in fact judges do have such copies of the Constitution, elaborating the text by historical materials, judicial decisions and so on.[17]

In a striking passage at the end of his judgment, Justice McHugh diagnoses the lack of an Australian bill of rights as the reason for his narrow interpretation of the *Migration Act*, implying that such a charter would give judges a type of permission to look beyond their borders and take international human rights law into account.[18] The *UK Human Rights Act* seems to have wrought an astonishing change to the approach of the UK courts to human rights issues: in the recent decision in *A (FC) v Secretary of State for the Home Department,* for example, the House of Lords used the Act to declare that the indefinite detention of suspected terrorists who were foreign nationals was 'the antithesis of the right to liberty and security of the person'.

Justice McHugh's proposition that the High Court must await the happy day when there is an Australian bill of rights to take international human rights law into account ignores the fact that these principles are readily available to the High Court now.

## CONCLUSION

The High Court has continued to portray international law as inherently vague, uncertain and open-ended, or a source of foreign and chaotic norms. This is a caricature that overstates the dangers of uncertainty. Certainly some international law principles are expressed in general terms, but many forms of international jurisprudence are available to assist in interpreting international standards.[19] Concepts regularly used in domestic law, such as 'reasonableness', or

'foreseeability', are no less vague and require considerable interpretation in particular contexts. The anxious references made by Justice McHugh in *Al Kateb* to the fact that there are 900 treaties to which Australia is a party give an inaccurate sense of the breadth of international law. Only a small number will be relevant to any particular decision. There are more High Court decisions than there are treaties that bind Australia, and yet no one suggests that they should not be referred to in litigation.

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

A more productive approach may be to perceive the potential of international law in Australian law as 'influential authority' rather than as 'binding' or 'non-binding' norms. Canadian academics have developed the idea of 'influential authority' in the context of the Canadian Supreme Court decision in *Baker v Canada*.[20] They argue that this points to the imperative exerted by international norms, although they are formally non-binding. '[R]ather than demanding that their actual terms be enforced [as rights], these influential sources instead insist that they be addressed, considered, weighed in the course of justifying a decision upon which they might rightly be thought to bear. They demand, one might say, respect as opposed to adherence with their terms.'[21] This approach allows a more fluid, flexible and subtle approach to international law.[22]

The High Court will continue to brush up against areas of international law. Few areas of social and commercial life will be untouched by international legal standards and norms. Its current approach rules out an important source of principles; the High Court seems to celebrate being home, alone. In this era of a semi-permanent war against terror, and the trend of the executive government to assert self-defining powers, it is especially important that our highest court develop a less parochial, less deferential sensibility to government action if it is to give any substance to the idea of the rule of law. The war on terror is, above all, a war of ideas. As Thomas Friedman noted recently, 'The greatest restraint on human behaviour is not a police officer or a fence, but a community and a culture.'[23] Given the risk that Australian lawmakers may respond to the global threat of terror by enacting more and more laws that erode our commitment to individual rights, the High Court has an important role in strengthening our legal culture so that it can resist the excesses of unchecked governmental power. International law can make an important contribution to this task.

**Notes:** **1** The 1891 draft of the Constitution, however, included a startlingly broad provision (adapted from the US 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 of its implication that Australia had the power to enter into international agreements independently of Great Britain. **2** The High Court has wrestled with the problems of determining the status of an asserted norm of custom in both *Chow Hung Ching* and *Polyukhovich*, indicating that an uncontroversial, widely accepted norm of custom will be more readily regarded as part of Australian law by the High Court. **3** The then Minister for Foreign Affairs (Gareth Evans) and the Attorney-General (Michael Lavarch) sought to override the impact of the decision in an unprecedented formal statement, a move emulated in 1997 by their Liberal Party successors, Alexander Downer and Daryl Williams. Both the Keating and Howard governments unsuccessfully attempted to legislate to overcome the effect of the decision. **4** This is considerably more radical than other members of the court in *Kartinyeri*. 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 'unmistakeable and unambiguous' language will override international law. **5** Eg *Re East; ex parte Nguyen* (1998) 196 CLR 354, 380-381. **6** Eg Ibid; *Hindmarsh Island* at 417-418. **7** For Justice Kirby's own account of some of these cases see 'Domestic Implementation of International Human Rights Norms', 5 *Australian Journal of Human Rights* 109 (1999). **8** *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ). **9** *Tania Singh v Cth* [2004] HCA 43. **10** *Truong v The Queen* [2004] HCA 10. **11** Para 127. **12** Para 171. **13** Para 201. **14** 63 – 65. **15** 68. **16** 71. **17** 183. **18** para 73. **19** For example, Justice L'Heureux-Dubé of the Supreme Court of Canada drew on a variety of international materials in *Ewanchuk* to discuss the scope of common law defences to sexual assault charges. She looked at treaty texts, general recommendations of UN treaty bodies and resolutions of the UN General Assembly. **20** [1999] 2 SCR 817. **21** Mayo Moran at 4. **22** In *Baker*, for example, 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'. **23** T Friedman *New York Times*, 10 February 2005.

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