Inaugural Kirby Lecture in International Law

International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison

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I. Introduction

Michael Donald Kirby attended the University of Sydney, where he read arts, law, economics and more law:[1] at a time when combined degrees were unusual he combined far more than most! He was admitted to the New South Wales Bar in 1967, and practised briefly as a solicitor, then as a barrister, before his first judicial appointment in 1975 as a Deputy President of the Australian Conciliation and Arbitration Commission. After a brief period as a judge of the Federal Court of Australia he was appointed President of the New South Wales Court of Appeal in September 1984. He served in that office for 12 years, until his appointment to the High Court of Australia in February 1996. He retired from the Court — no lesser instrument than the Constitution could have compelled it — on 18 March 2009, by which time he was Australia's longest serving judge.

Justice Kirby has also served on numerous boards and committees and held many positions, both at the national and international level, including board member of the CSIRO, President of the Court of Appeal of the Solomon Islands, the United Nations special representative in Cambodia and President of the International Commission of Jurists. He received Australia's highest civil honour when he was made a Companion in the General Division of the Order of Australia (AC) in 1991; in the same year he was awarded the Human Rights Medal. He is a Companion of the Order of St Michael and St George (CMG).

But the role which was most significant among the many — prior to his appointment to the Court of Appeal in 1984 — was his nine years as foundation President of the Australian Law Reform Commission (1975–1984), during which

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1 BA (1959), LLB (1962), BEc (1965); LLM (H1) (1967).

time he was the voice of law reform in Australia. Others — including Gerard Brennan, Gareth Evans, David St Leger Kelly, Tim Smith, Murray Wilcox, Michael Chesterman — contributed to the important work the ALRC did in these foundation years. Over them all, Michael was the presiding genius, giving voice to the reformers' plans.

During his time on the High Court, Justice Kirby has been an outstanding proponent of internationalism, often citing international human rights principles and writing judgments against a background of international and comparative law. I say outstanding in several senses: he has been prominent; his colleagues have for the most part not followed his lead. Indeed they might have been heard to say that, while human rights and comparative law are all very well as background, they can too readily become foreground and distract from the real legal issues. But Michael Kirby has not been deflected: he responds courteously to criticism, but not normally by any change of position. As he has said:[2]

> At first, my repeated references to the utility of international human rights principles, to afford a context for elucidating problems of Australian law, was regarded in some circles as heretical. Some Australian judges still consider it to be so. Yet I persisted and still do to this day. The reconciliation of international and domestic law is one of the greatest challenges affecting contemporary judges and the future of municipal legal systems everywhere.

While acknowledging that problems presented before Australian courts do not always have international resonance, he has emphasised the universality of the quest to protect basic human dignity and rights. He has always proceeded on the basis that:

> …a legal question has not only a text but a context and the text takes on its meaning from context and a wider range of materials, including human rights materials. I have no doubt that on the issue of the use of international human rights principles, given the way the world is developing, given the way this is happening all over the world that this will be an established and uncontroversial and entirely orthodox way to go about legal decision-making in 20 or 30 years' time, if not earlier.[3]

Since the Bangalore Principles of 1988,[4] courts throughout the British Commonwealth (Michael retains a touching faith in the Commonwealth) have been looking to international human rights law to resolve ambiguities in enacted law and gaps in the common law. There has been an increased interaction of international law and national law. International law, at least as a contextual matter but often as the basis of decision, is of growing importance in common law courts of final appeal. This is true not just in Australia but also in New Zealand,[5] Canada,[6] South

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2 Justice M Kirby, 'To Judge Is to Learn' 48 (2007) *Harvard International Law Journal* 36, 41–2.

3 ABC Radio, 'Bold Enough: Michael Kirby', *Sunday Profile*, 2 December 2007 <http://www.abc.net.au/sundayprofile/stories/s2106109.htm>.

4 The Bangalore Principles are set out in Justice M Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 66 *Australian Law Journal* 514.

5 See, eg, *Attorney–General v Refugee Council* [2003] 2 NZLR 577; *Attorney–General*

Africa[7] and the United Kingdom. Indeed it is even the case in the United States.[8] In Canada, a major decision of note during this period was the *Reference re Secession of Quebec*,[9] an opinion of the Supreme Court of Canada, which concerned the legality, both under international law and Canadian constitutional law, of a unilateral secession of Quebec from Canada and which had a marked positive effect on public debate on that issue. An earlier decision of the New Zealand Court of Appeal contains an often-quoted objection to treaty ratification by the executive being reduced to "window-dressing",[10] a point to which I will return.

Among common law courts of final appeal, without question the most active in the consideration of international law issues over the Kirby years has been the House of Lords. It is of interest to compare and contrast the caseload of the High Court of Australia with the House of Lords in cases dealing with international law and international human rights during the tenure of Kirby J, i.e. covering the calendar years 1996–2008.

The following table illustrates the caseloads of the two courts. I have grouped the relevant cases according to the perceived dominant international law issue. This is of course approximate. In *Al-Jedda*, for example, there were two issues — attribution of British military conduct in Iraq to the United Kingdom or the United Nations, and the impact of Chapter VII resolutions of the Security Council on human rights treaties.[11] Only time will tell which was the more important. Although a single case may have dealt with two or more issues of international law, each case is only represented once in the table.

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v Zaoui [2005] NZSC 38; *Kwok–Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] NZCA 174.

6 See, eg, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* (2004) 234 DLR (4th) 257; *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100; *R v Hape* 2007 SCC 26.

7 See, eg, *Kaunda v President of South Africa*, [2005] 4 AS 235 (CC); *Director of the Public Prosecutions KwaZulu-Natal v P*, [2006] 1All AS 446 (SCA); *Rootman v The President of the Republic of South Africa*, Case No 016/05, [2006] SCA 80 (RCA).

8 See, eg, *Rasul v Bush*, 542 US 466 (2004); *Permanent Mission of India to the United Nations v City of New York, New York*, 127 S Ct 2352 (2007); *Medellín v Texas*, 552 US 491 (2008).

9 [1998] 2 SCR 217.

10 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.

11 *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 153.

International law in the High Court and House of Lords (1996–2008)

International law issue	High Court of Australia	House of Lords
Relation between treaty law and national law	2	8
Relation between customary international law and national law	–	1
International law in constitutional/statutory interpretation	10	–
Treaty interpretation	1	5
State immunity	–	3
Refugee Convention obligations	2	9
Other international human rights	–	15
Extradition	2	7
Extra-territorial jurisdiction	1	2
Law of the sea	2	–
Territory/sovereignty	1	–
Miscellaneous	–	4 [12]
Total:	**21**	**54**

During this period, the number of House of Lords cases dealing with issues of international law was more than double that of the High Court. There are some obvious explanations for this disparity.

First, the Human Rights Act 1998 (UK) gave distinct effect in English law to the European Convention on Human Rights (ECHR);[13] there was no Australian equivalent during the period under review. The 1998 Act is largely responsible for the disparity in the number of cases dealing with human rights issues in the House of Lords and the High Court (12 and 5 respectively).

Secondly, there have been a number of major cases brought in the UK in relation to its involvement in the 2003 Iraq War, and the British involvement in

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12 These cases dealt with the following issues: compensation of members of the armed forces for injuries sustained abroad, challenge to an arbitral award, inconsistency between decisions of the European Court of Human Rights and domestic case-law, act of state doctrine.

13 213 UNTS 222.

post-invasion Iraq.[14] By contrast the High Court has not yet heard any major cases arising from Australian involvement in Iraq.

Thirdly, an indirect form of internationalisation has occurred in the UK since it joined the European Union in 1973. As a general matter, the relation between international law and EU law follows continental European traditions of thought, and not the more obviously dualistic Anglo-British mode.[15]

Finally, it should be noted that lower courts within the UK court hierarchy also deal with significant issues of international law. For example, the Court of Appeal decision in *Occidental v Ecuador*[16] considered in detail the principle of non-justiciability in relation to investment treaty arbitration. This is to be contrasted with the situation in Australian lower courts, where there are fewer cases where issues of international law are relevant. In England there are fewer appeals to the House of Lords than there are in any year to the High Court, and a higher proportion of this pool of cases concerns international law and human rights.

But though the differences in the caseload can be explained by the range of international and regional commitments and by major legislative mandates such as the Human Rights Act, there is more. The record of final appeal courts in dealing with issues of international law depends markedly on the individual approaches taken by the judges. With the notable exception of Kirby J, the judges of the High Court have been more reluctant than their contemporaries in the House of Lords to deal with international law issues. In a few cases their reluctance looks like recalcitrance.

II. The Shared Common Law Heritage

Before looking to the cases it is necessary to say something about the shared common law rules of the relation with international law. The common law heritage has four basic components: these concern (1) general customary international law, (2) treaties, (3) the extent and effects of the exercise of prerogative power in external affairs, and (4) international transactions. The rules adopted in each field appear to point in different directions, and this has caused confusion. In Australia these common law rules are unmodified by the Constitution, references in Chapter III to treaties and representatives of other States notwithstanding. But they are constitutional rules of the common law, concerned with the distribution of public power and the extent of governmental accountability for its exercise. As a result of developments over the last 20 years each of these rules has been modified or qualified to a degree, but the basic rules have not changed. So far they may be taken to be the same in England and Australia, despite a certain (and regrettable) tendency of the High Court to distance itself from British precedents.

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14 See, eg, *R v Jones (Margaret)* [2006] 2 All ER 741; *R (Al-Skeini) v Secretary of State for Defence* [2007] 3 All ER 685; *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 153; *R (on the application of Gentle) v Prime Minister* [2008] All ER (D) 111.

15 See generally D Chalmers and A Tomkins, *European Union Public Law* (2007).

16 [2006] QB 432.

It is worthwhile stressing that these secondary rules are common law rules, not international law ones — though they are *about* international law, or at least international transactions. In fact each of the common law rules can be set against different, sometimes even contradictory rules of international law, as we will see. They are common law rules of recognition — rules of reception or non-reception, to adapt HLA Hart's terminology. Each legal system has its own rules of reception: that is what it is to be a legal system.

(1) International law as "part" of the law

The first rule goes back to Lord Mansfield and even to Lord Chancellor Talbot.[17] It is that international law is "part of the law of England". By this is meant general international law, the law of nations, as Lord Mansfield called it.[18] (Treaties, though in a sense international law, are not part of the law of England — that is the second rule.)

But to say that the law of nations, or general international law, is in its fullest extent "part" of the law of England or of Australia is not self-explanatory. We might say that the law of torts or restitution is part of the law but we would be talking about issues of internal classification, not relations with another system. Indeed Lord Bingham has suggested that it is more accurate to refer to international law as a "source" of English law.[19] I am not sure that is helpful, since it merely replaces one uncertain term with another. Instead we should disaggregate the notion of "part" or "source" — a much more useful exercise than fiddling with terms such as "adoption" and "transformation", which tend to be used as substitutes for analysis and which imply that there is a difference in kind when there may only be a difference in emphasis. After all a rule can be transformed by being adopted.

Lord Mansfield's rule — itself adopted by Lord Denning[20] — has four elements. The first is about judicial knowledge. The courts acknowledge the existence of a body of international law, whose content is not a matter of evidence but of argument. The courts, duly aided by counsel, can determine for themselves what international law is. It is not, relative to the common law, a foreign system whose rules have to be proved and are presumed (in the absence of proof) to be the same as the common law.

The second element is about judicial authority. In any matter where the courts acknowledge international law to be relevant or to govern, they may apply international law as the rule of decision. In that context international law may also inform the policy of the law — as it did in *Oppenheimer v Cattermole*[21] — qualifying or precluding the recognition of foreign law.

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17 *Buvot v Barbuit* (1737) Cases t Talbot 281.

18 See, eg, *Triquet v Bath* (1764) 3 Burr 1478; *Heathfield v Chilton* (1767) 4 Burr 2015; *Viveash v Becker* (1814) 3 M & S 284.

19 *R v Jones (Margaret)* [2006] 2 All ER 741, 751 [11].

20 See *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 All ER 881, 889–90.

21 [1975] 1 All ER 538.

The third is about judicial integration. International law is not the same as English or Australian law but the latter should be assumed to be consistent with it. Thus legislation trumps — but on matters on which international law has something to say, legislation should be presumed to be consistent with international law if possible.

The fourth is about judicial precedent. A rule of international law applied in this way remains a rule of international law; it is not indigenized or domesticated. If international law changes, then so does the common law rule of decision based on it. That was settled in the *Trendtex Case*,[22] acknowledged by the House of Lords to be rightly decided notwithstanding earlier Court of Appeal authority to the contrary.[23]

Lord Mansfield's rule is of course a rule of the common law, which means it must defer to legislation. It must also defer to fundamental constitutional rules. For example the English courts have held that they are incompetent to create new criminal offences, and this precludes them from recognising in English law new crimes that may develop under international law.[24]

By contrast international law does not in general address the secondary rules of national law; it imposes obligations of result, not of means. Thus a national court which thought it was applying international law could produce a breach of an international obligation — for example, if it got the law wrong or applied it in a case where the State concerned lacked jurisdiction to prescribe or enforce. And a court expressly not applying international law might produce a result consistent or compliant with it.

(2) Treaties as not part of the law

The second rule is at least as fundamental. Treaties are not part of domestic law unless implemented by legislation. The reason is apparent: under common law systems the executive lacks any distinct legislative authority. But that compelling constitutional reason does not mean that a treaty, once implemented, ceases to be a treaty: the rules of interpretation of treaties are themselves rules of international law, now codified in the Vienna Convention on the Law of Treaties.[25]

There are some other qualifications, too. Legislation will be interpreted, if possible, to be consistent with the State's international obligations. I will return to the question whether unimplemented treaties can give rise to legitimate expectations relevant in judicial review — but at any rate it has been held in England that where a public authority gives reasons for a decision which are based on a treaty provision, the courts can review the decision by reference to the correctness of those reasons, or at lest on grounds of *Wednesbury* unreasonableness.[26] And finally, treaties involving third States are not subject to

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22 [1977] 1 All ER 881.
23 *Alcom v Republic of Colombia* [1984] AC 580.
24 See *R v Jones (Margaret)* [2006] 2 All ER 741.
25 1155 UNTS 331.
26 *Wednesbury Corporation v Ministry of Housing and Local Government (No 2)* [1965]

the forum's separation of powers constraints: to the extent those issues are justiciable, the treaty may be relevant. For example they may form a basis for arbitral jurisdiction recognised by the courts, as in *Dallal v Bank Mellat*[27] and *Occidental v Ecuador*.[28]

(3) The scope of prerogative powers

A third rule or cluster of rules concerns the inherent and residual powers of the executive in matters of international relations (what used to be called the prerogative) — for example, the recognition of new states and (where the practice of recognition subsists) governments, or the acquisition of foreign territory. This is the origin of the domestic act of State doctrine, deriving from cases such as *Buron v Denman*.[29] Again it has been qualified in recent British cases concerning overseas territories.

(4) Justiciability of international transactions

Finally, the courts acknowledge that they lack direct authority over international relations and disputes as such. Certain international transactions are not justiciable in common law courts — this is the holding in the *Buttes Oil and Gas Case*.[30] There is no time here to go into the intricacies — simply to mention that the rule was importantly qualified by the House of Lords in the *Iraq Airways Case*: it does not apply to egregious breaches of international law, in that case the seizure and subsequent confiscation of the Kuwait Airlines fleet following the Iraqi invasion of Kuwait.[31]

III. Some Comparisons in the Case-law

Against this background I turn to the case law of the House of Lords and the High Court in the period under review. Evidently it is not possible here to analyse more than 70 cases dealing with issues of international law during this period. Instead I propose to discuss four specific issues dealt with by both courts and to compare and contrast the approaches taken.

(1) "Particular social groups" under the Refugee Convention

The first group of cases concerns the interpretation of the phrase "particular social group" in the Convention Relating to the Status of Refugees of 1951.[32] This phrase forms part of the definition of "refugee" under article 1A(2) of the Convention, which defines a refugee as:

> any person who … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political

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3 All ER 571.

27 [1986] 1 All ER 239.

28 [2006] QB 432.

29 (1848) 1 Exch 769.

30 *Buttes Gas & Oil Corporation v Hammer (No 3)* [1981] 3 All ER 616.

31 *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 3 All ER 209.

32 189 UNTS 150.

> opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. (emphasis added)

In the High Court, this issue arose in *Applicant A v Minister of Immigration and Ethnic Affairs*.[33] The appellants, a husband and wife, lodged applications under the Migration Act 1958 (Cth) for recognition as refugees. The appellants had come to Australia from China. They already had one child, and argued that they feared sterilisation under the "one child policy" in China if they returned. Under s 4(1) of the Migration Act, the term "refugee" has the same meaning as in article 1 of the Refugee Convention.

In *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and another, Ex parte Shah*,[34] a later decision of the House of Lords, the appellants were two Pakistani women who had been forced to leave their homes by their husbands and were at risk of being falsely accused of adultery in Pakistan. They sought asylum in the United Kingdom, claiming that they would be unprotected by the state and risked prosecution for sexual immorality if they were forced to return to Pakistan.

In both cases, the primary issue was whether the appellants were members of a "particular social group" within the meaning of article 1A(2) of the Refugee Convention. The courts reached opposite conclusions, with the Australian majority (over the dissent of Brennan CJ and Kirby J) giving a more restrictive interpretation to the phrase than the majority in the House of Lords.

In *Applicant A*, the High Court majority[35] held that it was not permissible to define a "particular social group" by reference to the act that gave rise to the fear of persecution. In the words of McHugh J:

> There is simply a disparate collection of couples throughout China who want to have more than one child contrary to the one child policy… There is no social attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular social group for Convention purposes. To classify such couples as 'a particular social group' is to create an artificial construct that bears no resemblance to a social group as that term is ordinarily understood. Indeed it is hard to see how such couples are even a group for demographic purposes. It follows that it was not open as a matter of law for the tribunal to conclude that the appellants had 'a well-founded fear of being persecuted for reasons of … membership of a particular social group.'[36]

Gummow J likewise held that there must be a common unifying element binding individuals with similar characteristics or aspirations together before there is a social group of which they are members.[37]

Kirby J dissented. In his words:

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33 (1997) 190 CLR 225 ('*Applicant A*').
34 [1999] 2 All ER 545.
35 Dawson, McHugh and Gummow JJ; Brennan CJ and Kirby J dissenting.
36 *Applicant A* (1997) 190 CLR 225, 270.
37 Ibid 284–85.

> The phrase 'particular social group', where used in the Convention, does not provide a 'general safety net' to cover any form of persecution. But it is clearly a phrase with a wide denotation. It appears in a context which suggests that the 'group' is of a kind that will be subject to the same type of persecution, leading to attempted escape and claim for refuge, as has happened in the past on grounds of race, religion, nationality and political opinion.
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> …
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> The conduct which the appellants fear is conduct targeted at them precisely because of the characteristics which they have as members of their community. Yet it is those characteristics that constitute them as members of a 'particular social group' within that community. Their vulnerability to enforced sterilisation or abortion arises precisely because they have those characteristics… The law and policy which the appellants resist is of such a character, and so incompatible with their basic dignity and physical integrity, that they should not be forced to submit to it. Like infractions of a person's race, religion, nationality or political opinion, the impugned persecutory conduct, as found, attacks features of their very existence as human beings which are fundamental and beyond any country's legitimate law and policy. It both explains and justifies their 'well-founded fear.'[38]

By contrast in *Ex parte Shah* the House of Lords (Lord Millett dissenting) held that article 1A(1) did not require that a particular social group should have an element of cohesiveness. The phrase "particular social group" applied to any group which might be regarded as coming within the Convention's object and purpose. Women could themselves constitute a social group if they lived in a society, such as Pakistan, which discriminated against them on the grounds of sex, and it was immaterial that certain women in Pakistan might be able to avoid the impact of persecution.[39] In the words of Lord Steyn:

> Loyalty to the text requires that one should take into account that there is a limitation involved in the words 'particular social group.' What is not justified is to introduce into that formulation an additional restriction of cohesiveness. To do so would be contrary to the *ejusdem generis* approach… Cohesiveness may prove the existence of a particular social group. But the meaning of 'particular social group' should not be so limited: the phrase extends to what is fairly and contextually inherent in that phrase.[40]

Lord Hope concurred, noting that an "evolutionary approach…must be taken to international agreements."[41] Such an approach enables "account to be taken of changes in society and of discriminatory circumstances which may not have been obvious to the delegates when the Convention was being framed."[42]

Lord Millett, the sole dissenting judge, favoured an interpretation more in line with the restrictive interpretation of the Australian majority:

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38 Ibid 308–10.
39 [1999] 2 All ER 545, 551–70.
40 Ibid 555–56.
41 Ibid 568.
42 Ibid 568.

> It is in my opinion essential to bear in mind at all times that it is not enough for the applicant for asylum to establish that he or she is a member of a particular social group and is liable to persecution. The applicant must also establish that he or she is liable to persecution *because* he or she is a member of the group. The applicant must be the subject of attack, not for himself or herself alone, but because he or she is one of those jointly condemned in the eyes of their persecutors for possession of the characteristic which is common to the group.[43]

(2) Persecution and non-state actors

A second issue, also arising under the Refugee Convention, considered by both courts during the relevant period is that of persecution by non-state actors.

This question came before the High Court in 2004 in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003*.[44] The respondents were Ukrainian nationals who claimed to fear persecution because one of them was proselytizing on behalf of the Jehovah's Witnesses: the husband had been seriously assaulted and feared a repetition of such assaults. The Refugee Review Tribunal held that while it could not exclude that possibility, it was not the result of a deliberate government policy or any unwillingness or incapacity on the part of the Government to provide protection. The High Court unanimously agreed that "persecution" for the purposes of the Convention could be committed by private persons, although something more than individual random acts would be necessary. However, different approaches to the definition of persecution were taken. McHugh J supported a primarily textual approach to interpretation in accordance with article 31 of the Vienna Convention on the Law of Treaties[45] while Kirby J argued for a more expansive interpretation having regard to the history and purpose of the Refugee Convention.[46] Both justices discussed in some detail the various theories adopted in the doctrine in cases of non-governmental persecution. McHugh J gave reasons for rejecting the dominant "protection" theory, which had previously been adopted by the House of Lords:

> When a person fears persecution for a Convention reason from the random and uncoordinated acts of private individuals, the ability of that person's country to eliminate or reduce the risk of persecution may be relevant in determining whether the person has a well–founded fear of persecution... But determining whether the government of the country of nationality is able to prevent harm from the random and uncoordinated acts of private individuals is not a *necessary* element in determining whether the person's fear of harm from random acts is well–founded…
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> In determining the issue of well-founded fear, the critical question is whether the evidence established a real chance that the asylum seeker will be persecuted for a reason proscribed by the Convention, if returned to the country of nationality. If the evidence shows that the persecutors have targeted the asylum seeker, the ability of the country of nationality to protect that person will be relevant to the issue of well-

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43 Ibid 570.
44 (2004) 222 CLR 1 ('*Respondents S152/2003*').
45 1155 UNTS 331. See ibid 24–25 [67]–[69].
46 *Respondents S152/2003* (2004) 222 CLR 1, 37–39 [107]–[111].

> founded fear. If the evidence shows no more than that private individuals randomly harm the class of persons to which the asylum seeker belongs but fails to show that that person has a real chance of suffering harm, the ability of the country to eliminate those acts is irrelevant.[47]

Kirby J, while attracted to that view, was inclined nonetheless to prefer the protection theory:

> The ultimate purpose of the Convention is to shift a very important obligation of external protection from the country of nationality to the international community. On the face of things, this may suggest that there is some good reason for doing so — either the active participation or collusion of that country, its agencies and officials in the persecutory acts, or the failure of that country to afford protection where ordinarily, by international standards, that could be expected… A further reason for hesitation… is that to date, no final court has adopted the third theory. While that is not a reason for inaction where this court concludes that error is clearly shown, it is desirable as far as possible, to observe common approaches to the interpretation and application of an international treaty. This is particularly so in a treaty of major practical significance in the principal countries of refuge which have hitherto generally followed the protection theory, including Australia and the United Kingdom.[48]

The protection theory had previously been adopted by the House of Lords in *Horvath v Secretary of State for the Home Department*[49] and *Adan v Secretary of State for the Home Department*.[50] In *Horvath*, the Lords had held (Lord Lloyd dissenting) that, in a case involving alleged persecution by non-state agents under the Refugee Convention, "persecution" implied a failure by the state to make protection available against the ill–treatment or violence in question.

In their joint judgment in *Respondents S152/2003*, Gleeson CJ, Hayne and Heydon JJ likewise relied on *Horvath* for the proposition that, in cases involving alleged persecution by non-State actors, the willingness and ability of a State to protect its citizens would be relevant to whether the fear of persecution was well-founded, to whether the conduct giving rise to the fear constituted persecution, and to whether a person such as the husband was unable or, owing to fear of persecution, unwilling to avail himself of the protection of his home State.[51] Where sufficient State protection existed, the fear of persecution by others would not be well-founded.[52]

(3) Indefinite executive detention

I turn to a third and more contentious issue, that of indefinite detention, which has arisen in a variety of ways before final courts in Australia, the United Kingdom and also in the United States — notably in the context of Guantanamo Bay.

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47 Ibid 14 [32]–[33].
48 Ibid 38–39 [110]–[111].
49 [2001] 1 AC 489.
50 [1999] 1 AC 293.
51 (2004) 222 CLR 1, 9 [21].
52 Ibid 9–11 [22]–[25].

The key Australian decision is *Al-Kateb v Godwin*,[53] where the High Court by 4 to 3 sanctioned the Executive's power to detain indefinitely a stateless person who could not be returned elsewhere. In doing so the majority took a fundamentally different position to that of the House of Lords in *A v Secretary of State for the Home Department; X v Secretary of State for the Home Department*.[54] This decision created a sharp division between the majority and minority justices (in particular, Kirby and McHugh JJ), notably as to the invocation of principles of international human rights law in constitutional interpretation. It also attracted widespread coverage in the press for "the migrant who couldn't get out of Australia."[55]

Al-Kateb, who was stateless, arrived in Australia in December 2000 without a passport or Australian visa and was taken into immigration detention. In June 2002, he indicated to the Department of Immigration that he wished to leave Australia and return to Kuwait, and if that was not possible, he wished to be sent to Gaza. Section 198(1) of the Migration Act 1958 (Cth) requires removal of unlawful non-citizens "as soon as reasonably practicable". But the Department of Immigration was unable to find a third country to which Al-Kateb could be removed. Meanwhile he was held under indefinite detention in the Woomera Detention Centre.

The majority held that the language of the Migration Act was clear and left no room for any implication that the ability to detain aliens was limited to detention for a "reasonable" period. There was no room for application of a presumption that Parliament did not intend to abrogate fundamental rights and freedoms under the common law or that Parliament intended to legislate consistently with Australia's international obligations, such as the prohibition of arbitrary detention under article 9 of the ICCPR. In the words of McHugh J:

> The words of ss 196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country. The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.[56]

The minority (Gleeson CJ, Gummow and Kirby JJ) held that the impossibility of removal in the foreseeable future highlighted an ambiguity in s 196.[57] They appealed to the principle of interpretation that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights and freedoms unless that intention is manifested by unmistakable and unambiguous language. Had Parliament intended that, contrary to the fundamental freedom of personal liberty, outside the operation of criminal law and without reference to the particular

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53 (2004) 219 CLR 562.
54 [2005] 3 All ER 169.
55 ABC Radio, *Sunday Profile*, 'The Great Dissenter: Justice Michael Kirby', 25 November 2007 <http://www.abc.net.au/sundayprofiile/stories/s1200123.htm>.
56 *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 [33].
57 Ibid 614–15 [144] (Kirby J), 600 [95] (Gummow J), 572 [3] (Gleeson CJ).

circumstances and characteristics of an individual, detention ought to continue indefinitely, this severe curtailment of personal liberty would have been spelt out expressly: an executive obligation to detain someone for the term of their natural life was intolerable.[58] The absence of an express provision to this effect led to the conclusion that the Migration Act required the appellant's release.

But Kirby J went further: not only should the Court read ss 196 and 198 of the Migration Act so as to avoid unlimited executive detention, but the Constitution itself should be so interpreted:

> Whatever may have been possible in the world of 1945, the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts, and especially national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.[59]

Kirby J noted that the conclusion of the minority was supported by the Constitution as read in the light of norms of international law:[60]

> [W]ith every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail.[61]

McHugh J said that the claim that the Constitution should be read consistently with rules of international law overstepped the legitimate role of the judiciary and was "heretical".[62]

> It is not for the courts exercising federal jurisdiction to determine whether the course taken by Parliament is unjust or contrary to human rights.[63]

> If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be *amending* the Constitution in disregard of the direction in s128 of the Constitution. Attempts to suggest that a rule of international law is merely a factor that can be taken into account in interpreting the Constitution cannot hide the fact that, if that is done, the meaning of the Constitution is changed whenever that rule changes what would otherwise be the result of the case.[64]

Al-Kateb v Godwin may be contrasted with the decision of the House of Lords in *A v Secretary of State for the Home Department, X v Secretary of State for the Home Department*.[65] In that case, the claimants, all foreign nationals, had been detained indefinitely — without trial, charge or prospect of being charged under s 23 of the Anti-terrorism, Crime and Security Act 2001, having been certified by

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58 Ibid 578 [22] (Gleeson CJ), 601 [98] (Gummow J), 630 [193] (Kirby J).
59 Ibid 634 [175].
60 Ibid 616–17 [150].
61 Ibid 629 [190].
62 Ibid 589–90 [63].
63 Ibid 595 [74].
64 Ibid 592 [68].
65 [2005] 3 All ER 169.

the Home Secretary as "suspected international terrorists" within the meaning of s 21 of that Act.

The UK had entered a derogation to article 5(1) of the ECHR (the right to liberty and security of the person) which reads as follows.

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The appellants challenged the UK derogation and s 23 of the 2001 Act, claiming that they were inconsistent with article 5 of the ECHR. The Lords upheld the appeal by a margin of eight to one (Lord Walker dissenting), quashed the Order containing the derogation and issued a declaration that s 23 of the 2001 Act was incompatible with articles 5 and 14 of the ECHR insofar as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.[66]

On the question as to whether the measures taken by the government in derogation of article 5(1) were "strictly required by the exigencies of the situation", Lord Nicholls explained that the latitude which "the courts will accord to Parliament and ministers, as the primary decision-makers…will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right,"[67] and applied the doctrine of the variable standard of review:

> The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period.[68]

As to whether the measures in question were "strictly necessary", Lord Hope emphasised the "starting point" for the analysis, namely that "the article 5 right to liberty is a fundamental right which belongs to everyone who happens to be in this country, irrespective of his or her nationality or citizenship."[69] Lord Bingham held that "[t]he conclusion that the Order and s23 are, in Convention terms, 'disproportionate' was 'irresistible.'"[70]

The question of indefinite executive detention also arose before the House of Lords in an important case concerning the UK's involvement in Iraq: *R (Al-Jedda) v Secretary of State for Defence*.[71] The Claimant, a dual national of the UK and Iraq, had been held in custody by British troops at detention facilities in Iraq since

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66 Ibid 215 [73] (Lord Bingham).
67 Ibid 216 [80].
68 Ibid 217 [81].
69 Ibid 222 [106].
70 Ibid 199 [43].
71 [2008] 2 WLR 31.

October 2004 on the basis that his internment was necessary for imperative reasons of security. He had not been charged and there was no prospect that he would be charged. The Claimant argued that his detention infringed his rights under article 5(1) of the ECHR, as given effect by the Human Rights Act. The effect of paragraph 10 of Security Council Resolution 1546 (2004) which provided *inter alia* that "the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq…" was not to eliminate the protection under article 5(1) of the ECHR, via section 6, not to be arbitrarily detained.

The Lords unanimously dismissed the claimant's appeal, holding that the combined effect of UNSCR 1546 and article 103 of the UN Charter was to override the claimant's rights under article 5(1) of the ECHR. But whereas Article 103 overrode the right not to be detained indefinitely without charge or trial, it was not expressed to exclude any form of due process, which still had to be accorded in ways to be decided in pending proceedings. The Human Rights Act continued to have effect, except to the extent expressly provided for by the Security Council resolution. On this point Lord Bingham, who gave the leading speech, held:[72]

> …there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention.[73]

Faced with this last finding, the Executive forthwith released Mr Al-Jedda on to the streets of Baghdad, depriving him of his British nationality at the same time. "Imperative reasons of national security" seem to have evaporated — asserted one week, ignored the next.

In this context I should also refer to the decision of the United States Supreme Court in *Boumediene v Bush*,[74] where the majority held that the constitutional remedy of habeas corpus was available to an alien detainee held indefinitely without trial at Guantanamo Bay, and that the exclusion of the habeas corpus by the Military Commissions Act of 2006 was unconstitutional. The case has nothing directly to do with international law, but it shows how far out of line the majority in *Al-Kateb v Godwin* was in allowing indefinite executive detention within Australia in time of peace. That was the "austerity of tabulated legalism" with a vengeance!

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72 See, agreeing with Lord Bingham, ibid 70 [114] (Lord Rodger), 74 [129] (Baroness Hale), 74 [131] (Lord Carswell) and 80 [152] (Lord Brown).

73 Ibid 51 [38]. See also at 73 [125] (Baroness Hale) and 76 [136] (Lord Carswell).

74 128 S Ct 2229 (2008).

(4) Judicial Review and Legitimate Expectations under Treaties

I turn to a fourth common issue, which is whether unincorporated treaties can — although not having the force of law — give rise to legitimate expectations for the purposes of judicial review. Pursuant to one line of authority, unincorporated treaties have been treated as giving rise of themselves to legitimate expectations, based on the proposition that, where the executive ratifies a treaty, that act constitutes a representation to the public that its decision-makers will act in accordance with the relevant treaty obligations.

This approach was initially developed in Australasian courts, most notably in the Australian High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* in 1995.[75] In *Teoh*, the Court held that ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation that the Minister for Immigration would act in conformity with it, by treating the best interests of a convicted drug offender's children as a primary consideration in determining whether to order the removal of the offender from Australia. The majority (Mason CJ, Deane and Toohey JJ), after affirming the established rule that unimplemented treaties cannot operate as a direct source of individual rights and obligations in Australian law,[76] went on to hold that, nonetheless:

> …ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, *absent statutory or executive indications to the contrary,* that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.[77]

This approach was initially endorsed in a number of English decisions, including *R v Secretary of State for the Home Department, Ex parte Ahmed and Patel*[78] and *R v Uxbridge Magistrates' Court, Ex parte Adimi*.[79] More recently, doubts were expressed as to this approach in *R (ERRC) v Immigration Officer at Prague Airport (UNHCR intervening)*.[80] In that case, the claimants challenged the pre-entry clearance immigration control operated at Prague Airport pursuant to the Secretary of State for the Home Department's scheme, introduced in 1999,

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75 (1995) 183 CLR 273.
76 Ibid 286–88.
77 Ibid 291.
78 [1999] Imm AR 22 (CA).
79 [1999] 4 All ER 520.
80 [2005] 1 All ER 527.

whereby immigration rules were operated extra-territorially rather than simply at UK ports of entry. They applied for judicial review arguing, *inter alia*, that it violated the United Kingdom's international obligations under the Refugee Convention and under customary international law.

The House of Lords held that the obligations imposed by the Refugee Convention upon contracting states concerned the status and civil rights to be afforded to refugees who were within contracting states and therefore could not apply to the individual claimants who had never left the Czech Republic. However generous and purposive its approach to interpretation, the court's task remained one of interpreting the written document to which the contracting states had committed themselves. It had to interpret what the states had agreed.[81] Although the question of justiciability was not dealt with in the House of Lords, it was discussed in the Court of Appeal, where Simon Brown LJ expressed concern that the views he had expressed in *Adimi* and *Ahmed* as to legitimate expectations arising from the ratification of the Refugee Convention were "superficial" and "suspect."[82]

These doubts were echoed in the Australian High Court decision in *Re Minister for Immigration and Multicultural Affairs, Ex parte Lam*, [83] in which McHugh, Gummow and Callinan JJ expressed reservations about the *Teoh* decision, retreating from the position of the Mason High Court on this issue, even though neither party placed *Teoh* directly in issue. The High Court unanimously held that there was no denial of procedural fairness.[84] McHugh, Gummow and Callinan JJ held that the doctrine of legitimate expectations cannot give rise to substantive, rather than procedural rights.[85] All three judges expressed reservations concerning *Teoh*. McHugh and Gummow JJ stated that, "[i]t is one thing for a court in an application for judicial review to form a view as to the expectations of Australians presenting themselves at the gates of football grounds and racecourses. It is quite another to take ratification of any convention as a 'positive statement' made 'to the Australian people' that the executive government will act in accordance with the convention and to treat the question of the extent to which such matters impinge upon the popular consciousness as beside the point."[86]

The justices questioned the propriety of invoking unincorporated treaty obligations: the judiciary should not add to or vary the content of the administrative powers granted to administrative officials "by taking a particular view of the conduct by the Executive of external affairs. Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon

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81 Ibid 542–46 [15]–[21] (Lord Bingham).
82 [2004] QB 811, 830 [51].
83 (2003) 214 CLR 1.
84 Ibid 13–14 [36]–[38], 34 [104], 36 [113]–[115], 48–49 [149]–[151].
85 Ibid 21 [67], 48 [148].
86 Ibid 31–32 [95].

administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power."[87]

Also relevant in the context of legitimate expectations and unincorporated treaties is the later decision of the House of Lords in *R v Asfaw*.[88] Following the dismissal of the defendant's appeal against her conviction, which arose from her use of a fake passport,[89] the Court of Appeal certified that a point of law of general public importance was involved in the decision, namely if a defendant was charged with an offence not specified in s 31(3) of the Immigration and Asylum Act 1999,[90] to what extent was she entitled to rely on the protections afforded by article 31 of the 1951 Refugee Convention. The Lords held that there could be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with international obligations. It was for Parliament to determine the extent to which those obligations were to be incorporated. As stated by Lord Bingham, who gave the leading judgment in the case:

> …it is plain… that the Convention as a whole has never been formally incorporated or given effect in domestic law. While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation.
>
> The appellant sought to assert that she had a legitimate expectation that the UK would honour its obligation under article 31 of the Convention. But she cannot, at the relevant time, have had any legitimate expectation of being treated otherwise than in accordance with the 1999 Act.[91]

From the time *Teoh* was handed down, it was a subject of concern for the Australian Executive and Parliament. Both the Labor and Coalition governments attempted to mitigate the effect of the *Teoh* judgment. The 1995 Executive Statement expressly provides that merely entering into a treaty, without further parliamentary action, would not raise a legitimate expectation that administrative decision makers will act in accordance with its provisions.[92] The 1997 Executive Statement was in similar terms.[93] Both these governments unsuccessfully

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87 Ibid 33–34 [102].

88 [2008] All ER (D) 274 (May).

89 [2006] All ER (D) 311 (Mar).

90 Section 31 relevantly provides as follows: (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he — (a) presented himself to the authorities in the United Kingdom without delay; (b) showed good cause for his illegal entry or presence; and (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. …

91 [2008] All ER (D) 274 (May) [29]–[30].

92 Minister for Foreign Affairs and the Attorney-General, 'International Treaties and the High Court decision in *Teoh*' (Press Release, 10 May 1995).

93 Minister for Foreign Affairs and the Attorney-General and Minister for Justice, 'The Effect of Treaties in Administrative Decision-Making' (Press Release, 25 February

attempted to introduce legislation to reverse the effect of *Teoh*. Recent decisions of the High Court and House of Lords in relation to unincorporated treaties and the question of legitimate expectations suggest a retreat from principles espoused by the High Court in *Teoh*, reflecting an increasing caution about the role of unimplemented treaties.[94]

IV. Conclusions

It is time to take stock. In the United Kingdom and other dualist common law countries a change is gradually taking place in terms of the interaction between international law and national laws. This can be seen by greater ease in the handling of international materials, now evident in the House of Lords: international developments are no longer being treated as arrivals from outer space. It is also evidenced by a new recognition concerning the use which may be made by judges of international human rights principles, reflecting the growing body of international human rights law and the importance of its content. According to Kirby J, this is "both a natural and desirable development in our marvellously flexible and adaptable system of the common law. It is one which is in general harmony with the development of the international law of human rights."[95] But in Australia that is a minority view: one hears instead that international human rights are vague and imprecise — as if the modern common law of negligence or restitution were in all respects crystalline![96]

Indeed, there is a certain tendency for the High Court to pass by, metaphorically, on the other side, saying in effect that we are not as other final courts are.[97] Of course, each final court retains the last word in its own system, and one should be wary of facile comparativism as much as of facile internationalism. But the proposition that the executive is legally required to keep someone in

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1997).

94 In cognate areas see, eg, M Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1; A Duxbury, 'The impact and significance of *Teoh* and *Lam*', in M Groves and H Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 299; Sir A Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Journal of Administrative Law* 103; M Groves 'Is Teoh's case still good law?' (2007) 14 *Australian Journal of Administrative Law* 126; H Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423; S Blay and R Piotrowicz, 'The Awfulness of Lawfulness: Some Reflections on the Tension between International Law and Domestic Law' (2001) 21 *Australian Yearbook of International Law* 1; D Meagher, 'The "Tragic" High Court Decisions in Al–Kateb and Al Khafaji: Triumph of the "Plain Fact" Interpretive Approach and Constitutional Form Over Substance' (2005) 7(4) *Constitutional Law and Policy Review* 69.

95 Justice M Kirby, 'The Growing Rapprochment between International Law and National Law' in G Sturgess and A Anghie (eds), *Visions of the Legal Order in the 21st Century: Essays to Honour His Excellency Judge C J Weeramantry* <www.hcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm>.

96 H Charlesworth et al, above n 94, 446.

97 Cf Luke, 18:11.

administrative detention in Australia for the rest of his life — so compelled by a statutory provision containing the word "until" — is amazing and, frankly, disreputable. At a lower forensic temperature, the apparent lack of concern at uniform interpretation of major multilateral treaties such as the Refugee Convention is disappointing — though one must acknowledge the care and comprehensiveness of McHugh J's review of the international materials in *Respondents S152*.[98]

Moreover the other approach does not imply the catastrophic consequences hinted at, for example, by Callinan J in *Al-Kateb v Godwin*;[99] and at greater length in *Western Australia v Ward*.[100] Nor does it imply the so-called "loose-leaf Constitution" amusingly parodied by McHugh J.[101] We must always remember that it is a Constitution we are interpreting; and new developments at the international level may have to be taken into account without usurping the role of the Australian people under section 128. What is external affairs is different in our time, different at least in degree: *Koowarta v Bjelke-Petersen*;[102] *Tasmanian Dams*.[103] In *Al-Kateb v Godwin*, Gummow J helpfully analysed the relevance of the 20th century development of statelessness for the aliens power.[104] Gleeson CJ pointed out that reference to human rights was not new[105] — he might have added that the content of what we think of as fundamental rights has changed, and changed in part because of developments in international law. None of this seems "heretical".

So let us celebrate Justice Kirby's promotion of international law as a legitimate influence on the development of Australian law, especially in the field of fundamental rights — legitimate within the framework of the common law tradition I analysed earlier. And as is fitting for this first Kirby Lecture, I leave Michael Kirby with the last word:

> as international law grows in quantity, subject matter and importance, it is both inevitable and proper that national legislatures will seek (where their Constitution does not already so provide) that they have a more effective say in the consideration of ratification and in their impact on domestic law. The task of reconciling the growing body of international law with the domestic legal system remains an important and acute one. In the matter of fundamental human rights of universal application, it is inevitable, as Justice Brennan said in *Mabo* that the influence of international law will grow and the *rapprochment* between the two systems will continue.[106]

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98 Above n 44.
99 See (2004) 219 CLR 562, 652–62.
100 (2002) 213 CLR 1.
101 *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–95.
102 (1982) 153 CLR 168.
103 *Commonwealth v Tasmania* (1983) 158 CLR 1.
104 (2004) 219 CLR 562, 596–98.
105 Ibid 577.
106 Kirby, above n 95.

High Court cases dealing with International Law issues 1996 — 2008

Year	Case	Issue	Kirby J dissent?
1997	*Kruger v Commonwealth* (1997) 146 ALR 126	International conventions — effect on domestic law when legislation enacted prior to treaty obligations	N/A
	Applicant A v Minister of Immigration and Ethnic Affairs (1997) 142 ALR 331	Refugee Convention — treaty interpretation — "particular social group"	Y Sep Op
	Newcrest Mining (WA) Ltd v Commonwealth (1997) 147 ALR 42	Australian Constitution — interpretation consistent with international law?	N Sep Op
1998	*Kartinyeri v Commonwealth* (1998) 152 ALR 540	Australian Constitution — interpretation consistent with international law?	Y Sep Op
1999	*AMS v AIF* (1999) CLR 160	Australian legislation — consistent interpretation with international law?	N Sep Op
2001	*Commonwealth v Yarmirr* (2001) 184 ALR 113	Sovereignty & territorial sea — native title rights	Y (part) Sep Op
2002	*Western Australia v Ward* (2002) 191 ALR 1	Australian legislation — interpretation consistent with international law?	N Sep Op
2003	*Blunden v Commonwealth* (2003) 203 ALR 189	Jurisdiction over collisions on the high seas	N Sep Op
	Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc (2003) 200 ALR 39	Coastal state jurisdiction — flags of convenience	N
	Re Minister for Immigration and Multicultural and Indigenous Affairs, Ex parte Lam (2003) 195 ALR 502	Unincorporated treaties — legitimate expectations	N/A
2004	*Al Kateb v Godwin* (2004) 208 ALR 124	Australian Constitution and legislation — interpretation consistent with international law?	Y Sep Op
	Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (2004) 208 ALR 271	Australian legislation — interpretation consistent with international law?	Y Sep Op
	Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji (2004) 208 ALR 201	Australian Constitution and legislation — interpretation consistent with international law?	Y Sep Op
	Truong v The Queen (2004) 205 ALR 72	Extradition — principle of speciality	Y Sep Op
	Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487	Refugee Convention — "protection" & "persecution"	N Sep Op

Year	Case	Issue	Kirby J dissent?
	Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 206 ALR 130	Australian legislation — conflict with international law obligations	N Sep Op
2006	*Ferdinands v Commissioner for Public Employment* (2006) 224 ALR 238	Australian legislation — interpretation consistent with international law?	Y Sep Op
	Vasiljkovic v Commonwealth (2006) 228 ALR 447	Extradition –interpretation of Australian legislation & Constitution in accordance with international law	Y Sep Op
	XYZ v Commonwealth (2006) 227 ALR 495	Extra-territorial legislation — external affairs power	N Sep Op
	Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 (2006) 231 ALR 340	Refugee Convention — treaty interpretation — "protection obligations"	Y Sep Op
2008	*R v Tang* [2008] HCA 39	Slavery Convention — definition of "slavery"	Y (part) Sep Op

House of Lords cases dealing with International Law issues 1996 — 2008

Year	Case	Issue
1996	*T v Secretary of State for the Home Department* [1996] 2 All ER 865	Refugee Convention — "serious non-political crime", & relationship to political offence exception
	Abdi v Secretary of State for the Home Department [1996] 1 All ER 641	Refugee Convention — safe third country
	R v Latif [1996] 1 All ER 353	Extraterritorial criminal jurisdiction
1997	*R v The Secretary of State for the Home Department, Ex parte Launder* [1997] 3 All ER 961	Unincorporated treaties — legitimate expectations
	Sidhu v British Airways plc; Abnett (known as Sykes) v British Airways plc [1997] 1 All ER 193	Treaty interpretation
	Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd (the Nagasaki Spirit) [1997] 1 All ER 502	Treaty interpretation
1998	*R v Secretary of State for the Home Department, Ex parte Adan* [1998] 2 All ER 453	Refugee Convention –past persecution
1999	*R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 1)* [1998] 4 All ER 897; *R v Bow Street Metropolitan Stipendiary*	State immunity

Year	Case	Issue
	Magistrate, Ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 97	
	Islam v Secretary of State for the Home Department [1999] 2 All ER 545	Refugee Convention — particular social group
2000	*Holland v Lampen-Wolfe* [2000] 3 All ER 833	State immunity
	Re Burke [2000] 3 All ER 481	Extradition — interpretation of extradition treaty
	Re Ellis [2000] 1 All ER 113	Extradition — double criminality
	Horvath v Secretary of State for the Home Department [2000] 3 All ER 577	Refugee Convention — persecution by non-State agents
	R v Secretary of State for the Home Department, Ex parte Adan; [2001] 1 All ER 593	Refugee Convention — persecution by non-State agents
	R v Ministry of Defence, Ex parte Walker [2000] 2 All ER 917	Armed forces — compensation for injuries sustained abroad
2001	*Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122	Deportation — threat to national security
	Re Al-Fawwaz [2002] 1 All ER 545	Extradition — double criminality
	Shanning International Ltd (in liq) v Lloyds TSB Bank plc [2001] 1 WLR 1462	EC sanctions — affect on claim for breach of contract
2002	*Morris v KLM royal Dutch Airlines* [2002] 2 All ER 565	Treaty interpretation
	Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5) [2002] 3 All ER 209	Act of state doctrine
	R (on the application of Saadi) v Secretary of State for the Home Department [2002] 4 All ER 785	Detention — Article 5(1)(f) ECHR
	R v Lyons (on appeal from the Court of Appeal (Criminal Division)) [2002] 4 All ER 1028	Effect of unincorporated treaties
2003	*Société Eram Shipping Co Ltd v Hong Kong and Shanghai Banking Corporation Ltd* [2003] 3 All ER 465	Civil jurisdiction and extraterritoriality
2004	*Re McKerr* [2004] 2 All ER 409	Relationship between treaty law and English law — Article 2 ECHR
	Re McFarland [2004] All ER (D) 329	Relationship between treaty law and English law — treaty provision in policy statement rather than statute
	R (Ullah) v Special Adjuciator [2004] 3 All ER 785	ECHR - expulsion and extradition
	R (Razgar) v Secretary of State for the Home Department (No 2) [2004] 3 All ER 821	ECHR — expulsion
	Government of the United States of America v Montgomery (No 2)	ECHR article 6 — judicial enforcement of external confiscation order

Year	Case	Issue
	[2004] 4 All ER 289	
	R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2005] 1 All ER 527	Unincorporated treaties — legitimate expectations
	A v Secretary of State for the Home Department [2005] 3 All ER 169	ECHR — derogation from IHR obligations
2005	*R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 4 All ER 263	ECHR — article 3
	Lesotho Highlands Development Authority v Impregilo SpA [2005] 3 All ER 789	Challenge to arbitral award
	R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2006] 3 All ER 111	ECHR — application of Protocol to British Overseas Territories
	Office of the King's Prosecutor, Brussels v Cando Armas [2006] 1 All ER 647	Extradition — territoriality
	A v Secretary of State for the Home Department [2006] 1 All ER 575	ECHR; Torture Convention — admissibility of evidence obtained through torture
	Re Deep Vein Thrombosis and Air Travel Group Litigation [2006] 1 All ER 786	Treaty interpretation
2006	*Januzi v Secretary of State for the Home Department* [2006] 3 All ER 305	Refugee convention — definition of 'refugee'
	Kay v Lambeth London Borough Council [2006] 4 All ER 128	ECHR — inconsistency between ECtHR decisions and domestic authority
	R v Jones (Margaret) [2006] 2 All ER 741	Customary IL — incorporation into domestic law
	Jones v Saudi Arabia [2007] 1 All ER 113	State immunity
	K v Secretary of State for the Home Department [2007] 1 All ER 671	Refugee Convention — definition of refugee
2007	*Dabas v High Court of Justice in Madrid, Spain* [2007] 2 All ER 641	Statutory construction — European Council framework decision
	R (Hurst) v London Northern District Coroner [2007] 2 All ER 1025	Unincorporated treaties
	R (Al-Skeini) v Secretary of State for Defence [2007] 3 All ER 685	ECHR — jurisdiction & extra-territorial application
	AH (Sudan) v Secretary of State for the Home Department [2007] 3 WLR 832	Refugee Convention — internal relocation alternative
	R (Al-Jedda) v Secretary of State for Defence [2008] 2 WLR 31	ECHR article 5; UN SCR
2008	*Norris v Government of the United States of America* [2008] All ER (D) 158 (Mar)	Extradition — elements of offence charged required to correspond to elements of offence under English law
	R (on the application of Animal Defenders International) v Secretary of State for Culture,	ECHR — restriction on freedom of expression

Year	Case	Issue
	Media and Sport [2008] All ER (D) 155 (Mar)	
	R (on the application of Gentle) v Prime Minister [2008] All ER (D) 111 (Apr)	ECHR — duty to hold inquiry
	R v Asfaw [2008] All ER (D) 274	Unincorporated treaty — legitimate expectations
	McKinnon v Government of the United States of America [2008] 1 WLR 1739	Extradition — abuse of process
	R (Corner House Research) v Director of the Serious Fraud Office [2008] 3 WLR 568	Unincorporated treaties
	EM (Lebanon) v Secretary of State for the Home Department [2008] 3 WLR 931	ECHR — deportation
	R (Wellington) v Secretary of State for the Home Department [2008] 2 WLR 48	ECHR — non-refoulement