

THE 2009 JAMES CRAWFORD BIENNIAL LECTURE ON INTERNATIONAL LAW

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THE GROWING IMPACT OF INTERNATIONAL LAW ON THE COMMON LAW**

I INTRODUCTION

This is the fourth Crawford lecture. The first was given by the Professor James Crawford himself. He was followed by Professors Ivan Shearer and Hilary Charlesworth. Each of the first three lecturers was at one time a member of the Faculty, and a Professor of Law, of the University of Adelaide. I am the first outsider to be entrusted with the responsibility.

Still I am no stranger to the University of Adelaide. During my service in the Australian Law Reform Commission ('ALRC'),¹ and later in the appellate judiciary, I enjoyed a close relationship with this law school. In particular, Adelaide has spawned many fine international lawyers. It has always been an important centre for research and teaching in international law.

Like Caesar's Gaul, this lecture is divided into three parts. The first will offer a tribute to James Crawford, a friend since early days in the ALRC. Secondly, I will describe the conversation that is occurring between the common law and the ever-growing body of international law that is such a powerful force in the contemporary world. I will do so not only by reference to developments that have been occurring in Australia and the United Kingdom (the original source of the common law), but also in Malaysia and Singapore, as well. I include these jurisdictions out of respect for our intellectual links with them and the video link that is established on this lecture as on past occasions, with alumni of the University of Adelaide and other colleagues in Malaysia and Singapore with whom the University of Adelaide enjoys a special relationship. Finally, I will offer some thoughts as to how one might conceptualise the growing use that is being made of

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¹ The Australian Law Reform Commission ('ALRC') was, prior to 1996, called the 'Law Reform Commission'. However, for consistency, it will be referred to as the 'ALRC' throughout this article.

international law in expositions of the domestic common law. In doing this, I will also provide some prognostications.

The topic is technical. However, I hope to demonstrate that it is also interesting for the dynamic of change and development that it illustrates in the discipline of law. Clearly, it is important because it concerns the relationship of the law of national jurisdictions with the modern world of global law, technology, trade and other relationships.

II THE HONORAND: JAMES CRAWFORD

James Crawford was born in Adelaide in 1948. He was educated at Brighton High School and the University of Adelaide. He proceeded to Oxford University where he took his D Phil degree before returning to Adelaide as a lecturer in law in 1974. In fewer than ten years, he had been appointed a Reader and then Professor of Law. It was at that time, in 1982, that I persuaded him to leave leafy Adelaide and to accept appointment in the ALRC, whose foundation commissioners had included two other Adelaide alumni and teachers, Professors Alex Castles and David St L Kelly. I pay a tribute to the contributions that the Adelaide Law School and legal profession made to the creation of the ALRC. It may have been the influence of the early German settlers that rendered Adelaide a special place for reform and critical examination of society and its laws. Adelaide has long been a place open to new ideas about the law.

James Crawford came to Sydney to take charge of a reference that had been given to the ALRC concerning the recognition of Aboriginal customary laws.² He steered the Commission to producing an outstanding report. The topic was highly controversial, indeed divisive. Many of the report's proposals have not been translated into positive law. Nevertheless, the conduct of the investigation, under Professor Crawford, materially altered the *Zeitgeist* in Australia concerning the interface of the received law and our indigenous peoples. It promoted the notion, novel for the time, that the Australian legal system had far to go in adjusting to the laws and customs of the indigenes of the continent. It is probably no coincidence that the crucial step of re-stating the common law of Australia to recognise Aboriginal native title took place in the *Mabo* decision of 1992.³ Moreover, the key that unlocked the door to that ruling, rejecting earlier statements of the common law, was a recognition, given voice by Brennan J (himself earlier an ALRC commissioner), that the universal principles of human rights law were inconsistent with a common law rule based upon discrimination against indigenous citizens by reference to their race. Such a rule had to adjust.⁴

James Crawford was energetic as an ALRC commissioner. He led other projects, including one on sovereign immunity,⁵ and another on reform, patriation

² ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

⁴ (1992) 175 CLR 1, 42 (Brennan J).

⁵ ALRC, *Foreign State Immunity*, Report No 24 (1984).

and federalisation of Admiralty law and jurisdiction in Australia.⁶ The recommendations made in those projects were, almost without exception, translated into Australian law.⁷

In 1986, whilst still serving as an ALRC commissioner, Professor Crawford was appointed Challis Professor of International Law at the University of Sydney. He became Dean of the Sydney Law School in 1991. He held that post until 1992. He was then elected Whewell Professor of International Law at the University of Cambridge. This is an appointment he still holds; whilst also serving for a time as Chair of the Faculty Board of Law; serving as a member and rapporteur of the United Nations International Law Commission (1991–2001); publishing several respected legal texts; building a large practice as an advocate before international courts and tribunals; and assuming important positions in international bodies, including as a conciliator and arbitrator nominated by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes ('ICSID'). Many of Professor Crawford's recent activities have involved him in international commercial arbitration. This was the subject that he addressed on his return to the University of Sydney in 2009 to deliver an invited lecture to celebrate that University's new institutional home for its law school.⁸

James Crawford's stellar career demonstrates that he is one of the most famous of the alumni of the University of Adelaide. He is certainly one of the world's leaders in scholarly analysis of the directions of international law. In the last year of my service on the High Court of Australia, he inaugurated a lecture series at the Australian National University named after me.⁹ Now I repay the compliment. It is not a heavy burden because each of us has had that peculiar and beneficial experience of participating, to some degree, in the creation of international law. In his case, this has been done in the International Law Commission and before international courts and tribunals. In my case, it happened in activities of several of the agencies of the United Nations: UNESCO, the World Health Organisation, the United Nations Development Programme, the International Labour Organisation, UNAIDS, the United Nations Office on Drugs and Crime, and as Special Representative of the Secretary-General for Human Rights in Cambodia.

Engagements in international activities can sometimes dampen the enthusiasm of optimists. However, they also tend to illustrate the dynamism, energy and expansion of international law today. International law grows in harmony with the technology of international flight, shipping, trade, satellites and

⁶ ALRC, *Civil Admiralty Jurisdiction*, Report No 33 (1986).

⁷ *Foreign State Immunities Act 1985* (Cth) and *Admiralty Act 1988* (Cth). Some aspects of the report on Aboriginal customary laws were also implemented, eg by the *Crimes and Other Legislation Amendment Act 1994* (Cth) and the *Native Title Act 1993* (Cth).

⁸ James Crawford, 'Developments in International Commercial Arbitration: The Regulatory Framework' (Speech delivered at the University of Sydney Distinguished Lecture Series, The University of Sydney, 4 May 2009).

⁹ James Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison' (2009) 28 *Australian Year Book of International Law* 1.

telecommunications. It advances under the impetus of global media, trade and problems demanding global solutions. It spreads in response to the needs of human beings to secure, and enforce, laws that reduce the perils of modern warfare and encourage the harmonious accommodation of differences; the alternative to which is unprecedented destruction of the environment, the species, or both.

This is an exciting time to be engaged with international law. James Crawford, educated in Adelaide at this University, is one of the most brilliant legal actors on the scene. We, his students, friends, colleagues, teachers and admirers, are proud of his accomplishments. Especially so because he has always remained distinctively Australian.

III INTERNATIONAL LAW AND COMMON LAW

A *Defining the Issues*

I now intend to explore the influence of international law on the common law. The common law is the body of judge-made law declared in each jurisdiction by superior court judges in the course of resolving disputes brought before them for decision.

I put aside two important, but different, problems, namely the influence of international law on the construction of written constitutional texts and on the interpretation of ordinary legislation. Upon the first of these subjects sharp differences of opinion have been expressed in the High Court of Australia.¹⁰ Similar differences have emerged in the reasoning of the judges in the Supreme Court of the United States of America.¹¹ Depending upon the view taken concerning the proper approach to interpreting a constitutional text, international law may be regarded as irrelevant because it is outside the ‘original intent’ of those who first adopted and accepted the constitutional text.¹² Interesting although this particular debate undoubtedly is, it is not the subject of this lecture.

Nor am I concerned with the extent to which domestic courts should read contemporaneous statutory provisions so as to be as consistent as possible with universal principles of international law. At the beginning of the Australian Commonwealth, in 1908, in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*,¹³ Justice O'Connor declared that ‘every statute is to be interpreted and

¹⁰ See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62]; cf at 617 [152].

¹¹ See, eg, *Atkins v Virginia* 536 US 304 (2002) (US Supreme Court); *Lawrence v Texas* 539 US 558 (2003) (US Supreme Court); *Roper v Simmons* 543 US 551 (2005) (US Supreme Court). See also Michael Kirby, ‘International Law — the Impact on National Constitutions’ (2006) 21 *American University International Law Review* 327.

¹² See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–5 [181]–[182] (Heydon J).

¹³ (1908) 6 CLR 309. See also *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Plaintiff S157/2000 v Commonwealth* (2002) 211 CLR 476, 492 (Gleeson CJ).

applied so far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.¹⁴

This is another very interesting question, highly relevant to the discovery of the law applicable in a number of instances, given that statute law has now overtaken common law as the source of most of the law of modern nations. The influence of international law on the interpretation of statutes, at least where such statutes are not specifically enacted to give effect to international legal obligations, is also a matter of debate, at least in Australia.¹⁵ I explored this question in an earlier lecture at the University of Adelaide, published in this *Review*.¹⁶ The topic has also been the subject of debate in the courts of the United Kingdom. However, both by the common law,¹⁷ and now by provisions of the *Human Rights Act 1998* (UK),¹⁸ it is generally regarded in that country as proper for courts to resolve any ambiguity by interpreting the statute, so far as this is possible, to conform with the applicable principles of international law, especially if those principles express the law of universal human rights. This is another interesting and important controversy. However, this lecture is not the occasion to explore it.¹⁹

Instead, I intend to concentrate on the interface between the common law and international law, as expressed in customary law and in treaties, by examining how international law has come to influence judicial declarations as to the content of the common law. I will do this by reference to case law and academic analysis (including some observations by James Crawford himself). I will mention cases arising in the United Kingdom, Australia, Malaysia and Singapore. My survey will afford a number of pointers as to emerging trends.

In earlier times, before the establishment of the United Nations Organisation in 1945, international law was much more modest in its content and applications. However, since at least the mid-1970s, both in Europe and in countries of the Asia-Pacific region, international law has begun to cover a much wider range of subjects. Lord Denning in 1974 expressed the opinion that, in Britain, the influx of cases with a European element, as he put it, was like ‘an incoming tide [which] cannot be held back’.²⁰ Undoubtedly, the close ties with European institutions forged

¹⁴ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.

¹⁵ See, eg, *Coleman v Power* (2004) 220 CLR 1, 93–9 [243]–[257]. Similar issues have arisen in the United Kingdom: *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; Francis Bennion, *Statutory Interpretation — A Code* (LexisNexis Butterworths, 4th ed, 2002) 779.

¹⁶ Michael Kirby, ‘A Century of *Jumbunna*: Interpretive Principles and International Law’ (2010) 31 *Adelaide Law Review* 1.

¹⁷ See *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771 (Lord Diplock); *R v Secretary of State for the Home Department; Ex parte Brind* [1991] AC 696, 747–8 (Lord Bridge), 760 (Lord Ackner).

¹⁸ *Human Rights Act 1998* (UK) s 6 (‘*Human Rights Act*’).

¹⁹ See Kirby, above n 16.

²⁰ *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

by the United Kingdom in the past thirty years have proved a catalyst for legal change and for bringing international law more directly into the legal system of the United Kingdom. The same dynamic has not been present in the cases of Australia, Malaysia or Singapore.

The *Human Rights Act*, which came into domestic effect in the United Kingdom as from 2000, has had a large impact on the reasoning of British lawyers and judges. When a body of law becomes an element in the daily concerns of a lawyer, it is inevitable that its provisions will influence the way other parts of the law will be viewed and interpreted. A new habit of mind develops which cannot but influence the way lawyers and judges approach problems. And how they discover and apply the law that is needed for the resolution of legal contests.

B UK Customary International Law

It is useful at the outset to consider the influence of customary international law on the development of the common law of England. This requires examination of the incorporation/transformation debate.²¹ Is international law *incorporated*, as such, into the domestic legal system or must it first be *transformed* into domestic law in order to be recognised? The extensive discussion of these concepts in academic literature has attracted sharp divisions of opinion.²² With a few exceptions,²³ however, the courts in common law countries have ‘generally eschewed analysis

²¹ For a discussion of the two concepts, see *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529, 553 (Lord Denning MR) (*‘Trendtex’*).

²² See, eg, the discussions in Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 128; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 41; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 131; Rebecca M M Wallace, *International Law* (Sweet & Maxwell, 5th ed, 2005) 40; J G Collier, ‘Is International Law Really Part of the Law of England?’ (1989) 38 *International and Comparative Law Quarterly* 924; Daniel P O’Connell, ‘The Relationship between International Law and Municipal Law’ (1960) 48 *Georgetown Law Journal* 431, 444; Andrew J Cunningham, ‘The European Convention on Human Rights, Customary International Law and the Constitution’ (1994) 43 *International and Comparative Law Quarterly* 537, 547; Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, 1997) 11–2; Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 451; Felice Morgenstern, ‘Judicial Practice and the Supremacy of International Law’ (1950) 27 *British Year Book of International Law* 42; Hersch Lauterpacht, ‘Is International Law a Part of the Law of England?’ (1939) 25 *Transactions of the Grotius Society* 51; Kristen Walker, ‘Treaties and the Internationalisation of Australian Law’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 204, 227; Sir Anthony Mason, ‘International Law as a Source of Domestic Law’ in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 210, 212.

²³ See, eg, *Trendtex* [1977] QB 529, 553 (Lord Denning MR). In the Australian context, see *Nulyarimma v Thompson* (1999) 96 FCR 153, 178–91 (Merkel J) (Federal Court of Australia).

of the role of custom by reference to the distinction between incorporation and transformation'.²⁴ Many judges have treated the controversy as substantially esoteric. Lord Justice Stephenson, for example, remarked 30 years ago that 'the differences between the two schools of thought are more apparent than real'.²⁵

Impatience with the supposed distinction is not confined to the judiciary.²⁶ The somewhat illusory nature of the incorporation/transformation debate has encouraged academic commentators to look for alternative taxonomies, or to abandon such rigid classifications altogether. Professor Crawford, for example, has urged lawyers to focus not on the labels 'incorporation' and 'transformation' but on how, in practical terms, customary international law has actually influenced the decisions of courts in individual cases.²⁷ Writing with W. R. Edeson, Professor Crawford noted that '[t]he difficulty with slogans in the present context is that they fail to give guidance in particular cases'.²⁸

A lack of enthusiasm for the terms 'incorporation' and 'transformation' does not mean that these words serve no useful purpose. On the contrary, the practical distinction that the words imply may occasionally provide a valuable insight when assessing, on a case-by-case basis, the changing attitudes towards the use of international law in common law elaboration by the judiciary in the United Kingdom.

If a decision is said to stand for the proposition that customary international law is automatically *incorporated* into domestic law, one can say that the judiciary has adopted a generally favourable stance towards international law. *Incorporation* suggests that customary international law is a distinctive source of law, closely connected with municipal sources. On the other hand, if a decision is said to stand for the proposition that international law must first be *transformed* before it can become part of domestic or national law, the court will be viewed as exhibiting a more cautious attitude towards the use of international law. *Transformation* treats customary international law as distinct and separate from domestic law. Even if, in practice, the technical distinction between the terms is usually more apparent than real, the two expressions tend to reflect differing levels of sympathy for treating customary international law as a legitimate and influential body of legal principles, apt for domestic use by the national judiciary.

²⁴ Triggs, above n 22, 132.

²⁵ *Trendtex* [1977] QB 529, 569 (Stephenson LJ). See also *Nulyarimma v Thompson* (1999) 96 FCR 153, 184 (Merkel J) (Federal Court of Australia).

²⁶ Walker, above n 22, 228.

²⁷ Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', above n 9. See also James Crawford, 'General International Law and the Common Law: A Decade of Developments' (1982) 76 *American Society of International Law Proceedings* 232, 232.

²⁸ James Crawford and William Edeson, 'International Law and Australian Law' in Kevin William Ryan (ed), *International Law in Australia* (Lawbook, 2nd ed, 1984) 71, 78.

At the least, the two labels can be deployed to help plot a pattern of fluctuating judicial attitudes towards the effect of customary international law on the common law of England. A starting point for analysis of the case law is usually taken to be the judicial statements written in the eighteenth century in *Buvot v Barbut*²⁹ and *Triquet v Bath*.³⁰ Those decisions are said to exemplify an approach to international law more closely reflecting the *incorporation* doctrine,³¹ particularly after Lord Talbot declared in *Buvot v Barbut* that ‘the law of nations in its full extent [is] part of the law of England’.³²

This early British enthusiasm for incorporation was, however, qualified by judicial decisions written in the late nineteenth and early twentieth century. Thus, the decisions in *The Queen v Keyn*,³³ and arguably in *West Rand Central Gold Mining Co Ltd v The King*,³⁴ were viewed as signalling the emergence of the *transformation* doctrine.³⁵ If this understanding is correct, the cases suggested that isolationist tendencies and scepticism about the assistance offered by international law were on the rise in the courts of the United Kingdom at that time.

Such a view was not, however, shared by all observers. A number regarded the cases that considered the incorporation/transformation question as ‘ambiguous’.³⁶ Thus, Sir Hersch Lauterpacht thought that the ‘relevance [of *Keyn*’s case] to the question of the relation of international law to municipal law has been exaggerated’.³⁷ Professor Ian Brownlie was likewise of the opinion that the *West Rand* case was fully consistent with the incorporation doctrine. He argued that the oft-cited opinion of Chief Justice Cockburn in that case had been focused on proving the *existence* of rules of customary international law in domestic courts, not on examining whether those rules were in some way *incorporated* in, or had first to be *transformed* into, local law.³⁸

Statements on this issue in the context of customary international law continued to appear in judicial decisions of the English courts throughout the twentieth century. However, many of the decisions tended to obscure the dividing line between the

²⁹ (1736) Cas Temp Talbot 281; 25 ER 777.

³⁰ (1764) 3 Burr 1478; 97 ER 936.

³¹ Brownlie, above n 22, 41; Shaw, above n 22, 129.

³² *Buvot v Barbut* (1736) Cas Temp Talbot 281, 283; 25 ER 777, 778.

³³ (1876) 2 Ex D 63.

³⁴ [1905] 2 KB 391.

³⁵ Sir William S Holdsworth, *Essays in Law and History* (Clarendon Press, 1946) 263–6. See also Ivan Shearer, ‘The Relationship between International Law and Domestic Law’ in Brian R Opeskin and Donald R Rothwell, *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 40; Wallace, above n 22, 41.

³⁶ Shaw, above n 22, 131.

³⁷ Lauterpacht, above n 22, 60.

³⁸ Brownlie, above n 22, 43. See also Mason ‘International Law as a Source of Domestic Law’, above n 22, 210, 214; Collier, above n 22, 929; *Trendtex* [1977] QB 529, 569 (Stephenson LJ); Crawford and Edeson, above n 28, 71, 73.

theories of incorporation and transformation. Thus, in *Chung Chi Cheung v The King*, Lord Atkin said:

[I]nternational law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.³⁹

A few commentators expressed concern about this comment because it appeared to advocate the incorporation and transformation doctrines simultaneously.⁴⁰ Indeed, the quotation from Lord Atkin illustrates the problems of trying to classify judicial statements as falling into either the *incorporation* or the *transformation* camp: treating them as rigidly differentiated alternatives. At an attitudinal level, if labels are left to one side, Lord Atkin's statement spoke relatively clearly. It suggested that customary international law could, and should, influence domestic law. Although the precise impact of international custom remained unclear and the subject of debate, it was obvious that, by the mid-twentieth century, the judiciary in the United Kingdom was moving to an opinion that, at the very least, international law could be a legitimate and valuable *source* of local law in certain cases.

That broadly positive attitude towards international law was affirmed in 1977. In *Trendtex*, Lord Denning held that 'the rules of international law, as existing from time to time, do form part of our English law'.⁴¹ Cases such as *Trendtex*, and later *Maclaine Watson & Co Ltd v International Tin Council (No 2)*,⁴² led many observers of this controversy to conclude that the doctrine of incorporation had finally prevailed in the United Kingdom.⁴³ Such decisions were viewed as confirming the willingness of courts in the United Kingdom to refer to international law when developing and declaring the municipal common law of that jurisdiction.

To avoid becoming enmeshed in the incorporation/transformation debate, several commentators came to refer to customary international law simply as 'a *source* of English law'.⁴⁴ This 'source' formulation resonates closely with the Australian

³⁹ *Chung Chi Cheung v The King* [1939] AC 160, 167–8.

⁴⁰ Triggs, above n 22, 34; Collier, above n 22, 931; O'Connell, above n 22, 446.

⁴¹ [1977] QB 529, 554 (Lord Denning MR), see also 578–9 (Shaw LJ).

⁴² [1989] 1 Ch 286.

⁴³ Shaw, above n 22, 129; Brownlie, above n 22, 44; Triggs, above n 22, 135; Wallace, above n 22, 40; Hunt, above n 22, 11.

⁴⁴ Collier, above n 22, 935. See also O'Connell, above n 22, 445; *R v Jones (Margaret)* [2006] 2 All ER 741, 751 (Lord Bingham). Note, however, the criticisms of this formulation by Crawford, 'International Law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', above n 9; Rosalyn Higgins, 'The

approach to customary international law. However, in the courts of the United Kingdom, the twentieth century witnessed a gradual rise in the familiarity with, and positive attitude towards, customary international law. This was to prove different from the more hesitant judicial approach that had gone before.

C UK Impact of Treaties on the Common Law

When the role of treaties in the development of the common law in the United Kingdom is considered, the *European Convention on Human Rights* ('ECHR')⁴⁵ is now paramount in its importance and influence. International human rights law began to exert a far-reaching influence on British courts even before its domestic incorporation by the *Human Rights Act 1998* (UK) commencing in 2000.⁴⁶ By the late 1970s, United Kingdom courts were regularly turning to human rights treaties, particularly the *ECHR*, to help resolve common law issues.⁴⁷ A review of some of the more significant decisions illustrates the growing acceptance of international law as a useful guide for local judges when expressing the local common law for their own jurisdictions.

In 1976 in *R v Chief Immigration Officer, Heathrow Airport; Ex parte Salamat Bibi*,⁴⁸ a Pakistani woman and her children were refused admission to the United Kingdom for the declared purpose of visiting her husband. Article 8(1) of the *ECHR*, which refers to the right to respect for a person's private and family life, was invoked on the woman's behalf. In response, Lord Denning stated:

The position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it.⁴⁹

This was an influential statement on how the United Kingdom judiciary should approach the use of international law in common law elaboration.

Two years later, in 1978, a case arose involving a claim of unfair dismissal. The *ECHR* was once again relied upon. Lord Justice Scarman said:

Relationship between International and Regional Human Rights Norms and Domestic Law' (1992) 18 *Commonwealth Law Bulletin* 1268, 1273.

⁴⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁴⁶ *Human Rights Act 1998* (UK) sch 1; see Anthony Lester, David Pannick and Javan Herberg (eds), *Human Rights Law and Practice* (Lexis Nexis, 3rd ed, 2009) 914.

⁴⁷ Brownlie, above n 22, 47.

⁴⁸ [1976] 1 WLR 979; [1976] 3 All ER 843.

⁴⁹ *Ibid* [1976] 1 WLR 979, 984; All ER 843, 847.

[I]t is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations.⁵⁰

Although in dissent as to the result in that case, with the passage of time, this statement by Lord Justice Scarman was also to prove highly influential for later judicial thinking in the United Kingdom.

By the 1970s, a shift in judicial attitudes was unquestionably taking place. Still, the courts remained careful not to overstep the mark. In particular, the judges were conscious of the line between the respective responsibilities of the judiciary and of the legislature and executive with respect to international law. Thus, in *Malone v Metropolitan Police Commissioner*,⁵¹ the plaintiff asked the Court to hold that a right to immunity from telephonic interception existed based, in part, on article 8 of the *ECHR*. Although Sir Robert Megarry V-C said that he had given 'due consideration [to the Convention] in discussing the relevant English law on the point',⁵² he cautioned that courts in the United Kingdom could not implement treaties through the back door:

It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.⁵³

In the light of statements such as this, it was clear that the United Kingdom courts were not going to use the Convention to create new substantive legal rights, particularly where these might have widespread consequences, and where the English common law had previously been silent on the subject.

Nevertheless, such caution did not spell an end to the *ECHR* as an influence on the common law in the United Kingdom. The *Malone* case may be contrasted with the decision in *Gleaves v Deakin*,⁵⁴ decided just one year later. In that case, a private prosecution was brought against the authors and publishers of a book, charging them with criminal libel. In its decision, the House of Lords refused to allow the authors and publishers to call evidence before the committal proceedings concerning the generally bad reputation of the prosecutor. Lord Diplock (with Lord Keith of Kinkel agreeing) made a significant suggestion for reform of the common

⁵⁰ *Ahmad v Inner London Education Authority* [1978] QB 36, 48. See also *R v Secretary of State for the Home Department; Ex parte Phansopkar* [1976] QB 606, 626.

⁵¹ [1979] Ch 344.

⁵² *Ibid* 366.

⁵³ *Ibid* 379.

⁵⁴ [1980] AC 477.

law offence of libel. In making his suggestion, Lord Diplock referred to the United Kingdom's international treaty obligations:

The law of defamation, civil as well as criminal, has proved an intractable subject for radical reform. There is, however, one relatively simple step that could be taken which would at least avoid the risk of our failing to comply with our international obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. That step is to require the consent of the Attorney-General to be obtained for the institution of any prosecution for criminal libel. In deciding whether to grant his consent in the particular case, the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specific in article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent.⁵⁵

By the early 1980s, international treaty law was becoming a prominent part of the judicial 'toolkit' in the United Kingdom where judges were faced with difficult issues of common law interpretation and elaboration. In *Attorney-General v British Broadcasting Corporation*,⁵⁶ for example, the Attorney-General had sought an injunction to restrain the BBC from broadcasting a program critical of a Christian religious sect on the ground that the broadcast would prejudice an appeal pending before a local valuation court. An issue for decision in that appeal was whether the local valuation court was a 'court' for the purposes of the High Court's powers governing punishment for contempt of court. Lord Fraser of Tullybelton observed that 'in deciding this appeal the House has to hold a balance between the principle of freedom of expression and the principle that the administration of justice must be kept free from outside interference'.⁵⁷ He went on to say:

This House, and other courts in the United Kingdom, should have regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and to the decisions of the Court of Human Rights in cases, of which this is one, where our domestic law is not firmly settled.⁵⁸

Unsurprisingly, in light of his earlier opinions given in the English Court of Appeal, Lord Scarman adopted a similar approach. He also took note of the United Kingdom's obligations under the Convention in expressing his opinion about the content of the English common law.⁵⁹

Additional steps toward a candid and principled approach to the use of international law on the part of United Kingdom courts occurred in the early 1990s in the decisions in *Attorney-General v Guardian Newspapers Ltd (No 2)*⁶⁰ and *R v Chief*

⁵⁵ Ibid 483.

⁵⁶ [1981] AC 303.

⁵⁷ Ibid 352.

⁵⁸ Ibid.

⁵⁹ Ibid 354.

⁶⁰ [1990] 1 AC 109, 283 (Lord Goff).

Metropolitan Stipendiary Magistrate; Ex parte Choudhury.⁶¹ However, it was in *Derbyshire County Council v Times Newspapers Ltd*⁶² that the strongest statements were expressed regarding the way in which international law could (or even must) be used to interpret and develop the common law where the provisions of international law were relevant to the context of the governing rule.

In issue in *Derbyshire* was whether a local public authority was entitled to bring proceedings at common law for libel to protect its reputation when it was called into question. The authority was a statutory corporation and a legal person. So why should it not be able to sue to vindicate its reputation? The three members of the English Court of Appeal offered different observations on the effect of article 10 of the *ECHR* — at that stage still unincorporated in United Kingdom law — dealing with the right to freedom of expression. The main point of difference between the participating judges concerned the circumstances in which each judge thought it was appropriate to refer to international law.

For Lord Justice Ralph Gibson, reference by a court to such a source could be made when uncertainty existed:

If ... it is not clear by established principles of our law that the council has the right to sue in libel for alleged injury to its reputation, so that this court must decide whether under the common law that right is properly available to the council as a local government authority, then, as is not in dispute, this court must, in so deciding, have regard to the principles stated in the Convention and in particular to article 10.⁶³

Going further, Lady Justice Butler-Sloss expressed the opinion that reference to international law was not only preferable, but mandatory, wherever uncertainty or ambiguity existed. Her Ladyship said:

Where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. ... But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10.⁶⁴

Lord Justice Balcombe went further still. He held that it would be appropriate to refer to any relevant principles of international law, even when there was no ambiguity or uncertainty:

⁶¹ [1991] 1 QB 429, 449.

⁶² [1992] QB 770 (*'Derbyshire'*).

⁶³ *Ibid* 819.

⁶⁴ *Ibid* 830.

Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law. ... Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of article 10.⁶⁵

Although all three of these judicial opinions expressed an acceptance of the use of international law to assist in the development of the common law in particular circumstances, the differences in their respective approaches were striking. The law on the point remained unsettled, awaiting a decision on the point from the House of Lords.

An opportunity for the House of Lords to resolve the question arose in *Director of Public Prosecutions v Jones (Margaret)*.⁶⁶ Although the differences arising from *Derbyshire* were not fully settled in that appeal, three of the Law Lords affirmed the need for ambiguity or uncertainty in the common law before reference to international law would be justified.⁶⁷ However, such a requirement of ambiguity or uncertainty is not one that has been supported by all commentators. For example, Dame Rosalyn Higgins, until recently a Judge and later President of the International Court of Justice, has criticised the prerequisite of ambiguity or uncertainty: ‘If many human rights obligations are indeed part of general international law ... then it surely follows that the old requirement that there be an ambiguity in the domestic law is irrelevant.’⁶⁸ The requirement of uncertainty or ambiguity to warrant resort to international law in these circumstances has also been discussed by Australasian commentators.⁶⁹

It might seem unsatisfying to terminate this analysis with cases in the United Kingdom decided between 1992 and 1999. However, as the House of Lords acknowledged in 2001,⁷⁰ the passage of the *Human Rights Act 1998* (UK) provides a clear legislative basis, when developing the common law, for considering, at least those international human rights norms expressed in the *ECHR*. The need to rely on judge-made rules in identifying the effect of international law was significantly reduced by force of this legislation, if not completely removed. This

⁶⁵ Ibid 812.

⁶⁶ [1999] 2 AC 240.

⁶⁷ Ibid 259 (Lord Irvine); 265 (Lord Slynn); 277 (Lord Hope).

⁶⁸ Higgins, above n 44, 1273.

⁶⁹ See, eg, Walker, above n 22, 217. Ambiguity was originally a pre-requisite for resort to international human rights law under the *Bangalore Principles* of 1988: Michael Kirby, ‘The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms’ (1988) 62 *Australian Law Journal* 514, 531–2. However, that requirement was discarded as these principles were further developed in 1998: cf Kenneth J Keith, ‘Protecting Human Rights in a Time of Terror: The Role of National and International Law’ (2005) 13 *Waikato Law Review* 22, 30–1.

⁷⁰ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 207–8 (Lord Steyn); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] 1 QB 728, 759 (Laws LJ).

was so because, by the Act, the specified provisions of international law were given domestic force in the United Kingdom.

Obviously, there are reasons of principle and convenience for adopting this approach. It allows greater certainty and clarity as to when, and to what extent, international law may be resorted to in order to assist judges in the United Kingdom in expressing, developing and applying the common law. As a matter of basic legal principle, once a legislature, acting within its powers, has spoken in a relevant way, its voice supplants earlier opinions of judges. Those opinions continue to apply, if at all, only to provisions of international law not contained in the *Human Rights Act*.

D Summarising the UK Experience

From this it follows that courts in the United Kingdom have tended to treat customary international law and treaty law as presenting different categories for which different consequences follow. In accordance with the basic dualist approach followed in English law, treaties, as such, are not a source of direct rights and obligations unless validly incorporated into municipal law.⁷¹ Accordingly, the focus of most meaningful consideration of this topic in the United Kingdom is directed at the extent to which such treaties can influence the development of the common law. On the other hand, with customary international law, some decided cases, such as *Trendtex*,⁷² have suggested that such custom, where it expresses universal rules observed by civilised nations, automatically forms a part of domestic law in the United Kingdom. Other cases accept that, whether part of municipal law as such, or not, international customary law may be treated at least as a contextual consideration, relevant to the derivation by national judges of the common law applicable to a particular case.⁷³

One can confidently assert that courts in the United Kingdom today generally approach international law without hostility. More recently, they have done so with a broad appreciation so that the rules of international law may be treated as a source of useful analogies and comparisons. It can thus become a source for inspiration and guidance in the derivation of contemporary common law principles.

When arguments about international law have been raised by the parties, the courts in the United Kingdom have commonly acknowledged them and engaged with the issues and arguments they present. When international law has afforded possible guidance upon difficult or undecided common law questions, courts in the United Kingdom have not shied away from treating such international law as a useful source of knowledge and legal principle. As will be demonstrated, this conclusion is confirmed by the fact that statements on the potential utility of international law began to appear in Britain much earlier than, say, in Australia. Moreover, judicial

⁷¹ This principle is long established in the common law. It was stated in *Parlement Belge* (1879) 4 PD 129 (English Court of Appeal), if not earlier.

⁷² *Trendtex* [1977] QB 529.

⁷³ See, generally, *Ahmad v Inner London Education Authority* [1978] QB 36.

attitudes of indifference or hostility to international law in judicial reasoning have been less evident in the United Kingdom than elsewhere in Commonwealth countries. The question is presented: why should this be so?

E Australian Approaches to International Law

The Australian experience with international law as an influence on the development of its common law has, so far, reflected a somewhat different history. For two countries with such a long shared legal experience, particularly in respect of the common law, it is striking to notice that the developments in this area have often been so markedly distinct. While each jurisdiction now appears to be moving on a generally similar path towards ultimately similar outcomes, the paths travelled to get there have by no means been identical.

Generally speaking, the Australian judiciary has displayed a much greater hesitation towards treating international law as a legitimate and useful source of legal ideas, reasoning and principles. Commentators have noted that ‘anxieties’ appear to exist in the attitudes of many Australian judges (and other decision-makers) so far as international law is concerned. It has been argued that such ‘anxieties’ may stem from some or all of the following sources:

[T]he preservation of the separation of powers through maintaining the distinctiveness of the judicial from the political sphere; the fear of opening the floodgates to litigation; the sense that the use of international norms will cause instability in the Australian legal system; and the idea that international law is essentially un-Australian.⁷⁴

Whilst courts must act with due respect to the separation of constitutional powers, the Australian judiciary has occasionally appeared ambivalent on this rule.⁷⁵ It has acted with substantial hesitation, when it came to considering international law. Every now and then, the scepticism and even hostility towards international law has been expressed. Thus, in *Western Australia v Ward*,⁷⁶ Justice Callinan, in the High Court of Australia, remarked:

There is no requirement for the common law to develop in accordance with international law. While international law may occasionally, perhaps very occasionally, assist in determining the content of the common law, that is the limit of its use.⁷⁷

⁷⁴ Charlesworth, above n 22, 446.

⁷⁵ See, eg, *Combet v Commonwealth* (2005) 224 CLR 494, 594; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 134; *White v Director of Military Prosecutions* (2007) 231 CLR 570, 602–3.

⁷⁶ (2002) 213 CLR 1.

⁷⁷ *Ibid* 389 [958] (Callinan J).

Justice Callinan's attitude to international law in the Australian judiciary — by no means an isolated one — has proved rather difficult to change. Chief Justice Mason and Justice Deane in the 1980s and early 1990s, were supporters of the contextual use of international law as an aid to the development of the Australian common law.⁷⁸ However, even they advocated a generally 'cautious approach' to its use.⁷⁹ Their successors have, for the most part, been still more hesitant and some quite hostile.

The caution on the part of Australian judges has led to an absence of any sharp distinction in the Australian cases between customary international law and treaty law. Australian courts have, in general, not sought to apply different rules to international law, according to its origins. Instead, they have tended to view the distinct sources as constituent parts of a single body of international law. I will highlight, chronologically, rather than analytically, some important elements of Australian decisional law as it has emerged. I will take this course because judicial developments in Australia on this topic have occurred in identifiable phases.

F *Chow Hung Ching's Case*

For most of the twentieth century, international law lay dormant in Australian judicial reasoning. Prospects were particularly unpromising in respect of customary international law after a decision given during the early period: *Chow Hung Ching v The King*.⁸⁰ In that case, the response of the High Court of Australia to customary international law evinced a strong sympathy for the transformative approach.⁸¹ Justice Dixon, whose reasons in *Chow Hung Ching* were to prove most influential, wrote:⁸²

The theory of Blackstone that 'the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as *without foundation*. The true view, it is held, is 'that international law is not a part, but is one of the sources, of English law'.⁸³

This statement cannot be viewed as entirely negative, still less hostile, to the use of international law as a source of the Australian common law. The 'source' based view that Justice Dixon mentioned, was apparently based on an article written by J L Brierly.⁸⁴ It has come to be accepted as the modern authoritative position

⁷⁸ See, eg, Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20.

⁷⁹ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

⁸⁰ (1949) 77 CLR 449.

⁸¹ Crawford and Edson, above n 28, 71, 77.

⁸² Charlesworth, above n 22, 453. See also Shearer, above n 35, 34, 49.

⁸³ *Chow Hung Ching v The King* (1949) 77 CLR 449, 477 (emphasis added).

⁸⁴ J L Brierly, 'International Law in England' (1935) 51 *Law Quarterly Review* 24.

on international law and the common law in Australia. The explicit rejection of Blackstone's statement on incorporation, however, reflected a general lack of enthusiasm for international law which would not change until 40 years later.

G *Impact of Universal Human Rights*

In 1988, a meeting in India of Commonwealth jurists, including myself, adopted the *Bangalore Principles on the Domestic Application of International Human Rights Norms* ('*Bangalore Principles*').⁸⁵ The group was chaired by the Hon. P N Bhagwati, former Chief Justice of India. At the time, I was President of the New South Wales Court of Appeal and was the sole participant from Australia. A number of other participants from Commonwealth countries attended, including Mr Anthony Lester QC (now Lord Lester of Herne Hill), Justice Rajsoomer Lallah (later Chief Justice of Mauritius), Justice Enoch Dumbutshena (then Chief Justice of Zimbabwe). Judge Ruth Bader Ginsburg (later a Justice of the Supreme Court of the United States) also participated as the only non-Commonwealth participant.

The *Bangalore Principles* afforded a modest statement about the role that international law might properly play in the judicial decision-making of municipal courts of common law jurisdictions. They acknowledged the reality of the traditional dualist system where firm boundaries are maintained between international law and domestic law. Thus, Principle 4 of the *Bangalore Principles* states:

In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law.

This did not mean, however, that international legal principles were irrelevant to the development of domestic law. The remainder of Principle 4 went on to state:

However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete.

Principle 6 recognised the need for this process of international law recognition to 'take fully into account local laws, traditions, circumstances and needs'. And Principle 7 went on to state:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international

⁸⁵ See Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 69, 531–2, where the *Bangalore Principles* are reproduced.

obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

The *Bangalore Principles* did not suggest the judicial application of international law in the face of clearly inconsistent domestic law. Nor did they suggest that international law was the only, or even the primary, consideration to which reference might be had when ambiguity arose in domestic law. Instead, the *Bangalore Principles* sought to encourage the use of international law as one source of legal principles that, by a process of judicial reasoning from context and by analogy, could assist the development of the local common law where ambiguity or uncertainty arose as to the content of that law.

The *Bangalore Principles* were to prove influential in several countries. For example, with respect to the United Kingdom, Murray Hunt wrote:

At the time of the formulation of the Bangalore Principles, the UK was on the threshold of an important transition as far as the domestic status of international human rights norms was concerned, and the Principles are a useful measure of the worldwide progress towards acceptance of the legitimate use which could be made of such norms by national judges.⁸⁶

H *The Mabo Decision in the High Court*

Until the early 1990s, the High Court of Australia, following *Chow Hung Ching*, made little fresh comment on the role of international law. However, the position changed in 1992 in *Mabo*.⁸⁷ There the High Court held that the common law of Australia recognised a form of native title in circumstances where that title had not been extinguished. This title reflected the common law entitlement of the indigenous inhabitants of Australia to their traditional lands. The decision re-expressed the common law in Australia in a very significant way.

The leading opinion in *Mabo* was written by Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed. Justice Brennan made a number of important observations about the development of the common law by reference to international law. First, he stressed that the courts in Australia would not alter the common law in an unprincipled fashion. He said:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.⁸⁸

⁸⁶ Hunt, above n 22, 37.

⁸⁷ (1992) 175 CLR 1.

⁸⁸ Ibid 29.

Secondly, Justice Brennan declared that the common law of Australia was not obliged to reflect the values of a bygone era of discrimination and disrespect for universal human rights:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.⁸⁹

Thirdly, in an oft-quoted passage, Justice Brennan spelt out a role for international law in the judicial development of the Australian common law:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.⁹⁰

This advance in the judicial acceptance of international law was reflected in another important decision delivered the same year: *Dietrich v The Queen*.⁹¹ That case concerned a prisoner who was convicted of an indictable federal statutory offence; the importation into Australia of a trafficable quantity of heroin. Before his trial, the prisoner had made a number of attempts to secure legal representation. However, he was unsuccessful on each occasion. In consequence, he was not legally represented at his trial.

A majority of the High Court of Australia held that, in the circumstances, the accused had been denied his right to a fair trial. While Chief Justice Mason and Justice McHugh did not explicitly invoke international law to sustain the existence and content of the right in question, they assumed, without deciding, that Australian courts should use international law where the common law was ambiguous. They called this a 'common-sense approach'.⁹² Although in dissent as to the result, Justice Brennan re-affirmed the position he had expressed in *Mabo*, observing in connection with article 14 of the *International Covenant on Civil and Political Rights* ('ICCPR')⁹³ that, '[a]lthough this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development

⁸⁹ Ibid 41–2.

⁹⁰ Ibid 42.

⁹¹ (1992) 177 CLR 292.

⁹² Ibid 306.

⁹³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

of the common law'.⁹⁴ Justice Toohey similarly stated: 'Where the common law is unclear, an international instrument may be used by a court as a guide to that law'.⁹⁵

I *Applying Mabo in Australia*

Later decisions of the High Court of Australia have affirmed the status of international law as a contextual consideration casting light on the municipal common law. Thus, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,⁹⁶ Chief Justice Mason and Justice Toohey, in joint reasons, stated:

[I]nternational law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights.⁹⁷

Chief Justice Mason and Justice Deane reiterated the same approach in their joint reasons in *Minister of State for Immigration and Ethnic Affairs v Teoh*.⁹⁸ It was in that case that the High Court held that the ratification of a treaty by the executive could, in certain circumstances, give rise to a legitimate expectation that a Minister and administrative decision-makers would comply with the obligations imposed by that treaty. Even Justice McHugh, who dissented in the result in *Teoh*, was of the opinion that international treaties could assist the development of the common law, a position to which he had subscribed in *Mabo*.⁹⁹

With changes to the personnel of the High Court of Australia after 1996, references to international law became less frequent. Other Australian courts have, however, continued to follow the High Court's earlier lead and to refer to international law where ambiguity or uncertainty arose in the interpretation of the common law.¹⁰⁰ The facultative doctrine stated in *Mabo*, has never been overruled, nor formally doubted, by the High Court of Australia.

J *Summarising the Australian Experience*

Deep-seated judicial attitudes toward international law have proved difficult to dislodge in Australia. The distinction between custom and treaties has

⁹⁴ Ibid 321.

⁹⁵ Ibid 360–1.

⁹⁶ (1992) 178 CLR 477.

⁹⁷ Ibid 499.

⁹⁸ (1995) 183 CLR 273, 288 ('*Teoh*').

⁹⁹ Ibid 315.

¹⁰⁰ See, eg, *Minogue v Williams* [2000] FCA 125 [24] (Ryan, Merkel and Goldberg JJ) (Federal Court of Australia); *R v Stringer* (2000) 116 A Crim R 198, 217 (Adams J) (New South Wales Criminal Court of Appeal); *R v Granger* (2004) 88 SASR 453, 477 (Perry J) (South Australian Supreme Court; Court of Criminal Appeal); *Tomasevic v Travaglini* (2007) 17 VR 100, 114 (Bell J) (Victorian Supreme Court).

generally been disregarded as an irrelevant consideration in the exposition of this topic in Australian courts. This was perhaps surprising because Australian courts enthusiastically, and frequently, referred to decisions of other legal jurisdictions, notably the United Kingdom and United States, where a different rule was emerging. Arguably, it is but a small step to refer to the jurisprudence of international and regional courts where the content of universal rights is being elaborated and refined. Australia's legal isolationism was not destined to last forever. Neither source is binding. But both can be useful. By the end of the twentieth century, a renewed effort to bring Australia in from the cold occurred at many levels of the judiciary. The decision of the High Court of Australia in *Mabo* was simply the most influential and explicit of these.¹⁰¹

K *Impact of International Law in Malaysia*

International law has received relatively little judicial attention in the courts of Malaysia. In the days of the Federated Malay States, Chief Justice Earnshaw, writing in 1919 in *Public Prosecutor v Wah Ah Jee*,¹⁰² had to determine whether a magistrate had been correct in refusing to exercise jurisdiction where an offence had occurred on the high seas but the defendant had been brought before a local court for the application of Malayan law. Adopting a strictly 'dualist' approach, the Chief Justice held:

The Courts here must take the law as they find it expressed in the Enactments. It is not the duty of a Judge or Magistrate to consider whether the law so set forth is contrary to International Law or not.¹⁰³

Nearly seventy years later in *Public Prosecutor v Narogne Sookpavit & Ors*,¹⁰⁴ a criminal appeal before the Acrj Johore Bahru Court had to consider the liability of a number of Thai fishermen who had been arrested for offences against the *Fisheries Act 1963* (Malaysia). The Thai citizens attempted to rely on Article 14 of the *Geneva Convention on the Territorial Sea and the Contiguous Zone*.¹⁰⁵ That Convention had been ratified by Malaysia but had not been enacted by, nor otherwise incorporated into, domestic law. In the result, the Court considered the provisions of the Convention from the perspective that it helped evidence the requirements of customary international law.

¹⁰¹ An interesting recent illustration of resort in the High Court of Australia to international and comparative sources in resolving an Australian legal problem is *Roach v Electoral Commissioner* (2007) 233 CLR 162, 177–9 [13]–[19], 204 [100]–[101]. Cf 220–1 [163]–[164] and 224–5 [181].

¹⁰² *Public Prosecutor v Wah Ah Jee* (1919) 2 FMSLR 193 (F M S Supreme Court).

¹⁰³ *Ibid.*

¹⁰⁴ [1987] 2 MLJ 100, 106 (Federal Court of Malaysia).

¹⁰⁵ *Geneva Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

Still, in the absence of a countervailing statute to replace the provisions of the *Fisheries Act*, the Court concluded that its duty was to apply the domestic statutory law according to its terms:

[E]ven if there was such a right of innocent passage and such a right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation. ... The moral of this story therefore would appear to be that urgent inter-governmental action is required to clarify the extent of the privilege or right of innocent passage through these waters.¹⁰⁶

The dualist approach is also observed in Malaysia in relation to treaty law. Articles 74 and 76 of the Constitution of Malaysia specifically empower the legislature to enact laws implementing treaties. The Malaysian courts have held that the international rules of interpretation of treaties will take precedence over any conflicting domestic rules of interpretation when what is under consideration is the content of a treaty to which Malaysia is a party.¹⁰⁷ This approach is broadly consistent with the approach that has been adopted by the High Court of Australia.¹⁰⁸

In Malaysia, a highly influential decision affecting the use of international law was one in 1963 holding that ‘the constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia’.¹⁰⁹ This tendency to adopt the ‘four walls’ principle in constitutional adjudication may have spilled over into statutory interpretation and the use of international law to inform the content of the Malaysian common law.

The common law in Malaysia is shaped by the reception of the English common law as it stood immediately prior to independence in 1956.¹¹⁰ In this respect, the position may be contrasted with that of Singapore where the common law of England continued to apply until November 1993.¹¹¹ After these differential dates of reception, the common law is determined by the local judges, necessarily with attention to local cultural and social concerns. Occasionally, with respect to customary international law, the Malaysian courts have treated that body of law as

¹⁰⁶ *Public Prosecutor v Narogne Sookpavit* [1987] 2 MLJ 100, 106 (Federal Court of Malaysia).

¹⁰⁷ *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355, 358 (Malaysian High Court, Kuala Lumpur).

¹⁰⁸ *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, 251–6 (McHugh J), see also 294–5 (Kirby J).

¹⁰⁹ *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355, 358 (Thomson CJ) (Malaysian High Court, Kuala Lumpur).

¹¹⁰ *Civil Law Act 1956* (Malaysia) art 3(1).

¹¹¹ *Application of English Law Act 1994* (Singapore).

being of persuasive value. Thus in *Mohomad Ezam v Ketua Polis Negara*,¹¹² in the Federal Court of Malaysia, Siti Norma Yaakob FCJ observed:

If the United Nations wanted these principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law. ... Our laws backed by statutes and precedents ... are sufficient for this court to deal with the issue of access to legal representation [without the necessity of resort to international law].

Without the stimulus of a statute such as the *Human Rights Act* 1998 (UK), or need to urgently reconceptualise an important body of the common law as was presented by the *Mabo* decision in Australia, Malaysian courts appear generally to have adhered to the dualist doctrine. Thus, international customary law can sometimes be a persuasive consideration in elucidating local common law. But where there is clear positive local law — in the Malaysian constitution, a statute or a clearly applicable principle of the local common law — international customary law has not proved a strong influence on the shaping of Malaysia's own law. At least, this appears to be the case to the present time. Nevertheless, the door to influence is not closed by decisional authority.

L The Emerging Position in Singapore

The Constitution of Singapore is silent on the treatment that is to be given to international law by Singapore's courts. As a matter of practice, those courts have generally followed the United Kingdom's legal approach up to the time of Singapore's independence. Describing the role played by international law in Singapore, Simon Tay has said:

There are a number of reasons why we may now expect that international law will have a larger role in national legal systems such as Singapore's. ... In the case of Singapore there are also reasons why the reverse is ... true: that the national legal system is reaching out to the international system. This is because of governmental policies to encourage the city-state to serve as an international hub and to meet international standards in many fields. There is, correspondingly, a closer interaction between national and international law and policies in Singapore than might be seen in larger nations. This is especially noticeable in the field of economic activity, such as international trade and transport by air and sea. There is also considerable attention and pride in the government on the high international rating that the Singapore system of justice is accorded by a number of international investment analysts.¹¹³

¹¹² [2004] 4 MLJ 449, 512 (Federal Court of Malaysia).

¹¹³ Simon Tay, 'The Singapore Legal System and International Law: Influence or Interference?' in Kevin Y L Tan (ed), *The Singapore Legal System* (NUS Press, 1999) 467, 468–9.

Other commentators in Singapore have drawn a distinction between the utilisation of international law and practice in matters of economics, investment and trade and the position so far as cases concerning the environment and human rights are concerned. Professor Thio Li-An summarises her understanding of the Singaporean approach:

While readily borrowing from foreign commercial case law, Singapore courts display a distinct reticence in cases concerning public law values, where the emphasis is on ‘localizing’ rather than ‘globalizing’ case-law jurisprudence in favour of communitarian or collectivist ‘Singapore’ or ‘Asian’ values, in the name of cultural self-determination.¹¹⁴

Attempts to incorporate suggested principles of international human rights law into a case in Singapore challenged capital punishment by hanging failed in *Nguyen Tuong Van v Public Prosecutor*.¹¹⁵ Much of the court’s reasoning drew upon the old Malayan decisions as to finding the applicable law within the ‘four walls’ of the local express provisions. A measure of support for this approach can be found in the advice of the Privy Council in a Singapore appeal: *Haw Tua Tau v Public Prosecutor*.¹¹⁶ But that decision was written by the Privy Council before more recent advances in judicial reasoning that have occurred both in the United Kingdom and in Australia.

There is no case law that is definitive on the reception of international customary law into domestic Singaporean common law. Generally speaking, however, the Singaporean courts have followed the traditional dualist approach that was established by colonial judges in the Supreme Court of the Federated Malay States prior to independence.¹¹⁷

Simon Tay has suggested that the courts of Singapore are now open to persuasion by reference to international law in the development of the common law where it is not settled.¹¹⁸ However, if the local law is clear, whether constitutional, statutory or common law, that law will prevail.¹¹⁹ Thus, even if it were the case that a principle of customary international law had emerged prohibiting execution by hanging, the existence a clearly expressed local statute in Singapore, providing for such punishment, was held to prevail in the event of any inconsistency.¹²⁰ The

¹¹⁴ Li-Ann Thio, ‘In the Courts: The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court — Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecutor v Nguyen Tuong Van* (2004)’ (2004) *Oxford University Commonwealth Law Journal* 214, 215.

¹¹⁵ [2005] 1 SLR 103, 127 (Court of Appeal, Singapore).

¹¹⁶ [1980] 1 SLR 73, 81–2 (Privy Council).

¹¹⁷ *Public Prosecutor v Wah Ah Jee* (1919) 2 FMSLR 193 (F M S Supreme Court).

¹¹⁸ Tay, above n 113.

¹¹⁹ *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103, 112 (Court of Appeal, Singapore).

¹²⁰ *Ibid* 128.

conversation between international law and local law, at least in matters touching human rights, is somewhat muted and certainly quite weak.¹²¹

In the spectrum of national approaches to the use of customary international law in the elaboration of local common law, the judges in the United Kingdom appear to be most comfortable with the approach; those of Australia are selective in its use; and those of Malaysia and Singapore seem content with the earlier approach of English law, based on dualism, as it existed at the moment of independence and separation from the original common law source. For all that, the position is fluid. In a recent decision of the Court of Appeal in Singapore, in a sensitive case involving a defamation action brought by a senior politician, the Court appears not to have ruled out the possibility that the line of authority in the English courts, creating the *Reynolds* test for defamatory publication, might have some part to play in the evolution of Singapore's own common law on the subject.¹²²

IV THE ADVANCE OF INTERNATIONAL LAW: THE WAY AHEAD

The arguments against the use of international law to inform local judges on their own judicial acts in declaring the municipal common law are easy enough to see. They include the legal tradition of dualism; the absence of a specific democratic underpinning for the creation of most of the rules of international law; the availability of treaties, with local ratification and municipal enactment if it is desired to import directly particular principles of international law; and the suggested adequacy of the more traditional sources for the evolution of the common law.

As against such considerations, there are a number of reasons why judges and other observers, in the United Kingdom, Canada, New Zealand, and even Australia, are increasingly willing to reach for principles of customary international law in expounding the local common law, where it is silent or obscure on a particular point in issue.

The arguments for such a course are based substantially in pragmatic considerations.

First, where the law is uncertain, it is often useful, and sometimes desirable, to reach for developments that have occurred on the international stage. It is preferable that domestic judges should do this rather than simply to appeal to their own limited knowledge and experience and local case law that may not have addressed the issue at all.

Of its nature, the common law is always in a state of development, on a case by case basis. To remain relevant, law must adapt. Where important issues of principle

¹²¹ *Re Gavin Millar QC* [2008] 1 SLR 297, 313 (Kwang J) (High Court of Singapore).

¹²² *Far East Economic Review v Lee Hsien Loong* [2010] 1 SLR 52 referring to *Reynolds v Times Newspapers Ltd.* [2002] 2 LRC 690; [1999] 4 All ER 609.

are at stake, an appeal to fundamental principles of universal justice will often be a helpful guide to the judge uncertain as to what the law provides.¹²³

Against this background, Shane Monks has explained why references to international materials require no great departure from the established judicial methods observed in common law countries:

Australian courts have always made reference to case law from other common law jurisdictions, including the United States (with which Australia has never shared membership of a hierarchy of courts). There is no logical reason why international law should be a less acceptable source of comparative law than any other municipal jurisdiction. On the contrary, its acceptance by many different jurisdictions should make it a more acceptable source of comparison.¹²⁴

References to elaborations of any relevant principles of international law can lend a measure of apparent legitimacy and principle to judicial decision-making:

Referring to international law could assist in distancing the judicial law-making role from domestic controversy and party-politics and, as an objective source of law, from any suggestion that judges are simply imposing their own personal political views.¹²⁵

The advances of the common law in the past have occurred as a result of the attempts by judges to express the changing values of society deserving of legal enforcement. One inescapable contemporary influence in the expression of such values is the emerging content of international law. Technology, including contemporary media, affords judges and litigants today a much wider context for the expression of values simply because that is the world that the judges and litigants inhabit and for which the municipal common law must now be expressed. The expansion of the sources is no more than a recognition of the growth of global and regional influences upon the world in which the common law now operates.

Secondly, as originally expressed, the *Bangalore Principles* required ambiguity to justify any reference to international law. If a clear constitutional, statutory or common law rule exists, international law could not be invoked to override that authority. Ambiguity, uncertainty or possibly a gap in the applicable law were originally required before any reference at all could be made to international legal principles. At least so far as the common law is concerned, it is arguably always subject to a legislative override, but in accordance with any applicable constitutional norms.

¹²³ *Re Gavin Millar QC* [2008] 1 SLR 297, 138 (High Court of Singapore).

¹²⁴ Shane S Monks, 'In Defence of the Use of Public International Law by Australian Courts' (2002) 22 *Australian Yearbook of International Law* 201, 222–3.

¹²⁵ *Ibid* 223.

Subsequent versions of the *Bangalore Principles* have deleted the requirement for ambiguity.¹²⁶ However, this variation might involve a change that is more apparent than real. If a text is clear, judges and others affected, in every jurisdiction, would normally give the text judicial effect. As a practical matter, this would generally relieve the decision-maker of an obligation to search for different meanings or other sources of law. This is no more than a recognition of the practical pressures under which judges operate and the inclination of the judicial mind to accept the quickest way to decision, as a ‘source’ of reasoning.

Thirdly, affording international human rights law a place in the development of the common law pays appropriate regard to the special status of universal human rights norms in today’s world.¹²⁷ Most advanced nations have moved beyond purely majoritarian conceptions of democracy.¹²⁸ Respect for the fundamental rights of all people within a jurisdiction, including minorities, is now generally accepted as a prerequisite for a functioning democratic polity.¹²⁹

In developing the common law by reference to human rights principles, the judiciary, far from undermining the democratic system of government, plays a constructive role in upholding that system. In this way, judges contribute to respect for democracy in its fullest sense. By its very nature, international law can assist the municipal judiciary to understand, and more consistently adhere to, fundamental human rights and freedoms. Moreover, it can help stimulate legislative decision-making which may sometimes have neglected, ignored or unduly postponed the protection of minorities and the protection of the legal equality for all citizens.

Fourthly, particularly in ‘an era of increasing international interdependence’,¹³⁰ it is impossible today to ignore Lord Denning’s ‘incoming tide’¹³¹ of international law. With many cases coming before the courts already involving disputes having an international flavour — whether it be the identity of the parties, the applicable law or the subject matter of the dispute — litigants and the wider community will now generally expect a country’s laws, including the common law, to be in broad harmony with any relevant provisions of international law.¹³²

¹²⁶ Referring to the 1998 re-statement of the *Bangalore Principles*: see Keith, above n 69, 31.

¹²⁷ Hunt, above n 22, 35; Walker, above n 22, 233.

¹²⁸ Michael Kirby, ‘A Bill of Rights for Australia — But Do We Need It?’ (1995) 21 *Commonwealth Law Bulletin* 276, 282. In the Canadian context, see Armand de Mestral and Evan Fox-Decent, ‘Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law’ in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law* (Irwin Law, 2006) 31, 60–1.

¹²⁹ See, eg, Hilary Charlesworth, ‘Protecting Human Rights’ (1994) 68 *Law Institute Journal* 462, 463.

¹³⁰ Walker, above n 22, 233.

¹³¹ *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418 (Lord Denning MR).

¹³² See, eg, *Mabo* (1992) 175 CLR 1, 41–2 (Brennan J; Mason CJ and McHugh J concurring).

This is not a proposition based on ideological posturing. It flows from the reality of life in what is now an interconnected world. The law is an integral component of modern society. The legal nationalism of the past no longer affords a satisfying boundary in today's world for the sources of common law elaboration and expression. To accept international law as it affects trade and technology, but to exclude international law as it concerns universal human rights, evidences an unstable distinction. By definition, all international law is binding on nation states. Viewed from a dispassionate and specifically *legal* standpoint, selectivity in recognising parts of international law that are thought to be of immediate economic utility is not a very attractive principle.

Fifthly, using international law to influence the development of domestic common law can also help to resolve an inherent tension between two legal theories. On the one hand, it is normally for the legislature to determine whether a treaty will be incorporated into domestic law. On the other, treaty ratification by the executive on behalf of the nations should not be accepted by the courts to be an inconsequential or legally neutral act. As Sir Robin Cooke, then President of the New Zealand Court of Appeal, once remarked, political undertakings to be bound by an international instrument should not lightly be regarded as mere 'window-dressing'.¹³³ Judges should neither encourage nor condone such an attitude on the part of executive government. Especially so, given the growth of international law in recent decades and its daily importance for most countries.

One means of affording proper recognition to a country's international legal obligations, while still respecting the functions of the domestic legislature to enact any significant body of law so that it is binding on the people, is to seek, where possible, to develop the common law in line with the emerging common international obligations. According to international law itself, treaties, when ratified, bind the country concerned, including all three arms of government. They do not just bind the executive government. When judges pay regard to the content of treaty law they therefore help to ensure that the judiciary, as an arm of government, is not hindering conformity with the international obligations by which the country, in accordance with its own legal processes, has agreed to be bound. Apart from any other consequences, when judges take the ratification of a treaty at face value this tends to restrain purely symbolic or empty political gestures: 'feel-good posturing' not intended by those involved to have any municipal legal effect although they certainly have international legal consequences.

Sixthly, where judges employ international law in such a manner, it is therefore neither novel; nor is it particularly radical. It adopts an incremental approach that places international law on a plane equivalent to other interpretative aids long used by judges in our legal tradition in developing and declaring the common law. The most obvious example is provided by the case of historical and other scholarly materials. Domestic human rights legislation, such as the United Kingdom *Human Rights Act*, affords international human rights principles of far more direct and

¹³³ *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (Court of Appeal).

immediate applicability. In countries such as India, Canada and South Africa, international human rights law now enjoys a constitutional status and pervades many aspects of their legal systems.

Referring to international law, and especially when there is ambiguity or uncertainty in the common law, is therefore quite a modest step in judicial reasoning. It observes the proper boundaries between the legislature, executive and judiciary. Each of them, within their respective spheres, performs their proper functions in accordance with their own rules and procedures. At the same time, it ensures that a country's legal system does not become isolated from that of the community of nations. This is an even greater danger in the case of a country such as Australia because, as yet, it has no federal human rights charter that affords a direct and express path to access to international human rights law; and jurisprudence that permits these international law to have a more immediate effect upon the nation's domestic law.

Finally, the judicial use of international law does not usually amount to the introduction of rules and principles radically different from the laws with which lawyers of the common law tradition are familiar. Both Australia and the United Kingdom would probably consider that, in their law, they ordinarily observe and respect universal human rights and freedoms. Doubtless, as a general proposition this is true. Perhaps Malaysia does also, although the *Lina Joy*¹³⁴ case on apostasy has proved controversial.¹³⁵ International human rights law is normally consistent with, and reinforces, such values. This fact is neither surprising nor accidental. Key documents, such as the *Universal Declaration of Human Rights* and the *ICCPR* were profoundly influenced by values substantially derived from the Anglo-American legal tradition. The international law of human rights talks to countries within that tradition in familiar language and in terms of well-recognised legal concepts. It expresses principles that accord very closely with long expressed and familiar legal, moral and cultural traditions.

V CONCLUSION: AN ONGOING CONVERSATION

From the foregoing analysis, it follows that international law will inevitably continue to enter municipal law in a multitude of ways. The effect is already great. For example, in Canada, commentators have suggested that some 40 percent of statutes are adopted to implement international commitments of some kind or another.¹³⁶ However that may be, to attempt to halt the incoming tide of international law as an influence and source of domestic common law is to attempt to prevent the inevitable whilst risking isolation and irrelevance of municipal law in the process.

¹³⁴ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 3 CLJ 557 (Federal Court of Malaysia).

¹³⁵ Michael Kirby, 'Fundamental Human Rights and Religious Apostasy' (2008) 17 *Griffith Law Review* 151.

¹³⁶ Mestral and Fox-Decent, above n 128, 31, 34.

Sir Anthony Mason, a former Chief Justice of the High Court of Australia, in a statement endorsed by his successor, Sir Gerard Brennan,¹³⁷ explained that:

The old culture in which international affairs and national affairs were regarded as disparate and separate elements [is] giving way to the realisation that there is an ongoing interaction between international and national affairs, including law.¹³⁸

In the United Kingdom, Lord Bingham of Cornhill, long the Senior Law Lord, expressed similar sentiments. In 1992 he wrote:

Partly in hope and partly in expectation ... the 1990s will be remembered as the time when England ... ceased to be a legal island.¹³⁹

It was Lord Bingham's hope and expectation that the time had come when England no longer had 'an unquestioning belief in the superiority of the common law and its institutions [that meant there was] very little to be usefully learned from others.'¹⁴⁰

No country in the world is now outside the reach of the expanding application of international law, including the principles of international customary law. The modern lawyer's imagination needs to adjust to the new paradigm. Jurisdictionalism prevails. Domestic jurisdiction of nation states is still powerful. Ultimately, it may have the last word. But in the age of interplanetary travel, of informatics, of the human genome, of nuclear fission, of global problems such as HIV/AIDS and climate change, and of global challenges to peace, security and justice for all people, international law has an important part to play.

Local judges are often exercising a kind of international jurisdiction when they decide cases. There will never be enough international courts to give effect to international law. Nor should there be an undue proliferation of expensive and new international courts and tribunals. The implementation of international customary law must therefore increasingly be delegated to national courts in much the same way as, in the Australian Commonwealth, state courts may be invested with and exercise federal jurisdiction.¹⁴¹ Reconciling the rules of domestic jurisdiction and the principles of international law is a great challenge for lawyers of the current age and the age still to come. The challenge is one to which James Crawford has responded repeatedly and eloquently in his writings and in his work as a leading arbitrator and advocate before international and national courts and tribunals.

¹³⁷ Sir Gerard Brennan, 'The Fiftieth Anniversary of the International Court of Justice' (Speech delivered at the Opening of Colloquium, High Court of Australia, Canberra, 18 May 1996).

¹³⁸ Mason, 'The Influence of International and Transnational Law on Australian Municipal Law', above n 78, 23.

¹³⁹ T H Bingham, "'There Is a World Elsewhere": The Changing Perspectives of English Law' (1992) 41 *International and Comparative Law Quarterly* 513, 514.

¹⁴⁰ Ibid.

¹⁴¹ *Australian Constitutions* 77(iii).

The recent rise in the global recognition of the excellence of the University of Adelaide rests upon its fine teaching and research in law.¹⁴² And on its focus upon international law as a cutting edge subject for a world of unprecedented change. James Crawford is an example of what this University stands for and why its reputation continues to enlarge.

¹⁴² D Harrison, 'Unis Do Well in World Rankings', *Sydney Morning Herald* (Sydney), 9 October 2008, 6, referring to the inclusion of The University of Adelaide in the top 100 world universities according to *The Times Higher Education Supplement*.