

FEATURE

Promoting rigorous discussion and debate of matters of international legal significance was one of the founding aims of the *Melbourne Journal of International Law*. The discussion of the manner in which international law influences and guides the development of domestic law has received much recent attention. For a variety of reasons, jurists, legal scholars and law-makers look outside the domestic sphere in order to colour and inform the law as it presently stands, and as it will exist for those that follow. This edition of the *Journal* contains two articles which examine this process in Australia: 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' by Wendy Lacey, and a Case Note on *B & B and Minister for Immigration and Multicultural Affairs*, by Lara Ruddle and Sally Nicholes.

As a feature, we have elected to publish the valedictory address presented at The University of Melbourne by the Justice Kirby, in tribute to the retirement of Chief Justice Nicholson of the Family Court of Australia. Justice Kirby's address provides valuable context to the process by which international instruments, and international law more generally, have come to impact upon Australian law. It is also a retrospective of the distinguished career of, and a fitting tribute to, Nicholson CJ; a jurist whose commitment to human rights will be remembered by his legal colleagues and his fellow citizens alike.

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CHIEF JUSTICE NICHOLSON, AUSTRALIAN FAMILY LAW AND INTERNATIONAL HUMAN RIGHTS*

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[Alastair Nicholson retires in July 2004 after 16 years as Chief Justice of the Family Court of Australia. In this article, based on a valedictory address, the author describes Nicholson CJ's career. He introduces his theme by illustrating recent developments in the United States Supreme Court involving the use of the international law of human rights. By reference to decisions of Nicholson CJ, he identifies the legitimate use of international law in interpreting ambiguities in statutes; in developing the common law; and in understanding the meaning of the Australian Constitution. The limits of this process are also explained by reference to the recent High Court decision in MIMIA v B.]

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I 'A SPECTACULAR JUDGE'

The retirement of most judges passes without notice outside the cloistered world of the legal profession. This cannot be said of Alastair Nicholson, a distinguished alumnus of the Faculty of Law at the University of Melbourne. An insightful essay on his long service as the second Chief Justice of the Family Court of Australia observed that 'Nicholson has been a spectacular judge; perhaps appearing more extraordinary as the society around him has grown increasingly conservative'.¹ The same article remarked that:

In person, Nicholson is genial, and quick to talk about issues. He is a journalist's dream in one sense — never failing to answer a question directly and with a candour unusual in public life. But he is slow to delve into the personal, and seems almost puzzled when asked about the effect on him of his work — all the pain, love and hate he has seen pass through his court.²

* This article is based on the text of a valedictory address given on 15 April 2004 at the Faculty of Law, The University of Melbourne, to honour the Hon Alastair Nicholson AO RFD, retiring Chief Justice of the Family Court of Australia (1988–2004).

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¹ Margaret Simons, 'Court in the Balance as an Era Ends', *The Age* (Melbourne, Australia), 27 March 2004, Insight 3.

² *Ibid.*

Alastair Nicholson will retire from judicial office on 2 July 2004. At a ceremonial sitting on 2 April 2004, his service to the law and the people of Australia was honoured by judges, members of the legal profession, politicians and other citizens. It is too early to assess the full impact of his judicial work. Such things are measured in decades, if not longer. My purpose, as a Justice of the High Court, a fellow citizen and friend, is to identify some of the features of his career, some aspects of his personality and service, and a few elements of his jurisprudence that are of particular interest to me.

It is fitting that I should be called on to honour him. In a dark moment, his was a rare judicial voice lifted publicly to defend me and the independence of the courts when so many other voices fell silent.³ Such conduct was typical of the man: brave, forthright and valiant in the defence of the judicial institution.

No Melburnian — unless it be Dame Nellie Melba — has enjoyed so many farewells as Alastair Nicholson. It is therefore superfluous to spell out in detail all the well known steps in his distinguished career. However, the record demands that the main milestones be mentioned in order to set the context.

Alastair Nicholson was born in August 1938. He was raised on his parents' coffee plantation in the then Australian Territory of Papua New Guinea. At the time, it was emerging from the perils of a deadly war. He attended the famous Scotch College in Melbourne as a boarder. He took his degree in law at The University of Melbourne. In 1961 he was admitted to legal practice. He joined the Victorian Bar in 1963. In 1979 he was appointed one of Her Majesty's counsel. Between 1982 and 1988 he served as a judge of the Supreme Court of Victoria. Then, in 1988, he succeeded Elizabeth Evatt as the second Chief Justice of the Family Court of Australia.

In the Family Court, Nicholson CJ presided over countless trials and appeals, dealing with every nook and cranny of family law as it is known in this country. He chaired numerous committees and meetings of the Court. He attended hundreds of legal conferences in Australia and overseas. He earned recognition amongst his peers for his tremendous energy and unbounded intellectual curiosity. Thus, he was elected President of the Australian Association of Family Lawyers and Conciliators in 1993. In 1997 he was elected President of the Association of Family and Conciliation Courts, and chaired the Second World Congress on Family Law and the Rights of Children. His mind was ever open to new concepts, including some from sources overseas. This is a feature more possible in the field of family law than most, given the universal phenomenon of family breakdown with its consequences for the upbringing of children and the division of property.

From the start, in the Family Court, Nicholson CJ had to face important challenges that would have broken a lesser spirit. On his arrival, morale was low — partly because of unprecedented, murderous attacks on judges of the new Court and on their families. The Court's workload grew, but its budget did not keep pace. The challenge of introducing new technology was one which Nicholson CJ embraced with gusto. The introduction of child support legislation,

³ The reference is to a public statement by Chief Justice Nicholson on 17 March 2002 following an attack on the author in the Federal Parliament: See Enid Campbell and Matthew Groves, 'Attacks on Judges under Parliamentary Privilege: A Sorry Australian Episode' [2002] *Public Law* 626.

and the reference to the Commonwealth by the States of powers in relation to exnuptial children, mirrored significant social changes. Drug dependence, serial relationships, sexual abuse of children and strident lobby groups made the post of Chief Justice of the Family Court of Australia a particularly taxing one.⁴ Keeping on top of these institutional challenges, whilst absorbing significant changes in the governing legislation⁵ and in the doctrine propounded by the courts, would have tamed the energies of a lesser person. But Nicholson CJ had long demonstrated a toughness and sense of public duty that was to strengthen his resolve and see him through.

He has had a prolonged connection with the Australian Defence Force, rising to Judge Advocate General between 1987 and 1992. The path that began with his appointment as a humble flight lieutenant in the Legal Reserve of the Royal Australian Air Force, through service in Australia and at Butterworth in Malaysia, led ultimately to his promotion to the rank of Air Vice-Marshal. He was not forced by birth or necessity to contribute in these civic ways; it was part of the Presbyterian upbringing that gave him his values and strengthened him in all that he did. He was fortunate to be accompanied on his public journey by his wife, Lauris, his children, family and friends. When everywhere around him marriages and relationships were breaking apart, with the inevitable pain and stress that this causes, his family support was rock solid. As one who has similarly enjoyed such a stable anchor to a public life, I can aver the great debt that the Australian Commonwealth owes to Lauris Nicholson and to their family.

From his upbringing as a simple Presbyterian — like that other fine Victorian Robert Menzies — through his strong foundation in family life, his devoted service in the Defence Reserve, his duty in the courts and his uncompromising defence of judicial independence, Alastair Nicholson has revealed strong elements of conservative values in his makeup. When the dust settles, it is those who defend the country and its institutions who are the faithful conservatives — not the smashers of conventions and the prating, chattering critics who damage fundamental things.

Alastair Nicholson has known from an early age that to endure, great institutions must be defended, but also must change and adapt. These insights, probably formed in his earliest years observing the end of Empire in Papua New Guinea, guided him through his post as Chief Justice. From the start, his Court — because of the nature of its duties — was a target for criticism and calumny, most of it undeserved. He could have ignored the attacks and the personal affronts. Yet doing that was alien to his upbringing and character as a child of the Enlightenment. He wanted to engage with critics and supporters and with the Australian community whom he served. It was not for him to preside over a court sailing in a sea of dispirited morale. He led from the front, for that was his nature. This made him controversial in some circles. He was more candid and forthright than most judges. This brought him into difficulties with successive governments, ministers, some legal personalities, media pundits and civic groups.

⁴ Family Court of Australia, 'Interview with Chief Justice Alastair Nicholson', *Courtside* (Canberra, Australia) (26 March 2004) 1, 3.

⁵ Especially after amendments to the *Family Law Act 1975* (Cth) ('*Family Law Act*') introduced by the *Family Law Reform Act 1995* (Cth).

At the farewell sitting, the head of the Australian Bar Association said that Nicholson CJ would wear his battles with successive Attorneys-General as a 'badge of honour'.⁶ Doubtless, some will disagree. Even in his remarks at his farewell, he took the occasion to criticise a proposal to establish a new Family Tribunal, limiting the representation of participants by lawyers. He called this 'a serious attack on the civil liberties of Australians, smacking more of totalitarian regimes than of a democracy'.⁷ It was not his style to leave office otherwise than with all guns blazing. He had doubtless read that in Germany, in the 1930s, the judges, witnessing many wrongs, only lifted their voices once and then solely in defence of their pension rights. Alastair Nicholson was never one to embrace that model of judicial restraint or anything like it.

The tributes to him by judicial colleagues and officers of the Family Court, judges overseas and legal personalities are balanced by the comments of critics — usually unnamed — who condemn his endeavour to communicate with citizens beyond the legal cloister, who picture him as a relic of an earlier time of idealism over law and its role in society, or who describe him as a bigot who was 'snowed by feminists' and mortally wounded by the fierce controversies that whirled around him.⁸ There can be no gainsaying that he performed his duties as Chief Justice in a novel and highly personal manner. Only time will reveal a rounded assessment. However, none who have read his judicial opinions and his other contributions can doubt his intellectual capacity, energy, and curiosity about the human condition and its manifold elements. In the whispering courtrooms of equity and the sharp-eyed battlegrounds over patents, taxation and marine insurance, it is rarer to see the kaleidoscope of human emotions than in the crowded hearing rooms of the Family Court. Fortunate was Australia that the second Chief Justice of that court was a man of feelings — warm, intelligent, engaged, creative, and loyal to friends, institutions and the law alike.

The best assessment of him that I read in the period leading to his retirement was not written by a lawyer at all. It was spoken by Robert Hannaford, the famous portraitist, who painted a splendid image of Nicholson CJ that will hang in the Melbourne chambers of the Family Court.⁹ The portrait captures the man not in street clothes but in judicial robes — looking uncharacteristically vulnerable and perhaps just a little uncertain of what lies ahead after all the turmoil and the shouting and the anger and the passion of 43 years in the law (22 as a judge and 16 as Chief Justice). Hannaford said:

I found him a wonderful man. I developed a deep sense of someone who is a very balanced person, someone who has great convictions about his responsibilities and concerns for families, especially for children and for Indigenous people, and also someone who has many and varied other interests.¹⁰

⁶ Ian Harrison SC (Speech delivered at the retirement sitting of the Full Court of the Family Court of Australia, Australia, 26 March 2004). See Wayne Howell, 'Judge Attacks Blow to Rights; Children Will Suffer, Says Retiring Justice', *Herald Sun* (Melbourne, Australia), 27 March 2004, 9.

⁷ Nicholson CJ (Speech delivered at the retirement sitting of the Full Court of the Family Court of Australia, Australia, 26 March 2004). See Howell, above n 6.

⁸ See Simons, above n 1.

⁹ Robert Hannaford in Family Court of Australia, 'Portrait Unveiled' *Courtside* (Canberra, Australia) (26 March 2004) 12.

¹⁰ *Ibid.*

Those interests will carry this ‘spectacular judge’ forward into new and different challenges. A clue to what they will involve may be found in the jurisprudence of his opinions in the Family Court. He has leapt beyond the prison of the legal world as it was taught to him at The University of Melbourne 40 years ago. Unlike many other Australian lawyers, he has kept pace with the radical changes in that world and in the law that serves the world.

In the balance of these remarks, I intend to refer to what I consider the most important insight that Nicholson CJ brought to the doctrine of family law during his service as Chief Justice. I refer to his perception of the convergence of municipal law and international law. Of this, he was an early evangelist. Future generations of lawyers, and not just family lawyers, will honour him on this account.

II CONVERGENCE WITH INTERNATIONAL LAW

A few days ago, in Washington, Justice Antonin Scalia took the occasion of an address to the American Society of International Law to denounce the growing tendency of the majority on his Court to refer to international law and to cite references to the decisions of national and international bodies in the elaboration of American law. Using language of the same colour and vigour as Nicholson CJ often deployed, Justice Scalia declared: ‘We have no authority to look around and say “Wow, things have changed”’.¹¹

The language may be the same, as is the willingness to engage in intellectual debate over an issue that transcends unvisited courtrooms. But the viewpoints could not be more different. A source of energy for Justice Scalia, and local counterparts of a similar persuasion, is undoubtedly the vexing realisation that time is running out for their parochial vision of the law.¹²

Late in 2003, Justice Sandra Day O’Connor, also of the United States Supreme Court, suggested that ‘with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues’.¹³ The significance of this assertion, in the context of the US, cannot be overstated — many observers point to the influence which O’Connor J wields in the determinative votes of the US Supreme Court.¹⁴

Fifteen years earlier, at about the time Nicholson CJ was commencing his service as Chief Justice of the Family Court of Australia, the US Supreme Court was faced with a dilemma in *Thompson v Oklahoma*.¹⁵ It concerned whether a petitioner who had committed a murder when aged 15 years, could be sentenced

¹¹ Anne Gearan, ‘Scalia Skeptical about Foreign Law in US’, *Associated Press Newsfeed*, 2 April 2004.

¹² Christopher Patten, ‘Globalisation and the Law’ (2004) 2004 *European Human Rights Law Review* 6; Treasa Dunworth, ‘The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?’ (2004) 15 *Public Law Review* 36; Jutta Brunée and Stephen Toope, ‘A Hesitant Embrace: The Application of International Law by Canadian Courts’ (2002) 40 *Canadian Yearbook of International Law* 3.

¹³ Justice Sandra Day O’Connor (Remarks delivered at the Southern Center for International Studies, Atlanta, Georgia, US, 28 October 2003) 2 <http://www.southerncenter.org/OConnor_transcript.pdf> at 1 May 2004.

¹⁴ See, eg, Tony Mauro, ‘O’Connor Seen as Key in Race Case Debate’ (2003) 229 *New York Law Journal* 1; Tony Mauro and Jim Edwards, ‘O’Connor Will be Swing Vote in Affirmative Action Controversy’ (2003) 172 *New Jersey Law Journal* 6.

¹⁵ 487 US 815 (1988) (*Thompson*).

to death in punishment. Justice Stevens (with whom Brennan, Marshall and Blackmun JJ joined) held, for the Court, that the ‘cruel and unusual punishments’ prohibition in the Eighth Amendment to the *Constitution of the United States* prevented the execution of a person who was under the age of 16 years at the time of the offence. So far, there was nothing remarkable in the decision which built on the meandering course of the death penalty jurisprudence of American constitutional law.

It was in the *reasoning* of Stevens J that a new element appeared. He referred to the judicial decisions and legislation on the execution of minors appearing in many foreign jurisdictions which shared the ‘Anglo-American heritage’, as well as in the law of the ‘leading members of the Western European community’.¹⁶ Justice Stevens even referred to the position in Australia.¹⁷ It was a strong opinion, deploying an argument that took a legally novel and uncharacteristically global viewpoint.

Justice Scalia wrote a vigorous dissent (in which Rehnquist CJ and White J joined). He stated that the ‘civilized standards of decency in other countries’ were ‘totally inappropriate as a means of establishing the fundamental beliefs of this Nation’.¹⁸ The decisive opinion in the case, that saved Mr Thompson’s life, was written by O’Connor J.¹⁹ She agreed with the opinion of Stevens J. But she wrote more narrowly. She made no reference, at that time, to international or foreign law. So far, the extrospection propounded by Stevens J remained one that fell short of a court majority.

The decision in *Thompson* affords the background to Justice O’Connor’s more recent assertion that ‘[t]here has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes’.²⁰ So it was at the time when Nicholson CJ assumed federal judicial office in Australia. What a difference a decade can make in the law.

In 2002, in *Atkins v Virginia*,²¹ and in 2003 in *Lawrence v Texas*,²² the ‘first indicia of change’ in the approach of the US Supreme Court were acknowledged by Justice O’Connor.²³ In *Atkins*, Stevens J (with whom O’Connor, Kennedy, Souter, Ginsberg and Breyer JJ joined) invoked the established international consensus against the imposition of capital punishment upon mentally

¹⁶ Ibid 830–1 (Stevens J).

¹⁷ Ibid 830 (Stevens J). Stevens J stated that the death penalty was available in New South Wales for treason and piracy. Arguably, that was the position in New South Wales to 1985 following the enactment of the *Crimes (Amendment) Act 1955* (NSW). However, by 1988, the passage of the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW) and the *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW) had ensured that ‘the death penalty is totally repealed in New South Wales’: Second Reading Speech of the Crimes (Death Penalty Abolition) Amendment Bill 1985 (NSW) and the Miscellaneous Acts (Death Penalty Abolition) Amendment Bill 1985 (NSW), New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 April 1985, 5684–5 (Terry Sheahan, Attorney-General). Both Acts were assented to on 15 May 1985.

¹⁸ *Thompson*, 487 US 815, 868 (Scalia J) (1988).

¹⁹ Justice Kennedy was not sitting, and because the Supreme Court affirms the judgment below where the Court evenly divides (see, eg, *Dow Chemical Company v Stephenson*, 539 US 111 (2003)), O’Connor J’s opinion was effectively decisive.

²⁰ O’Connor, above n 13, 2.

²¹ 536 US 304 (2002) (‘*Atkins*’).

²² 539 US 558 (2003) (‘*Lawrence*’).

²³ O’Connor, above n 13, 2.

handicapped persons to inform the 'evolving standards of decency' that demanded that such a sentence be set aside on constitutional grounds.²⁴ The case pushed *Thompson* to the next stage. It did so by affording majority endorsement to a line of reasoning that invoked international law as relevant to the exposition of American legal and constitutional doctrine.

Still more dramatic was the decision in *Lawrence*. There, Kennedy J (with whom Stevens, Souter, Ginsburg and Breyer JJ joined) cited a series of decisions of the European Court of Human Rights, and of the law as expounded in several foreign nations, to support the proposition that a Texan law criminalising private adult homosexual conduct was invalid by the standards of the *Constitution of the United States*.²⁵ The reference to international and regional human rights law was described by Kennedy J, writing for the Court, as constituting a statement of 'values' that were 'share[d] with a wider civilisation'.²⁶ Justice O'Connor again wrote a separate concurrence. She founded her agreement not on notions of privacy but on broader notions of legal equality. Later, she was to describe *Lawrence* as additional evidence of the new '[s]olicitude for the views of foreign and international courts'.²⁷

Before these developments in the US, and until the same time in Australia, the introspective nature of legal doctrine was well documented and often the subject of commentary.²⁸ The jury is still out in the US as to whether the sharply divided opinions of the Court over the use of international and foreign law represent a fresh turning or merely a temporary diversion. But the pointers to change are unmistakable.

As often happens in these things, developments of a like kind in Australia occurred contemporaneously and undoubtedly under the stimulus of similar intellectual forces. In this country, the encouragement to judges to look beyond the traditional sources of Australian law to international law (especially as declaring universal principles of human rights) came in the landmark judgment in *Mabo v Queensland [No 2]*.²⁹ There, Brennan J declared that it was inevitable, following Australia's ratification of the *International Covenant on Civil and Political Rights*,³⁰ and specifically of the *First Optional Protocol to that Covenant*,³¹ that the powerful force of human rights law, thus endorsed, would bring its influence to bear on judicial exposition of Australian law.³² *Mabo* was not, specifically, a constitutional case, but it was a decision of the most profound legal importance. The passage in Brennan J's reasoning was critical to the decision. Without its invocation of a basis in human rights, overriding the earlier

²⁴ *Lawrence*, 536 US 304, 312, 321 (Stevens J) (2003).

²⁵ *Ibid* 329 (Stevens J).

²⁶ *Ibid* 16 (Kennedy J).

²⁷ O'Connor, above n 13, 2.

²⁸ See, eg, Anne Bayefsky and Joan Fitzpatrick, 'International Human Rights Law in United States Courts: A Comparative Perspective' (1992) 14 *Michigan Journal of International Law* 1, 72–80; Nadine Strossen, 'Recent US and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis' (1990) 41 *Hastings Law Journal* 805, 831–6.

²⁹ (1992) 175 CLR 1 ('*Mabo*').

³⁰ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

³¹ Opened for signature 16 December 1966, 99 UNTS 302 (entered into force 23 March 1976).

³² *Mabo* (1992) 175 CLR 1, 42 (Brennan J).

racial discrimination in the common law extinguishment of native title, the legal step taken in *Mabo* could never have occurred.

Few Australian judges or lawyers at the time noted the importance of the *Mabo* principle. I did, because for five years I had been propounding the same idea in the New South Wales Court of Appeal, following my return from the conference at which the *Bangalore Principles* on the Domestic Application of International Human Rights Law had been propounded.³³ Most Australian judges who knew of the development were sceptical or even hostile. This is usually the response of the legal mind to the challenge of fresh insights. The synapses of peaceful brains prefer not to be disturbed.

One exception to this judicial resistance arose in the judicial and extra-curial writings of the new Chief Justice of the Family Court. It was these pronouncements by Nicholson CJ that placed the Family Court 'at the forefront of recognition of the potential impacts of international law on the interpretation of domestic law'.³⁴ The principle stated in *Mabo* provided an important legal foundation, in his professional work and in his performance of the judicial 'duty to advance and preserve human rights'.³⁵

A useful starting point for my analysis is the decision that Nicholson CJ wrote with Fogarty J in *Murray v Director, Family Services (ACT)*.³⁶ The decision was given in 1993, a year after *Mabo*. It concerned an alleged abduction of children from New Zealand to Australia. One argument advanced on behalf of the children's mother was that the primary judge, by ordering the return of the children to New Zealand, had failed properly to consider the effect of the *Convention on the Rights of the Child*³⁷ before making that order. Specifically, it was asserted that the provisions of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth), which had partly incorporated into Australian municipal law the *Hague Convention on the Civil Aspects of International Child Abduction*,³⁸ was to be construed in a manner consistent with *CROC*.

Apparently standing in the way of this argument was the proposition, often stated in Australian law, that international instruments (such as *CROC*) do not, as

³³ The *Bangalore Principles* are published in 'The Bangalore Principles on "the Domestic Application of International Human Rights Norms"' (1988) 14 *Commonwealth Law Bulletin* 1196. See Justice 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; Justice Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.

³⁴ Juliet Behrens and Phillip Tahmindjis, 'Family Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law — Principles, Practice and Potential* (1998) 169, 182.

³⁵ Chief Justice Alastair Nicholson, 'The Role of the Judge' (Paper presented to the National Judicial Orientation Program, Wollongong, 9 November 1997) 12.

³⁶ (1994) 116 FLR 321 ('*Murray*').

³⁷ Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990) ('*CROC*').

³⁸ Opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) ('*Hague Convention*'). See Chief Justice Alastair Nicholson, 'Australian Judicial Attitudes to the *Convention on The Civil Aspects of International Child Abduction* (the *Hague Convention*)' (Address delivered at the International Society of Family Law, 8th World Conference: Families Across Frontiers, Cardiff, 1 July 1994) 3.

such, form part of local law in the absence of explicit statutory incorporation.³⁹ So how did the Family Court under Nicholson CJ reconcile this apparent diversity of judicial approaches to the use of international law? The one traditional; the other more modern and seemingly more relevant to the age of expanding international legal regulation?

In their joint opinion, Nicholson CJ and Fogarty J recognised that international law, unless incorporated, was not as such part of Australian domestic law. However, that did not prevent the use of international law: to help resolve ambiguities in the interpretation of domestic primary or subordinate legislation;⁴⁰ to fill gaps in such legislation;⁴¹ and to elucidate and develop the common law.⁴²

In the event, in *Murray*, Nicholson CJ and Fogarty J (with whom Finn J relevantly agreed) held that the provisions of *CROC* did not give rise to an inconsistency with the *Hague Convention*. For that reason, *CROC* could not prevail over the latter *Convention*. But the groundwork had been laid for a useful analytical framework for many of the decisions of Nicholson CJ that were to follow, concerning the convergence of municipal and international law. It is helpful to make reference to some of the decisions that have shown the way that international law can, and sometimes cannot, be used in the exposition of law in the Australian nation.

III INTERNATIONAL LAW AND STATUTORY INTERPRETATION

Of the three categories identified by Nicholson CJ and Fogarty J in *Murray*, the first is the least controversial.⁴³ Thus in *Kartinyeri v Commonwealth*, Gummow and Hayne JJ declared that the legislation in question in that case was to be ‘interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law’.⁴⁴ Although I took a broader view in *Kartinyeri*, the acceptance of the utility and application of the principles even of unincorporated international law in the interpretation of Australian legislation dates back to the earliest days of the High Court.⁴⁵

³⁹ See, eg, *Chow Hung Ching v The King* (1948) 77 CLR 449, 478 (Dixon J); *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ and Gibbs J); *Simsek v Macphee* (1982) 148 CLR 636, 641–2 (Stephen J); *Tasmanian Wilderness Society v Fraser* (1982) 153 CLR 270, 274 (Mason J); *Kioa v West* (1985) 159 CLR 550, 570–1 (Gibbs CJ); *Mabo* (1992) 175 CLR 1, 55 (Brennan J), 79 (Deane and Gaudron JJ); *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 74 (McHugh J); *Dietrich v R* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J), 359–60 (Toohey J); *Coe v Commonwealth* (1993) 118 ALR 193, 200–1 (Mason CJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 70–1 (Dawson J).

⁴⁰ *Murray* (1994) 116 FLR 321, 336, 338 (Nicholson CJ and Fogarty J).

⁴¹ *Ibid* 338.

⁴² *Ibid*.

⁴³ See Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 457, where it is pointed out that a ‘standard principle of statutory construction is that, in the case of ambiguity in a statute, the courts should favour a construction that accords with international law’.

⁴⁴ (1998) 195 CLR 337, 384 (Gummow and Hayne JJ).

⁴⁵ See, eg, *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J). See also Sir Anthony Mason, ‘The Tension between Legislative Supremacy and Judicial Review’ (2003) 77 *Australian Law Journal* 803, 808–9.

A supporting principle, also well-established in Australian law, is that courts will not construe legislation to abrogate or curtail fundamental rights or freedoms (including those expressed in international law) unless an intention to do so on the part of the legislature is manifested by unmistakable and unambiguous language.⁴⁶

Useful though these principles of construction may be, they clearly have their limitations. One has been explained by Chief Justice Nicholson and I agree with it.⁴⁷ Where provisions of international instruments ‘reveal but do not resolve the conflicting interests which, as a matter of municipal law, attend the case’ before the Court, the solution to the problem in hand must be found in municipal law, not in the artificial extension of unincorporated international law.

This limitation is illustrated in a case concerning the national relocation of former domestic partners that reached the High Court in *AMS v AIF*.⁴⁸ There, the father and mother were contesting the ‘sole guardianship and custody’ of the single child of their relationship. The parents had not married. They lived in the Northern Territory at the time of the child’s birth. After they separated, both parents returned to Perth, the mother with the child. Shortly afterwards the mother informed the father that she wished to return to the Northern Territory with the child. The mother applied for orders permitting that course; however these were refused by the primary judge. Indeed, the mother was restrained from changing the child’s residence in any way that would reduce the father’s contact with the child. Needless to say, this imposed a severe practical constraint on the freedom of movement and career pursuits of the mother.

In the High Court, conflicting opinions were expressed as to the construction of the *Family Court Act 1975* (WA). Its provisions relevantly mirrored the *Family Law Act 1975* (Cth) before changes were introduced by the *Family Law Reform Act 1995* (Cth). Arguments were addressed to the Court to the effect that, because of suggested ambiguity in the statutory provisions, it was permissible to resolve the uncertainties by reference to ‘the paramount consideration of the welfare of the child’. International law was invoked to work towards that purpose. Reference was made to *CROC*, to the *ICCPR* and to the *Convention on the Elimination of All Forms of Discrimination against Women*.⁴⁹ In my reasons, I accepted that the international principles referred to by the parties could help to put the ‘controversies into a conceptual context and express the basic values which must be taken into account’.⁵⁰ In any case involving family relocation issues, it is necessary to consider the paramount interest of the welfare of the

⁴⁶ See, eg, *Daniels Corporation International v Australian Competition and Consumer Commission* (2002) 192 ALR 561, 571 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 584–5 (Kirby J), 597 (Callinan J). See also Charlesworth et al, above n 43, 447.

⁴⁷ Chief Justice Alastair Nicholson, ‘Australian Judicial Approaches to International Human Rights Conventions and “Family Law”’ (Speech delivered at The Miller Du Toit and The Law Faculty of the University of Western Cape Family Law Conference, Cape Town, South Africa, 26 March 2002) 33 <<http://www.familycourt.gov.au/papers/pdf/capetown.pdf>> at 1 May 2004.

⁴⁸ (1999) 199 CLR 160.

⁴⁹ Opened for Signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’).

⁵⁰ *AMS v AIF* (1999) 199 CLR 160, 218 (Kirby J).

child together with the 'legitimate interests and desires of the parents'.⁵¹ Nonetheless, 'the international conventions ... merely express the sometimes conflicting principles which are already reflected in Australian law and court decisions'.⁵² For that reason, 'examination of the international instruments, or the jurisprudence which has gathered around them' did not ultimately assist in resolving the controversy.⁵³ In the end, the case had to be resolved by reference to unelaborated local law.

The later relocation decision in *U v U*⁵⁴ affords another illustration of a like point. There, the parents of a child, all of whom were born in India, were in dispute concerning the mother's proposal to relocate to that country with the child. A parenting order had been made in favour of the mother. However, it required her to reside in the vicinity of Wollongong. The primary judge refused to release the mother from that order. The Full Court of the Family Court found no error in that discretionary decision, and the majority of the High Court affirmed it.⁵⁵

Justice Gaudron and I dissented, concluding that the primary judge had failed to consider properly the extent to which the interests of the mother in returning to India would coincide with those of the child.⁵⁶ Interestingly, in both the majority⁵⁷ and minority reasons, reference was made to the contextual significance of international statements of fundamental rights. In the view of the majority, such considerations did not resolve the issues arising in the case. However, the decision in *U v U* illustrates the permeation of international law into the discourse of the applicable principles of Australian law on the subject.

A second control on the use of international law was pointed out in 1997 by a Full Court of the Family Court in *B and B: Family Law Reform Act 1995*,⁵⁸ in which Nicholson CJ presided. In that case, the Full Court was concerned with s 43(c) of the *Family Law Act*. That sub-section required that, in the exercise of the Family Court's discretion, regard was to be had to 'the need to protect the rights of children and to promote their welfare'. This section had been in the *Family Law Act* since its first passage in 1975. On that basis, the Federal Attorney-General submitted that it should not be interpreted by reference to *CROC*, since that statement of international law was not in existence at the time of the legislative adoption of s 43(c).

In their joint reasons in the case, Nicholson CJ, Fogarty and Lindenmayer JJ offered five grounds for rejecting this submission. First, although *CROC* had not been adopted at the time of the passage of the *Family Law Act*, the concept of the rights of children was well-established by that time, having been recognised in

⁵¹ Ibid 207 (Kirby J). For an analysis of the conflicting 'rights' involved in *AMS v AIF*, see Justice Michael Kirby, 'Family Law and Human Rights' (2003) 17 *Australian Journal of Family Law* 6, 12–13.

⁵² *AMS v AIF* (1999) 199 CLR 160, 218 (Kirby J).

⁵³ Ibid.

⁵⁴ (2003) 211 CLR 238.

⁵⁵ Ibid 263 (Callinan and Gummow JJ), 240 (Gleeson CJ), 249 (McHugh J), 284 (Hayne J).

⁵⁶ Ibid 248 (Gaudron J), 282–3 (Kirby J).

⁵⁷ See references to provisions of the Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (III) (1948) in *U v U* (2003) 211 CLR 238, 261–2 (Gummow and Callinan JJ).

⁵⁸ (1997) 21 Fam LR 676.

1959 in the *Declaration on the Rights of the Child*,⁵⁹ which preceded *CROC*, and to which Australia had acceded.⁶⁰ Secondly, the rights of children were not to be regarded as static. Section 43(c) of the *Family Law Act* was to be interpreted as understood from time to time.⁶¹ Thirdly, *CROC* was to be accorded particular attention because it was an instrument of the international law of human rights that had secured virtually universal acceptance by all nation states in the international community. It was therefore important that domestic law, so far as possible, should accord with it. Fourthly, the *Declaration on the Rights of the Child* was scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).⁶² It therefore enjoyed ‘special significance’ in Australian municipal law as a treaty nominated by the Federal Parliament in this way.⁶³ Fifthly, it was apparent that other provisions, later introduced into the *Family Law Act*, were enacted in reliance upon *CROC*. The reasoning of the Full Court in this manner reflects the way in which the House of Lords was later to reason regarding the interpretation of English legislation so that it would be in harmony with later adopted principles of universal human rights.⁶⁴

The use of international law to help resolve ambiguities in local legislation is by now well-established in Australian jurisprudence.⁶⁵ More controversial is the use of this source to fill gaps in local legislation. This, it will be remembered, was the second category identified by Nicholson CJ and Fogarty J in their decision in *Murray*.⁶⁶

In *Dietrich v The Queen*,⁶⁷ Toohey J in the High Court noted authority for the proposition that ‘a court may, perhaps must, consider the implications of an international instrument where there is a lacuna in the domestic law’.⁶⁸ Later statements in the High Court suggest that this broad interpretative approach may be especially relevant where legislation or delegated legislation has been made that specifically purports to implement the relevant international obligation.⁶⁹

The operation of this principle arose for consideration before a Full Court of the Family Court in *P v Commonwealth Central Authority*.⁷⁰ That case reached the High Court under the name *DP v Commonwealth Central Authority*.⁷¹ It was

⁵⁹ GA Res 1386(xiv), UN GAOR, 14th sess, 841st plen mtg, Agenda Item 64, Supp 16, 19, UN Doc A/4354 (1959).

⁶⁰ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 741–3 (Nicholson CJ, Fogarty and Lindenmayer JJ).

⁶¹ *Ibid* 741.

⁶² *Human Rights and Equal Opportunity Commission Act 1986* (Cth) sch 3. On 22 December 1992, the Attorney-General declared *CROC* to be an instrument relating to ‘human rights and freedoms’ made pursuant to the *Human Rights and Equal Opportunity Act 1986* (Cth) s 47(1); see Commonwealth of Australia, *Gazette No 1* (13 January 1993) 85.

⁶³ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 742 (Nicholson CJ, Fogarty and Lindenmayer JJ).

⁶⁴ *Fitzpatrick v Stirling Housing Association Ltd* [2001] 1 AC 27. See Lord Lester and David Pannick, *Human Rights Law and Practice* (2nd ed, 2004) 423.

⁶⁵ See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

⁶⁶ *Murray* (1994) 116 FLR 321, 338 (Nicholson CJ and Fogarty J).

⁶⁷ (1992) 177 CLR 292.

⁶⁸ *Ibid* 360 (Toohey J).

⁶⁹ *Northern Territory of Australia v GPAO* (1999) 196 CLR 553, 642 (Kirby J). See also Charlesworth et al, above n 43, 460.

⁷⁰ [2000] FamCA 461 (Unreported, Nicholson CJ, Buckley and Kay JJ, 19 May 2000).

⁷¹ (2001) 206 CLR 401.

heard together with a separate appeal from the Full Court of the Family Court in *JLM v Director-General, NSW Department of Community Services*.⁷²

In the Full Court, Nicholson CJ, Buckley and Kay JJ noted that art 1 of the *Hague Convention* expressed two core objects. These were to secure the prompt return of children wrongfully removed to, or retained in, a Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State were effectively respected by the courts and tribunals of other Contracting States.⁷³ On this basis, the Full Court endorsed the opinion of Nygh J to the effect that the purpose of the *Hague Convention* and the Regulation was 'to limit the discretion of the Court in the country to which the children had been taken quite severely and stringently'.⁷⁴

In support of this view, Nicholson CJ and his colleagues relied on my earlier explanation of the *Hague Convention* which had embraced a broad approach that, ultimately, the 'best interests' principle enshrined in art 3(1) of *CROC* was normally to be achieved by returning the particular child to the country from which it had been unlawfully taken so that, usually, the 'best interests' could be determined there.⁷⁵

Unfortunately for their Honours, my approach in this respect was not supported by a majority of the High Court in the appeal from their decision in *DP v Commonwealth Central Authority*.⁷⁶ Gleeson CJ dissented, although on another point.⁷⁷ However, the majority (Gaudron, Gummow and Hayne JJ) rejected the notion that the exception to mandatory return of an abducted child provided for in reg 16(3)(b) of the applicable regulation was to be construed narrowly because of the context. The majority went on to find that the mother in the case of *P*, who had unlawfully brought her disabled child to Australia, had discharged the onus of invoking the exception.⁷⁸ I disagreed, faithful as I saw it to the language and policy of the *Hague Convention* and the local regulation giving it effect.

Two points may be made concerning this authority. The first is that it indicates once again the extent to which all Australian courts are now quite regularly involved in clarifying the interaction of Australian law and international law. This is no longer a rare occurrence, whether in the Family Court, in the High Court of Australia or elsewhere. It is now part of the ordinary vocation of judging and lawyering in Australia.

Secondly, whatever views may be held concerning the outcome of the litigation in *DP v Commonwealth Central Authority*, Nicholson CJ, in a remark quoted to a conference some seven years before the final resolution of the question by the High Court, anticipated the result at which the High Court arrived:

⁷² The relevant Full Family Court decision can be found at *Director-General, NSW Department of Community Services v JLM* (2001) 28 Fam LR 243.

⁷³ *P v Commonwealth Central Authority* [2000] Fam CA 461 (Unreported, Nicholson CJ, Buckley and Kay JJ, 19 May 2000) [74].

⁷⁴ *Director General of Family and Community Services v Davis* (1990) 14 Fam LR 384 (Nygh J).

⁷⁵ See *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640, 686 (Kirby J).

⁷⁶ (2001) 206 CLR 401.

⁷⁷ *Ibid* 406–7 (Gleeson CJ).

⁷⁸ *Ibid* 418–24 (Gaudron, Gummow and Hayne JJ).

Unless the Contracting States to the [*Hague*] *Convention* are prepared to take further steps to improve the *Convention*, its very existence is threatened, for courts of Recovery States would be quick to find exceptions where they are not satisfied that the welfare of the children will indeed be enhanced by their return to the original jurisdiction.⁷⁹

This is the danger to which I was endeavouring to point in my opinions on this issue. It was a danger to which the Full Court of the Family Court was also alert. The achievement of the international treaty response to the serious and growing problem of child abduction, in the age of international air transport, is a major one for the global community. The *Hague Convention* is an important achievement for the protection of vulnerable children and the safeguarding of their interests and those of their parents and families. It would be a tragedy if this important milestone of international law were undermined by parochial, and even xenophobic, decisions of municipal courts asserting that the abducted child is better off as a result of the abduction and should not be returned; as the *Convention* and local law contemplate will happen virtually as a matter of course.

It is obvious from the foregoing that there are limits upon the extent to which international law, specifically that concerned with human rights, can be invoked in the interpretation of Australian legislation. Nicholson CJ always acknowledged those limits. If the purpose of an Australian legislature, acting within its constitutional powers, is plain from the language of a statute, an Australian court has no authority to ignore the legislative text or to give it an effect otherwise than according to its natural meaning. For the High Court or any other Australian court — including the Family Court of Australia — to act contrary to this rule is expressly forbidden by the *Australian Constitution* from which, ultimately, the jurisdiction and powers of such courts are derived. Under the *Australian Constitution*, laws made by the Parliament of the Commonwealth are ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth’.⁸⁰

Different eyes will sometimes read a written law in different ways. Language is an imperfect means of communicating meaning from one human being to another. Different eyes will see, or deny, ambiguity in statutory language. Different judges will feel, or reject, an authority to give effect, in judicial reasons and orders, to doubts about statutory meaning. Under the *Australian Constitution*, questions of this kind are resolved according to law and within an established hierarchy of courts. Every judge understands this. I did when I served for more than a decade as President of the New South Wales Court of Appeal. Nicholson CJ was likewise never under any illusions. Both of us, I suppose, would have been willing to accept Lord Denning’s classification as ‘bold spirits’ rather than ‘timorous souls’.⁸¹ In every legal system, at every time and in every

⁷⁹ Quoted in Nicholson, ‘Australian Judicial Attitudes to the *Convention on The Civil Aspects of International Child Abduction* (the *Hague Convention*)’, above n 38, 25.

⁸⁰ *Commonwealth of Australia Constitution Act 1900* (UK) s 5.

⁸¹ *Candler v Crane, Christmas and Co* [1951] 2 KB 164, 178 (Denning LJ).

place, there are differences of this kind within the judiciary.⁸² Sometimes, however, even ‘bold spirits’ disagree.

An instance of the limits of international law, and of a disagreement between those receptive to the influence of international law, may be seen in *Minister for Immigration and Multicultural and Indigenous Affairs v B*.⁸³ There, the High Court unanimously reversed a majority decision of the Full Court of the Family Court.⁸⁴ In that case, Nicholson CJ and O’Ryan J (with Ellis J dissenting in part) concluded that the Family Court had jurisdiction and power with respect to the claim made. This was for orders against the Minister to oblige the release from immigration detention of five children who had arrived in Australia as ‘unlawful non-citizens’ within the meaning of the *Migration Act 1958* (Cth).⁸⁵ As a result of this decision, a second Full Court of the Family Court, differently constituted, ordered the Minister to release the children.⁸⁶ This was done. However, the Minister secured a certificate and brought an immediate appeal to the High Court.⁸⁷

Although different judges of the High Court took different paths to conclude that the Family Court did not have the jurisdiction and power asserted under the increased powers of that Court with respect to the welfare of children, most of the judges did not elaborate upon the claim made by Nicholson CJ and O’Ryan J that the Family Court’s welfare jurisdiction was enlarged under Australian legislation when read in the light of applicable international law. One judge — Callinan J — expressly reserved whether, in any case, the welfare of children in Australia could truly be an ‘external affair’, attracting federal legislative power under the *Australian Constitution*.⁸⁸

In my reasoning, however, it was necessary for me to grapple with the invocation of international law as a source for the powers claimed by the Family Court. I accepted that the provision for mandatory detention of unlawful non-citizens in s 196 of the *Migration Act* should be read, as far as its language permitted, to ensure conformity with Australia’s treaty obligations.⁸⁹ To that extent, I agreed in the approach of Nicholson CJ and O’Ryan J in the Family Court. However, when I proceeded to examine the language of the *Migration*

⁸² They have emerged in the development of constitutional courts in Central and Eastern Europe since the collapse of the Soviet Union: See Alexander Brösl, ‘At the Crossroads on the Way to an Independent Slovak Judiciary’ in Jiří Přibáň, Pauline Roberts and James Young (eds), *Systems of Justice in Transition — Central European Experiences Since 1989* (2003) 141, 155.

⁸³ [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) (*MIMIA v B*).

⁸⁴ *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181.

⁸⁵ *Migration Act 1958* (Cth) ss 4, 14.

⁸⁶ *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 621 (Unreported, Kay, Coleman and Collier JJ, 25 August 2003).

⁸⁷ The certificate was issued under the *Family Law Act 1975* (Cth) s 95(b). See *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004), [66] (Gummow, Hayne and Heydon JJ), [126] (Kirby J).

⁸⁸ *Australian Constitution* s 51(xxix). See *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004), [220] (Callinan J).

⁸⁹ *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004), [143] (Kirby J).

Act, read alongside several official reports tabled in the Parliament, raising specific concerns about mandatory detention of children by reference to international law,⁹⁰ I could not agree that international law assisted in the case. Australian law was clear. It made no distinction for children. It appeared to involve a deliberate decision of our Parliament, made by legislators with their eyes wide open. In such a case, the specific provisions for detention in the *Migration Act* excluded the general provisions for child welfare in the *Family Law Act*. It was a sad case.

Sad cases, and cases arguably involving breaches of Australia's international legal obligations, encourage judges who deeply respect human rights, to put on their spectacles and to ask themselves: Did the Parliament *really* mean this result?⁹¹ When the answer to that question is in the affirmative, so long as the law is constitutionally valid, municipal courts must give effect to it.⁹² This is so although it involves an arguable breach of international legal commitments or time honoured civil rights. Lord Denning declared that he could not sleep at night 'if I've felt I have decided unjustly'.⁹³ Obedience to the law is the ultimate and overriding duty of judges. However, addressing perceived issues of injustice conscientiously is always a proper judicial function. It is one that Nicholson CJ never took lightly.

IV INTERNATIONAL LAW AND COMMON LAW

The third and probably most significant category for the influence of international law upon Australian law, mentioned by Nicholson CJ and Fogarty J in *Murray*,⁹⁴ is the influence which international law — particularly when expressing universal principles of human rights — has upon expressions of the common law of Australia.⁹⁵

The extent to which Australian judges are utilising international instruments in the ascertainment of Australian common law has expanded notably in the decade since *Mabo*. An interesting recent illustration is the reasoning of Gleeson CJ in dissent in *Cattanach v Melchior*.⁹⁶ There, the question concerned the common law of Australia in relation to a claim for damages for the unplanned birth of a child following negligent medical advice after a failed sterilisation procedure. In his opinion, denying recovery, Gleeson CJ looked to no fewer than eight international⁹⁷ and regional⁹⁸ human rights instruments to support the

⁹⁰ Ibid [160]–[169] (Kirby J).

⁹¹ This was essentially what was done in favour of the complainant by a unanimous High Court in *Daniels Corporation International v Australian Competition and Consumer Commission* (2002) 192 ALR 561.

⁹² *Re Kavanagh's Application* (2003) 204 ALR 1, 5–6 (Kirby J).

⁹³ Garry Sturgess and Philip Chubb, *Judging the World — Law and Politics in the World's Leading Courts* (1988) 2, cited in Bröstl, above n 82, 55.

⁹⁴ *Murray* (1994) 116 FLR 321, 338 (Nicholson CJ and Fogarty J).

⁹⁵ See *Mabo* (1992) 175 CLR 1, 42 (Brennan J).

⁹⁶ (2003) 199 ALR 131.

⁹⁷ See, eg, *ICCPR*, above n 30; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *CROC*, above n 37.

conclusion that it would be offensive to local legal principle to assign an economic value to the parent–child relationship.⁹⁹ In reasoning in this way, Gleeson CJ was merely implementing what he had earlier said in an extra-curial paper: ‘Courts may use international treaties and conventions in resolving uncertainties in the common law’.¹⁰⁰

Almost a decade earlier, Sir Anthony Mason, writing in a family law context, suggested that although international instruments, such as *CROC*, were not formally incorporated into Australian domestic law, they could be ‘used as a legitimate guide, by the courts, in developing the common law, particularly in developing difficult concepts such as the best interests of the child’.¹⁰¹ This view was propounded by reference to the judgment of Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*.¹⁰² That decision, in turn, had built upon the seminal passage in *Mabo*.

Although some cold water has been thrown on the authority of the decision in *Teoh* in the High Court more recently,¹⁰³ it has not been overruled. Meanwhile, in the Full Court of the Family Court, Nicholson CJ in *T and S*¹⁰⁴ illustrated the way in which *Teoh* could sometimes be useful in approaching complex and novel legal questions.

The case of *T and S* concerned a residence and contact dispute between a father and mother of a child. The mother had claimed that she had been physically abused by the father. Her allegation was not accepted by the primary judge. During the trial, the father was legally represented throughout the entire hearing of six days. The mother was legally represented only on the last day. On appeal, the mother was represented for the first time by senior counsel. A submission was put to the appellate court that, in the circumstances, the mother should be allowed, exceptionally, to present further affidavit evidence to support the allegation of domestic violence rejected at trial. Following the decision of the High Court in *CDJ v VAJ*,¹⁰⁵ the Full Court exercised its discretion¹⁰⁶ to permit fresh evidence to be adduced on behalf of the mother.¹⁰⁷

⁹⁸ Organization of American States, *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978); Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, 28 ILM 156 (entered into force 16 November 1999); Organization of the Islamic Conference, *Cairo Declaration on Human Rights in Islam*, OIC Res 49/19-P (1990); Council of the League of Arab States, *Arab Charter on Human Rights*, Council of the League of Arab States, Res 5437, 102nd sess (1994).

⁹⁹ *Cattanach v Melchior* (2003) 199 ALR 131, 143–4 (Gleeson CJ).

¹⁰⁰ Chief Justice Murray Gleeson ‘Global Influences on the Australian Judiciary’ (2002) 22 *Australian Bar Review* 184, 187.

¹⁰¹ Sir Anthony Mason, ‘International Law and its Relationship with Family Law’ (Paper presented at Enhancing Access to Justice: Family Court of Australia, Second National Conference, Twin Waters, Australia, 20–23 September 1995) 15, 26.

¹⁰² (1995) 183 CLR 273 (‘*Teoh*’).

¹⁰³ See *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502.

¹⁰⁴ (2001) 28 Fam LR 342.

¹⁰⁵ (1998) 197 CLR 172.

¹⁰⁶ Pursuant to the *Family Law Act 1975* (Cth) s 93A(2).

¹⁰⁷ *T and S* (2001) 28 Fam LR 342, 371–2 (Nicholson CJ, Ellis and Mullane JJ).

In his reasons, Nicholson CJ stated that the case highlighted ‘a serious problem affecting the administration of justice in family law proceedings’.¹⁰⁸ He made reference to the High Court decision in *Teoh*. He held that the mother had been denied the ‘practical enjoyment of rights which [were] meant to be assured’ under *CEDAW* and the *Declaration on the Rights of Disabled Persons 1975*.¹⁰⁹ The latter was considered relevant because of the suggested recognition in it of the predicament of women subjected over long periods to physical violence within domestic relationships.¹¹⁰

Leave to appeal from the judgment of the Full Family Court in *T and S* was refused by the High Court.¹¹¹ Leaving aside the international element, the comments of Nicholson CJ concerning the disadvantage suffered in the litigation by the unrepresented mother might have seemed self-evident. However, they occasioned one of many personal attacks on the Chief Justice by well-known media ‘pundits’ and others holding a contrary view. As is so often the case in attacks from that quarter, when carefully analysed they were found to be ‘poorly researched and factually incorrect’.¹¹²

The intolerance and even rage of critics who denounce the growing power and influence of international law upon our legal doctrine portray a shameful ignorance concerning the way our legal system develops to serve a free society as it changes. Because one of the undoubted realities of today’s world is the power of globalisation, it is inevitable that the influence of international law will continue to expand and to affect national legal systems. One of the great ironies of this discourse is that the global economy needs the expansion of international law to regulate and sustain its expanding strength. The selfsame pundits who commonly embrace the panacea of the global economy are not, however, usually so enthusiastic about the other side of the coin. Yet with the attributes of increasing global *economic* freedom come the attributes of *personal* freedom, individual human rights and human dignity.¹¹³

V INTERNATIONAL LAW AND CONSTITUTIONAL INTERPRETATION

This returns me to the passages in the decisions of the US Supreme Court where international law is increasingly invoked in the elaboration of that nation’s *Constitution*. Even before the recent American developments, and for much the same reasons, I have suggested that the interpretation of the *Australian Constitution* must also nowadays be undertaken in the context of international

¹⁰⁸ Ibid 373 (Nicholson CJ).

¹⁰⁹ GA Res 3447(xxx), UN GAOR, 30th sess, 2433rd plen mtg, Supp 34, 88, UN Doc A/10034 (1975).

¹¹⁰ *T and S* (2001) 28 Fam LR 342, 374 (Nicholson CJ).

¹¹¹ Transcript of Proceedings, *DJS v LJT* (High Court of Australia, Kirby and Hayne JJ, 19 March 2002).

¹¹² Jenni Millbank, ‘Domestic Violence, the Unrepresented Litigant and Access to Justice’ (2004) <<http://www.familycourt.gov.au/papers/html/millbank2.html>> at 1 May 2004.

¹¹³ See Nicholson, ‘Australian Judicial Approaches to International Human Rights Conventions and “Family Law”’, above n 47, 24; John Morss, ‘Saving Human Rights from Its Friends: A Critique of the Imaginary Justice of Costas Douzinas’ (2003) 27 *Melbourne University Law Review* 889, 901–4.

law. Our *Constitution* speaks to Australia of the nation we are. But it also speaks to the world in which Australia, as a nation state, must find and play its part.¹¹⁴

So far, my view on this subject has not, in Australia, gained broad acceptance.¹¹⁵ A view of the *Australian Constitution* persists in many circles that it is, in effect, a colonial document, largely confined to the division of powers (mainly economic powers) among the successors to the British colonies in the South Pacific. This is a crippled and overly narrow perspective of the *Australian Constitution*. It is one that has failed to keep pace with the legal context in which the *Australian Constitution* operates. It is one that I reject. Increasingly, scholars and judges across the world are adopting a global approach to constitutionalism. One US commentator recently explained:

International law shows evidence of constitutionalization, at least in the broadest terms of ‘imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights’. Where international law was formerly blind to the treatment of individuals as such by states, it increasingly constrains the terms of state action.¹¹⁶

A feature of the internationalisation of the law, including constitutional law, is the growing understanding (described most clearly by Professor Ian Brownlie)¹¹⁷ that in making their decisions on subjects relevant to international law, national courts are exercising a kind of international jurisdiction. Thereby, such courts — however unconsciously or even reluctantly — become part of the global machinery for constitutionalism and the rule of law that is the hope of the future of humanity. Indeed, it is not too much to say that it is probably a development essential to the survival of our species. In due course, this perception will become clearer to Australian judges and lawyers, including specialists in constitutional law. Ultimately, it should not be so difficult for us in Australia. Because of the autochthonous expedient, we have lived for a century with the notion of parallel federal and state legal jurisdictions. The concept of an international jurisdiction is one that comes naturally to an Australian citizen.

For the most part, the debates over the use of international law in constitutional interpretation will have to be resolved in the High Court and not, as such, in the Family Court. But the Family Court decides constitutional issues and may provide stimulus and applications of international law within its own jurisdiction and powers. These debates will not be finally resolved during my judicial service. But mark my words, they will be resolved in favour of an harmonious relationship between Australian constitutional law and international law.

¹¹⁴ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657 (Kirby J).

¹¹⁵ See a discussion of some of the hostility to the approach in Kristen Walker, ‘International Law and a Tool of Constitutional Interpretation’ (2002) 28 *Monash University Law Review* 85.

¹¹⁶ Peter Spiro, ‘Treaties, International Law, and Constitutional Rights’ (2003) 55 *Stanford Law Review* 1999, 2022 (footnote omitted).

¹¹⁷ Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 584, 708. See also Justice Gérard La Forest, ‘The Expanding Role of the Supreme Court of Canada in International Law Issues’ (1996) 34 *Canadian Yearbook of International Law* 89, 100; *R v Finta* [1994] 1 SCR 701, 773–4 (La Forest J); Gibran Van Ert, *Using International Law in Canadian Courts* (2002) 46.

VI CONCLUSION

Unsurprisingly, in his extra-curial remarks, Chief Justice Nicholson has supported the need to view constitutional law through the prism of international law — particularly as it affects basic human rights.¹¹⁸ From the vantage point of his unique experience, he has described the difficulties in the Australian Commonwealth of pursuing effectively the best interests of the nation's children within a constitutional structure that is now replete with anomalies, omissions and difficulties.¹¹⁹

In 1995, Sir Anthony Mason declared that 'international law is exercising and will continue to exercise a marked influence on Australian family law'.¹²⁰ Last year I remarked, to similar effect, that international law has come to play an 'undreamt of' role in family law litigation.¹²¹

Over the past 16 years, Australia has been fortunate to have had at the helm of its national family court a lawyer in tune with one of the major intellectual movements in the law today. No longer is it good enough for any of us to live in the warm cocoon of our own legal jurisdiction. Ideas, including legal ideas, inform the legal process and reflect the changing times. International law is not, as such, part of Australian law until incorporated by one of the organs of law-making. A treaty may not be incorporated by the judiciary 'by the back door', as it were.¹²² But this does not deny to the judiciary the interstitial acceptance of the broad intellectual influence of international law upon what they do. In his judicial work, Nicholson CJ learned this lesson early. He practised it faithfully. He recognised its limits. But he also saw, and declared, its great potential for the doing of individual justice.

The law and liberty in Australia will shortly lose a devoted judicial servant at the head of a great national judicial institution. Others will follow. They, in their turn, will make their own contributions. They will be strengthened and encouraged in doing so by the example of Alastair Nicholson. When a full appreciation of his judicial work is written, I do not doubt that many more, and different, insights will be offered. But his early appreciation of the importance of international law for Australia's domestic law will be the brightest of many jewels that will continue long to shine.

¹¹⁸ Chief Justice Alastair Nicholson, 'Children and Young People — The Law and Human Rights' (Address delivered at Sir Richard Blackburn Lecture, Canberra, 14 May 2002) 13; Chief Justice Alastair Nicholson, 'Unmarried Families: Respect, Recognition and Rights "Down Under"' (Paper presented to the International Society of Family Law 11th World Conference: Family Life and Human Rights, University of Copenhagen, 2 August 2002) 22.

¹¹⁹ Nicholson, 'Children and Young People', above n 118, 14. See also Chief Justice Alastair Nicholson, 'Implementing the UN *Convention on the Rights of the Child* in Australia' (Paper presented to the South Australian Children's Interests Bureau, Adelaide, 21 December 1993).

¹²⁰ Mason, 'International Law and its Relationship with Family Law', above n 101, 26.

¹²¹ Kirby, 'Family Law and Human Rights', above n 51, 17.

¹²² See *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384–6 (Gummow and Hayne JJ). See also Charlesworth et al, above n 43, 463.