

COMMENTARIES

TRANSNATIONAL JUDICIAL DIALOGUE, INTERNATIONALISATION OF LAW AND AUSTRALIAN JUDGES

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[In recent years an increasing number of judges of national courts, including in Australia, have taken part in a transnational dialogue about basic principles of the law, the values that underpin these principles, and the light that may be thrown on such values and principles by the international law of human rights. In Australia, the use of such materials in elucidating local legislation (especially when intended to give effect to a treaty) and in elaborating the common law is less controversial following Mabo v Queensland [No 2]. However, their use in constitutional elaboration remains contested. The author describes the occasions for such judicial dialogue, including international civil society organisations of lawyers and two new bodies with which he is associated: the Judicial Reference Group of the United Nations High Commissioner for Human Rights and the Hague Institute for Internationalisation of Law. He then describes the way in which international law may seep into constitutional reasoning. He instances the prisoners' voting decision of Roach v Australian Electoral Commission. The minority in that case criticised the majority judges for referring to reasoning of the European Court of Human Rights. The author suggests that references to such analogous materials are both inevitable and beneficial.]

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I INTRODUCTION: TRANSNATIONAL JUDICIAL CONVERSATION

A distinctive feature of the present age has been the increase in dialogue between judges and other lawyers across national boundaries. This dialogue has concerned both the substance of the law and its doctrines and procedures for conducting trials, appeals and the work of the courts generally.

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To some extent the dialogue has been comparatively uncontroversial, as in cases where national judges are called upon to interpret international treaties incorporated into municipal law. The growth of treaty law, especially since 1945,¹ has meant that increasing numbers of cases have involved national courts in construing treaty provisions. There are strong reasons why such tasks of interpretation should be carried out, as far as possible, in a consistent way. Recognition of this principle has taken Australian courts to a study of the international law governing the interpretation of treaties;² the *travaux préparatoires* that preceded the adoption of the treaty;³ and the decisions of courts and tribunals of high authority in other countries struggling with the same or similar problems.⁴

More controversial, at least in Australia, has been the extent to which it is legitimate for judges in national courts in non-treaty cases to invoke decisions of courts of other countries, or principles of international law, in discharging their responsibilities of finding and declaring national law. Most controversial of all has been the invocation of the international law of human rights, especially in matters of constitutional adjudication.⁵

In a sharp comment, in his dissenting reasons in the recent decision of the High Court of Australia in *Roach v Australian Electoral Commissioner*,⁶ Heydon J rejected the invocation by the plaintiff prisoner of analogies suggested for the case in hand by the terms of, and decisions about and commentaries on, various named international treaties and national constitutional provisions.⁷ Heydon J said that

these instruments can have nothing whatever to do with the construction of the *Australian Constitution*. These instruments did not influence the framers of the Constitution, for they all postdate it by many years ... The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the Constitution, it might be thought that the process of assessing the significance of what the Committee did would be assisted by knowing which countries were on

¹ See John O'Brien, *International Law* (1st ed, 2001) 82.

² See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265 and *Commonwealth v Tasmania* (1983) 158 CLR 1, 177 ('*Tasmanian Dams Case*') discussing *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

³ *Tasmanian Dams Case* (1983) 158 CLR 1, 93.

⁴ See, eg, *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225, 259–63, 280–2; *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 203–8, 231.

⁵ See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–61 (Kirby J).

⁶ (2007) 239 ALR 1 ('*Roach*').

⁷ *Ibid* 46–7. The materials rejected included the following: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 May 1976) ('*ICCPR*'); *Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 262 (entered into force 18 May 1954); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11; *Constitution of South Africa* (1996).

the Committee at the relevant times, what the names and standing of the representatives of these countries were, what influence (if any) Australia had on the Committee's deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff's submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities — that is, denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one.⁸

The 'one' concerned was identified as myself. I shall return to the decision in *Roach* later in this article, for it indicates that there may be a growing willingness on the part of Australian judges to acknowledge the utility of international materials in the performance of their own tasks, discharged with the aid of transparent analogical reasoning. First, however, I will describe some of the practical ways in which the international conversation between national judges of courts of high authority is taking place.

In recent months, two meetings have occurred that illustrate the dialogue that is taking place. That dialogue is one that expands the source materials of analogical information available to contemporary judges. One was a meeting of a new Judicial Reference Group of the High Commissioner for Human Rights ('JRG') that took place in Geneva in November 2007. The other was a meeting at Cambridge University organised by the Hague Institute for the Internationalisation of Law ('HiIL') in February 2008. These meetings occurred against a background of many other professional gatherings in which judges and practising lawyers from many countries now participate, share ideas and experience, and receive information and the stimulus of fresh insights from colleagues in other jurisdictions.

The purpose of this article is to demonstrate that with the growing body of treaty law, increasing international trade and commerce, the advent of the internet and enhanced international travel have come stimuli of a specifically judicial and legal kind. Inevitably, these stimuli have influenced the ideas and values of national judges as they approach the resolution of local legal problems. Honesty and transparency sometimes suggest an acknowledgement of such source materials. The proposition is that this is a development as natural as it is inevitable. It is no more than part of the global reality of contemporary times.

II VENUES FOR TRANSNATIONAL DIALOGUE

A *The Office of the High Commissioner for Human Rights*

In the past, the Office of the High Commissioner for Human Rights ('OHCHR') has engaged with national judges in a number of ways. The links have included the provision of training materials for use in the education of judges about international norms and treaty body jurisprudence;⁹ the occasional

⁸ *Roach* (2007) 239 ALR 1, 47.

⁹ See, eg, OHCHR in cooperation with the International Bar Association, *Professional Training Series No 9: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) ('*Manual on Human Rights*').

consultation with particular judges concerning special aspects of human rights guarantees;¹⁰ the establishment of expert groups on legal issues which have included national judges;¹¹ the invitation to particular judges or former judges to participate in the special procedures of the Human Rights Council as United Nations special rapporteurs or special representatives; and the occasional provision of submissions to national courts by way of amicus curiae briefs in appropriate cases.¹²

Whereas the engagement of the OHCHR with the governments of member states is institutionally assured through the activities of the Human Rights Council and whereas contact with national Human Rights Commissions (and other bodies within the executive government of member states) is institutionally provided for on a regular basis, the contacts between the OHCHR and national judges have, until now, been relatively limited and confined.

In part, this has been the result of the very large number of national courts, their diverse functions, the differing ways in which they are organised and the practical difficulties of making direct contact with them. In part, it has followed from respect for the principle of judicial independence, which is itself expressed in international human rights law.¹³ Until quite recently, in many countries, this principle was given effect by limiting the contact between members of the judiciary and other branches of the national government, even for purposes of general judicial education. Still less was the direct contact with international agencies of the UN. Relationships with such agencies were conventionally viewed as the exclusive responsibility of the executive government of the nation and inappropriate for the national judiciary.

In more recent years, the judiciary in most countries, including Australia, have become involved in activities of judicial education, in global and regional meetings designed to promote the exchange of experience and ideas and contact with international bodies concerned with shared questions of legal doctrine, the administration of justice and human rights. As more countries have ratified

¹⁰ For example, the writer has contributed to a number of documents in connection with the UN: *ibid* xxxi. The writer has also acted as an expert-moderator at the ‘Seminar on Good Governance Practices for the Promotion of Human Rights’ (OHCHR, UN Development Programme) <<http://www2.ohchr.org/english/issues/development/docs/agendafinal.doc>> at 23 May 2008.

¹¹ The author was conferred the presidency of the Drafting Group of the International Bioethics Committee, UN Educational, Scientific and Cultural Organization (‘UNESCO’), *Second Meeting of the IBC Drafting Group for the Elaboration of a Declaration on Universal Norms on Bioethics*, UN Doc SHS/EST/04/CIB-Gred-2/3 (2 July 2004) [1].

¹² An amicus curiae brief was filed by Ms Mary Robinson in the US Supreme Court in *Lawrence v Texas* 539 US 588 (2003) and more recently an amicus curiae brief was filed by the OHCHR in US Guantánamo Bay litigation: *Boumediene v Bush*, No 06-1195 (US Supreme Court, filed 5 March 2007) and *Al Odah v US*, 06-1196 (US Supreme Court, filed 5 March 2007) (Amicus Curiae Brief: UN High Commissioner for Human Rights), available from <<http://www.abanet.org>> at 23 May 2008.

¹³ See, eg, *ICCPR*, above n 7, art 14(1).

international human rights treaties¹⁴ and as reference to these instruments in domestic judicial adjudication has increased in most countries,¹⁵ the interest and involvement of members of national judiciaries in the global work centred in the OHCHR has expanded. The consequential growth of a transnational judicial dialogue¹⁶ has therefore occasioned consideration by the OHCHR of proper ways to ensure an input into the work of the Office so as to take advantage of perspectives derived from experienced members of national judiciaries.

Because, in their day to day work, directly and indirectly, national judges are often concerned with decision-making on subjects that may be broadly classified as involving aspects of universal human rights, it has increasingly become apparent that expanding awareness in the national judiciaries of the work of the High Commissioner for Human Rights, and vice versa, might be justifiable and beneficial. Although, within their national courts, municipal judges are generally bound to apply only national law, save where that law itself commands application of international human rights norms,¹⁷ such judges will frequently be both an interested audience for some of the activities of the High Commissioner for Human Rights and occasional contributors to the attainment of the same or similar objectives.

The work of the OHCHR with judges includes outreach to the judiciary in several countries by the conduct of diploma courses on international human

¹⁴ The nine core international human rights treaties and protocols relevant to the Commissioner for Human Rights are: *ICCPR*, above n 7; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 26 January 1990, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007 (not yet in force); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (not yet in force).

¹⁵ See generally Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2000) 23 *Human Rights Quarterly* 483; Andrew S Butler and Petra Butler, 'The Judicial Use of International Human Rights Law in New Zealand' (1999) 29 *Victoria University of Wellington Law Review* 173; Harvie Wilkinson III, 'The Use of International Law in Judicial Decisions' (2004) 27 *Harvard Journal of Law and Public Policy* 423.

¹⁶ Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; Anne-Marie Slaughter, *A New World Order* (2004); Carl Baudenbacher, 'Foreword: Globalization of the Judiciary' (2003) 38 *Texas International Law Journal* 397. Cf Alex Mills and Tim Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1; Robert H Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003).

¹⁷ As, for instance, where national law provides for implementation in domestic jurisdiction of international treaty provisions or in crimes of universal jurisdiction. For example s 36(2)(a) of the *Migration Act 1958* (Cth) incorporates the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*') and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1966, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*'), to which Australia is a party, and makes reference to the international definition of 'refugee'.

rights law (for example, in Mexico and Azerbaijan);¹⁸ judicial colloquia on domestic application of human rights norms (for example, regional meetings in Latin America, Eastern Europe and Asia are planned);¹⁹ and in the publication of the OHCHR *Manual on Human Rights*.²⁰

A number of recent initiatives have been taken by the OHCHR involving specific contacts with members of national judiciaries. Thus, during 2006–07 the Office has participated in specific training programmes with judges and prosecutors in Morocco, Egypt and Burkina Faso on the protection of human rights whilst responding to anti-terrorism legislation and in a training programme on human rights and international humanitarian law for provincial judges in Colombia. The OHCHR also took part in organising a workshop for judges and lawyers of the Pacific region concerned with economic, social and cultural rights, in conjunction with the Commonwealth Secretariat, Interights and the Fiji Human Rights Commission.²¹

A resolution of the United Nations Human Rights Council ('UNHRC') called on the High Commissioner to 'reinforce advisory services and technical assistance relating to national capacity-building in the field of the administration of justice'.²² This resolution, amongst other things, requested the compilation of 'key decisions of international human rights jurisprudence' and the 'organization of periodic consultations amongst judges at the international, regional and sub-regional levels'.²³

B The Judicial Reference Group

It was partly in response to this resolution of the UNHRC and partly in answer to the perceived need to bridge gaps in appropriate engagement with national judges, important actors in the protection of human rights at the national level, that the JRG was established.²⁴ Deepening country engagement on human

¹⁸ OHCHR, *OHCHR in Mexico (2006–2007)* <<http://www.ohchr.org/EN/Countries/LACRegion/Pages/MXSummary.aspx>> at 23 May 2008; OHCHR, *OHCHR – Southern Caucasus Regional Office* <<http://www.ohchr.org/EN/Countries/EnacaRegion/Pages/SouthernCaucasusSummary.aspx>> at 23 May 2008.

¹⁹ OHCHR, *OHCHR – Latin America Regional Office (2008–2009)* (2008) <<http://www.ohchr.org/EN/Countries/LACRegion/Pages/LACRegionProgramme0809.aspx>> at 23 May 2008; OHCHR, *OHCHR Human Rights Programme for Europe, North America and Central Asia (2008–2009)* (2008) <<http://www.ohchr.org/EN/Countries/EnacaRegion/Pages/EnacaRegionProgramme0809.aspx>> at 23 May 2008; OHCHR, *OHCHR – South East Asia Regional Office (2008–2009)* (2008) <<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/SouthEastAsiaSummary0809.aspx>> at 23 May 2008; OHCHR, *OHCHR – South and West Asia Regional Office (2008–2009)* (2008) <<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/SouthWestAsiaSummary0809.aspx>> at 23 May 2008.

²⁰ Above n 9.

²¹ OHCHR Pacific Region, *Conclusions and Recommendations of the Colloquium and Workshop for Judges and Lawyers on the Justifiability of Economic, Social and Cultural Rights in the Pacific Region* (2006) <http://pacific.ohchr.org/final_conclusions.htm> at 23 May 2008.

²² Commission on Human Rights, *Human Rights in the Administration of Justice, in particular Juvenile Justice*, 60th sess, 55th mtg, UN Doc E/CN.4/RES/2004/43 (19 April 2004) 3.

²³ *Ibid* 4.

²⁴ OHCHR, *High Commissioner's Judicial Reference Group* (2007) <<http://www2.ohchr.org/english/events/jrg.htm>> at 23 May 2008.

rights issues suggested the likely utility of increased contact between the OHCHR and national judiciaries.

In November 2007, the UN High Commissioner for Human Rights convened a meeting in Geneva of the JRG comprising a number of senior judges from national courts in all continents. The object of the meeting was to explore informally an enlargement of the dialogue between members of national judiciaries and the High Commissioner. The judicial members of the JRG were judges or former judges from courts of high authority in Argentina, Canada, Egypt, France, India, Israel, the Philippines, the Russian Federation, Samoa, South Africa, Switzerland, the United Kingdom, the United States and myself from Australia. The High Commissioner, Her Excellency Louise Arbour,²⁵ supported by senior staff from her Office in Geneva, chaired the meeting and was present throughout. The meeting was conducted informally, permitting a high level of spontaneity in the expression of opinions. It was agreed that no comments made during the meeting would be attributed to individual judges. Nevertheless, it is appropriate to note the happening of the meeting and to set it in the context of other developments of interest to Australian judges and lawyers.

So as to focus attention on a concrete theme and engage discussion of members of the JRG about the dimensions of a common judicial question affected by human rights law, a paper was distributed to the participants by the OHCHR Secretariat. This concerned pre-trial detention and human rights. The paper collected statistical information from a number of member states; descriptions of features of typical national laws on the subject; the relevant provisions of international human rights standards; the practical alternatives available in place of detention; and the new and recent concerns that are now to be added to traditional human rights discussions of detention of persons awaiting trial (including risks of exposure to violence, drug use and the spread of the HIV virus and AIDS during incarceration). The treaty requirement to differentiate between the conditions of unconvicted prisoners on remand awaiting trial and sentence and those of convicted prisoners was emphasised, as was the need in many countries to avoid harsh, punitive and degrading treatment of prisoners awaiting trial.²⁶

The inclusion of a study of the interface between municipal law upon a common subject of concrete legal and judicial practice and established international human rights norms permitted members of the JRG to view the detailed jurisprudence that has grown up in recent years within the human rights organs of the UN relating to the liberty and security of persons under articles of relevant human rights treaties.²⁷ Some national judges, including those of the

²⁵ The High Commissioner is a past Justice of the Supreme Court of Canada. In February 2008 Her Excellency announced that she would be retiring from the post of High Commissioner in mid-2008: George Negus (Reporter) and Jane Worthington (Producer), 'Interview with Louise Arbour', *Dateline*, Australia, 19 March 2008.

²⁶ See, eg, *ICCPR*, above n 7, art 10(2)(a). Cf *United Mexican States v Cabal* (2001) 209 CLR 165, 197. The conditions were more fully described in *Cabal v United Mexican States* (2001) 180 ALR 593, 602–3 and *Cabal v United Mexican States [No 2]* (2001) 181 ALR 169, 178.

²⁷ See, eg, *ICCPR*, above n 7, arts 6 (life), 7 (non-torture), 9 (liberty and security), 14(2) (presumption of innocence). See also *Convention on the Rights of the Child*, above n 14, art 37(b) (detention of a child as last resort). See *Minister for Immigration and Multicultural Affairs v B* (2004) 219 CLR 365, 418 (Kirby J).

highest courts, are not aware in any detail (or at all) of the substantial growth in recent years of international jurisprudence now emerging from international and regional courts and tribunals, UN committees, agencies and treaty bodies.

In this context, the participants in the JRG were able to examine the use that had been made in various countries of judicial and treaty bodies' elaborations of provisions of international human rights law in statements concerning national and regional human rights standards and in expressing municipal statutory and common law.²⁸ Attention was drawn to useful, privately published texts that outline the principles of international and regional human rights law; give reference to (and excerpts from) decisions of human rights courts, commissions and treaty bodies on the meaning and requirements of such law; and explore the practical applications of broadly stated principles in differing factual situations.²⁹

General topics that were on the table in the JRG included: ways of improving awareness and availability of international law sources for judges and practising lawyers; the contents of contemporary judicial education; the availability of sourcebooks and handbooks, such as the *Handbook for Determining Refugee Status*³⁰ distributed by the UN High Commissioner for Refugees;³¹ the translation of national court decisions into major world languages; contact with regional meetings of judges; the work of relevant civil society organisations; the filing of amicus curiae briefs in national courts³² and international tribunals;³³

²⁸ See, eg, *Vishaka v Rajasthan* [1997] 3 LRC 361, 367–8; *Van Gorkom v Attorney-General* [1977] 1 NZLR 535, 542–3; *Tavita v Minister for Immigration* [1994] 2 NZLR 257; *Roper v Simmons* 543 US 551 (2005) 575–8; *Lawrence v Texas* 539 US 558 (2003) 560, 565, 573, 576; *S v Makwanyane* 1995(3) SA 391; *Dow v Attorney-General* [1991] LRC (Const) 574 affirmed in *Dow v Attorney-General* (1996) 103 ILR 128; *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'); *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

²⁹ Singled out for special mention in this regard were a number of texts including: Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004); Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* (2nd ed, 2004); Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002); Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007). The value of up-to-date works of reference, elaborating with illustrations the broadly stated principles of international human rights law, for the work of busy judges in national courts, was obvious.

³⁰ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992) ('*Handbook for Determining Refugee Status*'). See *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225, 302 (Kirby J).

³¹ See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 ALR 340, 362 (Kirby J). The UN High Commissioner for Refugees also publishes 'Advisory Opinions' which are widely publicised and used in domestic judicial and tribunal adjudication: see UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention on the Status of Refugees and Its 1967 Protocol* (2007), available from <<http://www.unhcr.org>> at 23 May 2008.

³² *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 ALR 340, 361 (Kirby J).

and the establishment of website links and the spread of other media of transnational dialogue.

C Other Fora

The establishment of the JRG is but one of a number of developments that bring national judges of many countries together to discuss issues in common. This process has now been under way for decades.

In the past, a major international contribution relevant to Australia and several countries present in the JRG has been the work of the Commonwealth Secretariat, the Commonwealth Lawyers' Association and the Commonwealth Magistrates and Judges Association. It was an initiative of the Commonwealth Secretariat, in conjunction with the international non-governmental body Interights, that launched the *Bangalore Principles on the Domestic Application of Human Rights Norms* and the series of conferences that followed that in Bangalore in 1988 — 20 years ago.³⁴

Beyond the Commonwealth of Nations, the internet has facilitated links between judges and advocates of many lands, including those in developing countries and in countries beyond those linked by the English language or common law traditions. Thus, extremely valuable work is performed by international civil society organisations including the International Commission of Jurists,³⁵ the International Bar Association,³⁶ the International Law Association, Union Internationale des Avocats,³⁷ the International Association of Judges,³⁸ the International Association of Women Judges³⁹ and the International Association of Lesbian and Gay Judges.⁴⁰ There are many more. A number of

³³ The High Commissioner filed an application for leave to intervene before the Iraqi High Tribunal, Trial Chamber, in relation to the sentencing of co-defendants formerly associated with the leadership of Iraq. See UN, 'High Commissioner for Human Rights Files Brief Regarding Death Sentence in Case of Taha Yassin Ramadan in Iraq' (Press Release, 8 February 2007).

³⁴ The *Bangalore Principles* are reproduced in Michael Kirby, 'The *Bangalore Principles* on "the Domestic Application of Human Rights Norms"' (1988) 14 *Commonwealth Law Bulletin* 1196. Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514; 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.

³⁵ See, eg, International Commission of Jurists, *Programmes and Activities* (2008) <http://www.icj.org/rubrique.php3?id_rubrique=37&lang=en> at 23 May 2008.

³⁶ In 1995 the International Bar Association ('IBA') established the Human Rights Institute to promote 'the rule of law worldwide': International Bar Association, *International Bar Association's Human Rights Institute* (2008) <<http://www.ibanet.org/humanrights/headerpage.cfm>> at 23 May 2008.

³⁷ In 1927 a group of European lawyers established Union Internationale des Avocats to foster international contacts: Union Internationale des Avocats, *What is the UIA?* (2008) <<http://www.uianet.org/jsp/qquia/qquia.jsp?locale=en>> at 23 May 2008.

³⁸ The International Association of Judges aims 'to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedoms': International Association of Judges, *International Association of Judges* (2008) <http://www.iaj-uim.org/old/ENG/frameset_ENG.html> at 23 May 2008.

³⁹ The International Association of Women Judges works 'to advance human rights, eliminate discrimination on the basis of gender and make courts accessible to all': International Association of Women Judges, *Welcome* (2008) <<http://www.iawj.org>> at 23 May 2008.

⁴⁰ Judge J G Cohen, *President's Message* (2008) <<http://home.att.net/~ialgj>> at 23 May 2008.

participants in the JRG were themselves present or past office-holders in some of the bodies named.

As a further sign of the times, major universities are now conducting regular seminars on aspects of international law, including international human rights law. Yale Law School, over the past 15 years, has convened an annual conference of senior judges concerned with shared issues of constitutional law,⁴¹ and has in doing so extended the transnational dialogue. Harvard Law School has likewise convened regular judicial workshops on the interface of the national and international judiciaries, international and constitutional law and human rights law.⁴² The University of Melbourne has participated in a trilateral dialogue involving it with universities in Oxford and Boston in considering aspects of the international judicial conversation.⁴³ Judges from final courts in various countries have participated in these *conversazioni*.

Another initiative worth noting is the establishment in the Netherlands of the HiiL. This body was launched in September 2005 by the Minister of Justice of the Netherlands, the Minister of Education, Culture and Science and the President of the Netherlands Organisation for Scientific Research.⁴⁴ HiiL is working on a research programme titled 'National Law in a Global Society'.⁴⁵ I am also a member of the HiiL International Advisory Board.

In February 2008, at Cambridge University, officers of the HiiL met with consultants to plan a major conference to take place in October 2008 in the Hague.⁴⁶ It is expected that this conference will bring together judges from a number of national courts — principally final appellate and constitutional courts — in order to consider issues presented to the courts by the growing dynamic resulting from the international judicial conversation. Amongst other topics studied in the meeting in Cambridge were the extent to which coherency is possible or desirable in decisions of the highest courts in the current age when addressing common legal problems; the extent to which internationalisation of judicial sources in national courts presents issues for the legitimacy of judicial decision-making within national courts; and the features of the current transnational judicial dialogue and how it is developing in practice.

To some extent the transnational dialogue is growing as a result of the development of treaty law. Thus, in Europe, the decisions of regional and national courts involving Europe-wide law or principles, as established by the European Union and the Council of Europe, provide pressure towards finding

⁴¹ See generally Michael Kirby, 'Are We All Nominalists Now?' (Speech delivered at Leo Cussen Institute, Melbourne, Australia, 30 April 2004).

⁴² Michael Kirby, 'Transnational Judicial Dialogue: Strengthening Networks and Mechanism for Judicial Consultation and Cooperation' (Speech delivered at the Harvard Law School, US, 2 December 2006).

⁴³ Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576.

⁴⁴ Morris Tabaksblat, Sam Muller and Michiel Scheltema, HiiL, *From a New Hague Vision to a New Hague Institute: Strategic Plan 2007–2009*, available from <<http://www.hiil.org>> at 23 May 2008.

⁴⁵ *Ibid* 6.

⁴⁶ A Law of the Future Conference is being planned under the title 'Highest Courts in an Internationalising World'. The conference will take place at the Peace Palace, the Hague on 23–4 October 2008: HiiL, *HiiL Law of the Future Conference 2008: Pre-Announcement* (8 April 2008) available from <<http://www.hiil.org>> at 23 May 2008.

consistent interpretations and approaches in the resolution of like problems. However, even in a country such as Australia, outside the European systems, the advance of treaty law is having an impact upon domestic judicial decision-making. This can be seen more clearly in decisions upon the meaning of an international treaty of widespread application, such as the *Refugee Convention* and *Refugee Protocol*.⁴⁷ Because that treaty is effectively incorporated in Australian domestic law,⁴⁸ it is inevitable, proper and useful for Australian courts to make reference to decisions on like problems considered in courts of high authority in other countries, particularly other countries of asylum.⁴⁹

Even outside treaty law, where use of international and transnational materials is quite natural, the habit of looking beyond national sources has increased markedly in recent years.⁵⁰ In part, this has been the result of new technology. However, in part, it has occurred because of the commonality of issues arising in different countries at roughly the same time.

The proposed conference of the HiiL will bring together judges of national and international courts to examine the extent to which this phenomenon of borrowing and cross-referencing is happening. The conference will also consider any problems that it occasions, for example, in the so-called 'democratic deficit' and in the role of the national judiciaries under the doctrine of the separation of governmental powers.⁵¹

III AUSTRALIAN JUDICIAL ENGAGEMENT WITH THE INTERNATIONALISATION OF LAW

A Judges' Engagement with International Law

Australia was a founding member of the UN. Dr H V Evatt, one-time Justice of the High Court, later Federal Attorney-General and Minister for External Affairs, played an important part in the negotiation and adoption of the *Charter of the United Nations* and the adoption of the *Universal Declaration of Human Rights* ('UDHR').⁵² Evatt was elected President of the General Assembly for its third session, 1948–49. He was thus President when the UDHR was adopted.

Latham CJ, whilst still serving on the High Court, was granted leave of absence from his judicial duties to serve as Australian Minister to Japan in 1940, although his mission came too late to help in avoiding war. Dixon J, likewise whilst a serving judge, took leave of absence in 1942–44 to serve as Australian

⁴⁷ Above n 17. Australia is a party to both these instruments.

⁴⁸ *Migration Act 1958* (Cth) s 36(2)(a).

⁴⁹ See, eg, *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225, 235–7, 251–6, 276–83; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 ALR 340, 359–61.

⁵⁰ Michael Kirby, 'A Global Approach to Judicial Independence and Integrity' (2001) 21 *University of Queensland Law Journal* 147. See *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

⁵¹ Alfred C Aman Jr, *The Democracy Deficit: Taming Globalization through Law Reform* (2004) 87; Vicki C Jackson, 'Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement' (2007) 35 *Federal Law Review* 161; Judith Resnick, 'Law's Migration: American Exceptionalism, Silent Dialogues and Federalism's Multiple Ports of Entry' (2006) 115 *Yale Law Journal* 1564.

⁵² GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948).

Minister to Washington with particular responsibilities for Australia's interests in the Pacific War. Later, in 1950, Dixon J was appointed UN mediator in the dispute between India and Pakistan over Kashmir.⁵³ His efforts did not succeed.⁵⁴

After her retirement as a Justice of the High Court, the Hon Mary Gaudron has served as a member of the Administrative Tribunal of the International Labour Organization (the oldest UN agency) and in other UN postings. The writer served as Special Representative of the Secretary-General for Human Rights in Cambodia between 1993 and 1996. Some of that service occurred whilst a Justice of the High Court. However, upon the latter appointment, resignation was tendered to the Secretary-General, the activities thereafter being confined to fulfilling duties still then outstanding. Other activities have been performed by the writer in agencies of the United Nations involving consultative and non-political functions.⁵⁵

Other Australian judges have participated in a wide range of international activities. Several Australian judges serve as members of courts, especially but not only, in Pacific countries.⁵⁶ A number have served in conjunction with non-governmental bodies in judicial training for courts, particularly in Indonesia.⁵⁷ One or two have served on the international executives of civil society organisations fostering law related services and training.⁵⁸ One, Boulton J of the Australian Industrial Relations Commission, now serves on a long-term secondment to the International Labour Organization, based in Jakarta.⁵⁹ Doubtless, there are others.

B *Constitutional Limitations upon Greater Engagement*

In the years since Latham CJ and Dixon J gave wartime service in international postings, the constitutional doctrines governing the separation of federal judicial power from the other branches of government have, to some

⁵³ *The India-Pakistan Question*, SC Res 80, UN SCOR, 471st mtg, UN Doc S/RES/80 (14 March 1950) 3.

⁵⁴ *The India-Pakistan Question*, SC Res 91, UN SCOR, 539th mtg, UN Doc S/RES/91 (30 March 1951) 1–3.

⁵⁵ For example, as a member of the World Health Organization Global Commission on AIDS, the International Bioethics Committee of UNESCO, the mission to South Africa of the International Labour Organization and the Judicial Integrity Group of the UN Office on Drugs and Crime.

⁵⁶ Daryl Williams, 'Judicial Management: Australian Initiatives' (1998) 23 *International Legal Practitioner* 108, 109.

⁵⁷ For information on a number of different judicial training programs, see Public Interest Advocacy Centre, *Public Interest Law in Indonesia* (2000) <<http://www.piac.asn.au/system/indonesia.html>> at 23 May 2008; Indonesia Australia Legal Development Facility, *Activities* (2008) <<http://www.ialdf.org/activities.html>> at 23 May 2008; Department of Foreign Affairs and Trade, Commonwealth of Australia, *Australia-Indonesia Institute: Annual Report 1998-1999* (1999) <http://www.dfat.gov.au/aia/aia_ar1999/major_activities/professions.html> at 23 May 2008.

⁵⁸ For example, Branson J of the Federal Court of Australia served on the executive of the International Development Law Organization. Similarly, the Hon John Dowd, when a Justice of the Supreme Court of New South Wales and since retiring from that office, has served as a Commissioner and member of the executive of the International Commission of Jurists.

⁵⁹ Industrial Dispute Resolution, *Justice Alan Boulton AO* <<http://www.e-airc.gov.au/iidrconference/boulton>> at 23 May 2008.

extent, been sharpened in Australia.⁶⁰ This development has been based, in part, on perceptions of the apparent purpose of the text and structure of the *Australian Constitution*,⁶¹ in part on appreciation of considerations of history, and in part on the perceived special needs of a federal system of government for a manifestly neutral judicial umpire.

Whether constitutional considerations forbid all international activities by federal judges in Australia has never been decided. The particular federal concerns that have underpinned prohibitions on serving judges accepting functions for the executive government of the Commonwealth⁶² or of a Territory or State do not appear to have the same significance, or dangers, for involvement of serving judges, for example, in purely advisory bodies of the UN.

Nevertheless, sensitivities remain and would present for consideration in countries, especially federal countries, which consider that, generally speaking, serving judges should have as little as possible to do with officials of the other branches of government.⁶³ Thus, in Australia, save for the formal occasions such as the opening of the Federal Parliament and occasional social meetings, it is unusual for serving judges to have personal or professional contact with officials of the executive and even more so with serving politicians. This point cannot be pressed to unrealistic lengths. Serving judges will occasionally participate in national or other advisory bodies (for example, advisory boards of a university or law faculty) alongside officials and private sector members. Even this, some judges will decline to do. Perceptions of bias rules have probably become more stringent in Australia in recent years.⁶⁴ But here, too, extreme positions have not been adopted.⁶⁵ In all cases, save those that enliven express constitutional or statutory prohibitions,⁶⁶ questions of prudence and judgment arise. There is no evidence that there is a present need for more stringent rules against abuse of office or participation in duties deemed inconsistent with the judicial office.

Generally speaking, the sensitivities just mentioned are well appreciated by serving judges in Australia and elsewhere. Clearly, they limit the extent to which, and subjects upon which, judges should be involved in national and international bodies. So far as international bodies are concerned, according to Australian conventions, it would be appropriate for a serving judge to inform the

⁶⁰ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 25–6 (Gaudron J).

⁶¹ See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1955) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9–11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 25 (Gaudron J); cf 43–6 (Kirby J).

⁶² See, eg, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 25 (Gaudron J); cf 41–7 (Kirby J).

⁶³ See Helen Irving, 'Advisory Opinions, the Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105, 116–17.

⁶⁴ See generally Andrew Field, 'Confirming the Parting of Ways: The Law of Bias and the Automatic Disqualification Rule in England and Australia' [2001] *Singapore Journal of Legal Studies* 388, 389.

⁶⁵ See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Johnson v Johnson* (2000) 201 CLR 488.

⁶⁶ See, eg, *Commonwealth of Australia Constitution Act 1900* (Imp) s 72(ii). For Members of Parliament there are more express disqualifications with drastic consequences: see, eg, ss 44–6. See also *Sue v Hill* (1999) 199 CLR 462.

relevant officers of the executive government of any activities that could possibly impinge on municipal law or policy. But, for the most part, as in the JRG or HiiL, discussions in international judicial or similar fora are at a level of abstraction and generality as to make them unlikely in the extreme to cause any difficulty or embarrassment to the judge's court, colleagues or national government.

Most national governments today recognise the desirability and utility of judges, like other office-holders, having contact with judges and other experts in other countries whilst fully discharging their domestic obligations, so as to enhance their own knowledge and to offer appropriate contributions in return. Most rational people now appreciate that good ideas are not all necessarily home grown. International engagement by national judges in appropriate bodies can sometimes enhance their service to their own courts, enlarge their thinking and improve the efficiency of their judicial service.

So much for the involvement of serving judges in international bodies and in international conferences and seminars in which consideration may be given to developments in international, regional and national law. There are limits. When these limits are reached, it is the duty of the judge concerned to say so and to have no further involvement in the activity. The same is true where, in litigation before a court, a party asks the court to do something that is not properly a judicial function but one that belongs to the executive government⁶⁷ or the parliament.⁶⁸ In all such matters, serving judges need to keep their eyes alert to the line in the sand.

C *Judicial Use of Sources of International Law*

There remains one further question about the engagement of Australian judges with international law that has been quite controversial in some circles. I refer to the use of international legal norms that have not been expressly incorporated into domestic law by, or under, valid municipal legislation, to cast light on the content of national law and especially to become a source, however indirect, of binding legal obligations.⁶⁹

Undoubtedly, the most sensitive question in this regard has been the extent to which international law may be utilised in expressing the requirements of a national constitution. That question has been vigorously contested in countries, like Australia, that observe the dualist theory of international law.⁷⁰ According to the strict appreciation of this theory, international law and municipal law comprise 'two essentially different legal systems, existing side by side within different spheres of action — the international plane and the domestic plane'.⁷¹

It is clear from available literature that the issue of comparative constitutionalism, and specifically of the use of international human rights law in

⁶⁷ See, eg, *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677.

⁶⁸ See, eg, *Egan v Willis* (1998) 195 CLR 424, 492–3; *Sue v Hill* (1999) 199 CLR 462, 557; *Re Reid; ex parte Bienstein* (2001) 182 ALR 473, 478–9; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 263.

⁶⁹ See Brian R Opeskin, 'Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries' (2001) 27 *Commonwealth Law Bulletin* 1242.

⁷⁰ See *ibid* 1248, 1267.

⁷¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 205.

the interpretation of national constitutions, is a lively subject of debate in national courts, academic institutions and other bodies.⁷² In Australia this issue has been the subject of consideration by judges in decisions of the High Court.⁷³ Several prominent legal scholars have also recently engaged with the topic and written extensively about it. In fact, the issue is now a growing subject of discourse in legal literature.⁷⁴ The High Commissioner for Human Rights has herself written about it.⁷⁵ It would exceed the scope of this article to explore this issue at any length in the present context. The writer has earlier expressed views extrajudicially⁷⁶ and in judicial opinions.⁷⁷

Since the decision of the High Court and the reasoning of the majority in *Mabo v Queensland [No 2]*,⁷⁸ there has been less debate in Australia about the use that judges may make of international law relating to human rights in resolving issues that are not specifically constitutional. In that decision, in well-known words, Brennan J wrote:

The opening up of international remedies to individuals pursuant to Australia's accession to the *Optional Protocol to the International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. 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.⁷⁹

The common law develops by way of the published reasons of the judges, moving by analogical reasoning and analysis from an earlier point, as expressed in earlier judicial opinions, to a later point. It is in that sense that judges today, in Australia as elsewhere, live in a world in which international law plays an increasing role and impinges on the judicial perceptions of reality and justice.

⁷² See Michael Kirby, 'International Law: The Impact on National Constitutions' (2006) 21 *American University International Law Review* 327.

⁷³ See, eg, *Al-Kateb* (2004) 219 CLR 562, 589–95 (McHugh J); 617–24 (Kirby J).

⁷⁴ See, eg, Richard A Posner, 'Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31; Janet Koven Levit, 'The Constitutionalization of Human Rights in Argentina: Problem or Promise?' (1999) 37 *Colombia Journal of Transnational Law* 281; Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*' (2006) 119 *Harvard Law Review* 129, 132, 140; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99; Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109; Jackson, 'Transnational Challenges to Constitutional Law', above n 51 (describing Australian constitutional developments); Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Review* 819; Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296; Karen Knop, 'Shaping the Parameters of International Law in the New Millennium — Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501; John O McGinnis, 'Contemporary Foreign and International Law in Constitutional Construction' (2006) 69 *Albany Law Review* 801; Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissidents' (2003) 55 *Stanford Law Review* 1863.

⁷⁵ Louise Arbour and Fannie Lafontaine, 'Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective' (2007) 45 *Osgoode Hall Law Journal* 239, 250–65.

⁷⁶ See, eg, Kirby, 'International Law', above n 72.

⁷⁷ See especially *Al-Kateb* (2004) 219 CLR 562, 617–24.

⁷⁸ (1992) 175 CLR 1.

⁷⁹ *Ibid* 42 (citations omitted).

Inevitably, these perceptions spill over into reasoning addressed to the solutions of contemporary problems of municipal law.

It would not be proper for a municipal judge, unilaterally, to attempt to introduce an entire body of international law into domestic jurisdiction — where the executive government and parliament have held back from doing so — by ‘the back door’, as it were.⁸⁰ No one doubts that this is so. But to say this is, in effect, no more than to recognise the interstitial role of the judiciary in expounding the common law and declaring new rules and obligations that bind particular individuals and render them liable to legal sanctions.

Between the use of international texts and jurisprudence as tools in reasoning (which is legitimate) and ‘back door’ incorporation of entire treaty obligations (which is not), there is obviously a great deal of room for debate and difference amongst particular municipal judges. This is not only true of Australia. There is an equally lively debate upon this topic in other countries, most notably the US.⁸¹

It follows that, to some extent, at least in dualist jurisdictions and those that do not have a comprehensive national constitutional charter of human rights (such as Australia), suggestions that steps should be taken to enhance national judicial awareness of the developments of the international law of human rights would be seen by some municipal judges as lacking priority for their day to day work. For others, it would be viewed as mildly heretical. For still others, it might be regarded as downright inappropriate, involving the potential invocation of non-municipal legal sources to introduce into domestic law vaguely worded ‘rules’ that can be twisted to achieve outcomes desired by the particular judge (‘cherry picking’) rather than outcomes required by pre-existing law.

For most countries these arguments will be perceived as presenting immaterial concerns because the judges have their own constitutional or statutory charters of fundamental human rights bearing some analogy to the equivalent statements of rights in international human rights law.⁸² For judges in such countries, the notion of rejecting the jurisprudence of international or regional courts and treaty bodies would be unthinkable, even where those judges are not *bound* to follow them as a matter of legal duty. For a country, such as Australia, at an earlier stage of legal development on this issue, the legal culture is partly indifferent and partly hostile. In regard to the field of international human rights law, in particular, the hostility is sometimes acute. Evidence of that response may be seen in the reasoning of McHugh J in *Al-Kateb*.⁸³

It must therefore be recognised that the extent to which international human rights law is relevant to the resolution of particular cases before municipal

⁸⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

⁸¹ See, eg, *Atkins v Virginia* 536 US 304, 317 (Stevens J; O’Connor, Kennedy, Souter, Ginsburg and Breyer JJ joining); cf 325–8 (Rehnquist CJ; Scalia and Thomas JJ joining) (2002); *Roper v Simmons* 543 US 551 (2005) 575–8 (Kennedy J; Stevens, Souter, Ginsburg and Breyer JJ joining); cf 604–5 (O’Connor J), 622–8 (Scalia J; Rehnquist CJ and Thomas J joining).

⁸² In the New Zealand context, for example, Courts have often interpreted the *Bill of Rights Act 1990* (NZ) by reference to international materials. See, eg, *Taunoa v Attorney General* [2008] 1 NZLR 429; *R v Hansen* [2007] 3 NZLR 1.

⁸³ (2004) 219 CLR 562, 589–95.

courts, at least in countries such as Australia, and specifically where the international law in question has not been expressly incorporated by valid legislation, remains a somewhat controversial issue. No doubt in such countries (and there are today relatively few without some form of national human rights guarantees), international law, including the international law of fundamental human rights, will continue to be embraced with caution and a degree of hesitation.⁸⁴ The likelihood is that the transnational judicial dialogue evidenced by the developments described in this article, will continue to gather pace. Thus, the provision of information to judges on international legal developments seems a useful starting point. Some judges would find such materials helpful although not binding. Those who do not want such information are at liberty to ignore it. Those who feel a need to use it in various ways must obviously do so in a manner that conforms to their own municipal law.

IV A DIVIDED CONSTITUTIONAL DECISION

These comments bring me back to the decision of the High Court of Australia in *Roach*.⁸⁵ That decision, in my opinion, illustrates the way in which international human rights jurisprudence has a tendency to seep into judicial reasoning, including about the meaning and application of a national constitution.

The decision in *Roach* concerned the validity of a new federal statute which had purported to expand a disqualification from the entitlement to vote in federal elections in Australia of prisoners serving sentences of imprisonment.⁸⁶ A majority of the High Court upheld the challenge to the amending law.⁸⁷ A minority dissented.⁸⁸ The result of the ruling was that prisoners in Australian gaols, serving sentences of less than three years imprisonment, were entitled (indeed required) to vote in the Australian general election of 24 November 2007.

The majority reasoning in *Roach* is particularly interesting for the fact that both Gleeson CJ and the joint majority reasons made reference to the decisions of other national courts (particularly in the UK and Canada) dealing with similar questions in accordance with their own domestic constitutional law — often by reference to charters or statutes of fundamental rights.⁸⁹ They each also referred, as a contextual matter of relevance, to general legal principles expounded by, and outcomes reached in, the European Court of Human Rights concerning the

⁸⁴ Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (Speech delivered at the Conference on Implementing International Human Rights, Australian National University, Canberra, Australia, 6 December 1997).

⁸⁵ (2007) 239 ALR 1.

⁸⁶ *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) amending the *Commonwealth Electoral Act 1918* (Cth).

⁸⁷ *Roach* (2007) 239 ALR 1, 11 (Gleeson CJ), 29–30 (Gummow, Kirby and Crennan JJ).

⁸⁸ *Ibid* 45 (Hayne J), 48–9 (Heydon J). Because of his pending retirement, Callinan J did not participate in the decision.

⁸⁹ *Ibid* 7, 28.

requirements of the *European Convention on Human Rights*⁹⁰ for UK legislation similar to that considered in *Roach*.⁹¹

The utilisation of the reasoning of the European Court of Human Rights on the meaning and requirements of the *European Convention* in the exploration and elaboration of the requirements of the *Australian Constitution* was strongly criticised by Hayne and Heydon JJ in their respective dissenting reasons in *Roach*. I have quoted above part of Heydon J's opinion. The criticism was explained by reference to the past decisional authority which, the dissenting judges felt, prohibited any such use in constitutional adjudication.⁹² The majority did not, of course, treat the international or national legal materials as binding on them or in any way conclusive of the legal questions before them.⁹³ Such sources were, in a sense, a record of contextual and historical developments, thought to cast some analogical light on the resolution of the Australian constitutional problem before the High Court.⁹⁴

To forbid use of, or even reference to, such materials, although they were presented in argument and provided part of the intellectual *milieu* for the decision of the municipal court, would involve a needlessly rigid rule. It would diminish the transparent revelation of contextual considerations. It would sever Australian case law from interesting and sometimes useful developments in the growing body of law of international human rights. Finally, it would also ignore the discursive characteristics of common law judicial reasoning and the role that such reasoning plays in revealing the diverse *stimuli* contributing to analogous considerations of issues by the judiciary.

V CONCLUSION

The internationalisation of law is a lively subject for debate and discussion in national judicial circles, including in constitutional cases and in countries, such as Australia, which have hitherto been generally hostile to the use of international law in that context.⁹⁵

⁹⁰ *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) ('*European Convention on Human Rights*').

⁹¹ *Roach* (2007) 239 ALR 1, 8 (Gleeson CJ), referring to *Hirst v United Kingdom [No 2]* (2005) IX Eur Court HR 187.

⁹² *Roach* (2007) 239 ALR 1, 42–4 (Hayne J), 46–7 (Heydon J).

⁹³ Indeed, foreign cases were only drawn upon in the closing paragraphs of the joint judgment: *ibid* 28–9.

⁹⁴ Gleeson CJ, for example, was particularly firm in this regard, emphasising the different constitutional contexts and that:

There is a danger that uncritical translation of the concept of proportionality from the legal context of cases ... to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action. Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our Constitution.

Ibid 8. His Honour held that the reasoning in such cases could, nevertheless, be constructive.

⁹⁵ See, eg, *Polites v Commonwealth* (1945) 70 CLR 60, 78; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384. Cf *Bennett v Commonwealth* (2007) 325 ALR 1, 36.

So long as judges continue to operate in the real world that surrounds them, and to candidly explain the relevance, as they see it, of the intellectual setting in which they perform their functions, it is inevitable, including in Australia, that they will occasionally make reference to developments of international human rights law. This will occur where it is thought to be relevant and to bear some rational analogy to the problem in hand.⁹⁶ And this explains why the transnational judicial conversation is likely to continue and to expand.

⁹⁶ Ernst Willheim has identified earlier cases 'long prior to the current division in the High Court', where members of the Court have referred to international law principles in constitutional matters. These cases include *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 595–6, 612 (Deane J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 (Gleeson CJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 607 (Gummow J) referring to the *European Convention on Human Rights*. See Ernst Willheim, 'Globalisation, State Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a Proper Influence on Constitutional Interpretation' (2005) 6 *Asia-Pacific Journal on Human Rights and the Law* 1, 18–19.