GLOBAL COMMITMENTS TO HUMAN RIGHTS IN NATIONAL COURTS IN THE AGE OF OBAMA*

PROFESSOR ADRIEN KATHERINE WING**

Chancellor Dowd, Vice Chancellor Clark, Honourable Michael Kirby, Dean Bee Chen Goh, our sponsor OzXchange, and distinguished guests.

Thank you for inviting me to give the third annual Michael Kirby lecture. I met Justice Kirby in July 2008 while attending the wonderful 'Activating Human Rights' conference in Byron Bay hosted by Southern Cross University as well. This afternoon, I was delighted to launch the proceedings from that major event. I can see why the judge has been such a beloved figure and why he has been praised for his empathy and commitment to human rights. He is a person of great courage and independence. Clearly, his retirement from the High Court is a major loss to the bench. I am deeply privileged to deliver this talk in his honour.

I want to note that I am accompanied here today by my partner James Sommerville, who came with me to the 'Landscapes of Exile' conference at Byron Bay in 2006. That conference was also organised by Southern Cross University and is where I first met Bee Chen Goh, Baden Offord and several other faculty members here. I am also accompanied by my mother Katherine Wing, who is on her first trip down under. We have just spent a week on our first visit to the South Island of New Zealand, which everyone knows is truly spectacular. I bring you greetings from the faculty at the University of Otago Law School where I did a lecture on 'US Foreign Policy' on Wednesday.

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* The 2009 Michael Kirby Lecture at Southern Cross University, delivered on 20 March 2009.

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I decided to augment my topic, which was agreed upon last September. It is now 'Global Commitments to Human Rights in National Courts in the Age of Obama.' President Barack Hussein Obama's November 2008 election will be an amazing thing for the world we hope, and I feel compelled to incorporate its relevance to my topic today.

My thesis is one that Justice Kirby has strongly advocated[1] – that national courts can and should gain strength from international human rights law. The interaction of international and national law is one of the largest challenges in the century ahead, and many countries including my own, as well as this one, are just in the infancy of realising this important fact.[2] There is a slow, but growing, worldwide trend even in some common law jurisdictions to use international law more in the national courts.

One American author, Professor Melissa Waters, calls this trend 'creeping monism'.[3] Common law judges are slowly abandoning their dualist nature of regarding international and national law as very distinct and are moving toward a practice much more common in civil law nations that understand the principle of monism. They are making a gradual shift toward a more flexible approach to international law, including unincorporated human rights treaties – toward regarding international and national law as one system in which the national law is more easily subsumed under the international. The European Court of Human Rights (ECHR) is at the forefront in terms of handling cases, and its opinions are cited by national courts around the world.[4]

Professor Waters did a comprehensive study of various countries, including looking at six years of judicial treatment of the *International Covenant on Civil and Political Rights* (ICCPR). The survey of the US, Australia, New Zealand, Canada, and the British Privy Council showed the following: 31 per cent of the courts mentioned international human rights in a 'gilding the lily' of the national law approach, in which the international level is used to enhance the reach of the national level; and 14 per cent of the courts used international human rights to help update the common law.[5]

1 See, for example, Michael Kirby, 'International Law – The Impact of National Constitutions' (2005–06) 21 *American University International Law Review* 327 (hereinafter referred to as '*International*').

2 Ibid 363.

3 Melissa Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628.

4 John B Attanasio, 'Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization and Courts' in Thomas M Franck and Gregory H Fox (eds), *International Law Decisions in National Courts* (1996) 373.

5 Waters, above n 3, 689.

Justice Kirby is particularly noteworthy with respect to the Australian data. Of the 54 opinions citing the ICCPR, 49 are Kirby opinions. The worst countries for incorporating international law are the US and Australia.[6] Justice Kirby had some sharp interchanges with Justice McHugh in this regard.[7] Kirby took an aggressive approach rejecting dualism and argued that domestic courts should engage in interpretive incorporation that merges aspects of national and international law.[8] Constitutional provisions must be interpreted in conformity with international human rights law, whether or not that law is domestically incorporated. Only 12 per cent of court cases surveyed by Professor Waters used this approach, and the US, Canadian, and New Zealand courts have not used this treatment at all.

Justice Kirby mentioned a number of reasons why we need to rely more upon international law.

> International law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.[9]

Kirby believes that terrible things can happen with respect to human rights absent international law.[10] Moreover, human rights are becoming a duty.[11] Additionally, there is a need for global dialogue on human rights.[12] International and regional tribunals cannot enforce all international law so the national courts must be involved.[13]

6 For more on Australia see, for example, Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (2008).
7 See, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562.
8 Michael Kirby, 'Impact of National Constitutions' (2005) 99 *American Society of International Law Proceedings* 1, 13.
9 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8, 661.
10 Kirby, *International*, above n 1, 363.
11 Ibid, citing American Supreme Court Justice Sandra Day O'Connor, 'Keynote Address' (2002) 96 *American Society of International Law Proceedings* 348, 353.
12 Kirby, *International*, above n 1, 363.
13 Ibid 361.

Kirby has stated that Australia's next generation of lawyers must revamp their focus and think globally. Changing times have spurred advances in international law – in trade law, economic law and human rights law. While the country has made progress in terms of ending discrimination against aboriginals, minorities and gays, there is a way to go.[14]

It is unfortunate that there are only three countries in the world – India, New Guinea, and South Africa, that have constitutions that require courts in deciding local cases to pay regard to international law.[15] I am very honoured to have worked for four years with the African National Congress Constitutional Committee in the period leading up to the adoption of the Constitution where this was done.[16]

The nonbinding Bangalore principles on the domestic application of international human rights norms for the Commonwealth state that international human rights law can guide judges.[17] Justice Kirby has referenced these principles on a number of occasions.[18]

In the US, we also face some tension between the traditional dualist and the progressive monist approaches. We have developed four models for enforcing international human rights norms.

> The first, the international enforcement model, asserts that international norms are directly binding on the United States and can be enforced through an international tribunal or organisation. The second, the domestic enforcement model, asserts that the international norms must be enforced by US courts for one of two reasons: because the United States has a treaty obligation, or because customary international law binds the United States. The third approach, the interpretive mandate, asserts that US courts must interpret statutory and constitutional rights consistently with international norms. The final approach, the persuasive model, asserts that US courts need only consult an international norm for its persuasive value.[19]

14 'Kirby Urges Lawyers to Think Globally', Sydney Morning Herald (Sydney), 9 September 2009, <http://news.smh.com.au/national/kirby-urges-lawyers-to-think-globally-20080909-4d3g.html> at 20 March 2009.

15 See Kirby, *International*, above n 1, 330.

16 See Adrien Katherine Wing, 'The South African Transition to Democratic Rule: Lessons for International & Comparative Law' (2000) 94 *American Society of International Law Proceedings* 254.

17 See Michael Kirby, 'Implementing the Bangalore Principles on Human Rights Law' in Commonwealth Secretariat (ed), *Developing Human Rights Jurisprudence* (1990) 49.

18 See, for example, *Newcrest Mining*, above n 9.

19 Stanley A Halpin, 'Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights Law on the Interpretation of the US Constitution' (2006) 30 *Hastings International and Comparative Law Review* 1, 4.

The US has episodically considered international or foreign law dating back to *Marbury v Madison*,[20] the original case establishing the concept of judicial review of congressional laws. During slavery, the dissents in the infamous *Dred Scott* case invoked international law for the idea that the slave was a free man.[21] Justice McLean said that there were examples from European countries that a man did not remain a slave when taken across borders. Look at France who set everyone free when they gave up slavery.[22] Justice Curtis said that countries should look to international law and foreign law on the status of slaves taken across the border unless domestic law provided otherwise.[23]

In the modern era, various justices have commented on the role of international human rights law, and taken approaches acknowledging its relevance and validity. Justice Harry Blackmun critiqued the Supreme Court's decision in *Stanford v Kentucky* in 1989,[24] which upheld the death penalty for minors over the age of 16. Justice Blackmun dissented from the opinion, and the Court's opinion was later reversed by a five to four vote after he left the Court in *Roper v Simmons*.[25] This latter case cited several human rights treaties in deciding the execution of juveniles was unconstitutional.[26]

Blackmun observed in *Stanford*:

> During my thirty-four years of service on the federal bench, the United States has become economically and politically intertwined with the rest of the world as never before. International human rights conventions – still a relatively new idea when I came to the bench in 1959 – have created mutual obligations that are accepted throughout the world. As we approach the 100th anniversary of

20 See Vicki C Jackson, 'Constitutions as "Living Trees?" Comparative Constitutional Law and Interpretative Metaphors' (2006) 75 *Fordham Law Review* 921. See, for example, *Marbury v Madison*, 5 US (1 Cranch) 137, 163, 176–8 (1803); *Chisholm v Georgia*, 2 US (2 Dall) 419, 459–60 (1793) (Wilson J); Steven G Calabresi, '*Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal' (2004) 65 *Ohio State Law Journal* 1097, 1104–5; Steven G Calabresi and Stephanie Dotson Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision' (2005) 47 *William and Mary Law Review* 743; Sarah H Cleveland, 'Our International Constitution' (2006) 31 *Yale Journal of International Law* 1; David Fontana, 'Refined Comparativism in Constitutional Law' (2001) 49 *University of California Los Angeles (UCLA) Law Review* 539, 545–9, 552–6; Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109, 109 & nn 3–4, 110 & n 7, 111, 114; Vicki C Jackson, 'Transnational Discourse, Relational Authority and the US Court: Gender Equality' (2003) 37 *Loyla of Los Angeles Law Review* 271, 335–7 & nn 227–8.

21 See *Dred Scott v Sandford*, 60 US 393, 534, 556–7 (1856) (McLean J, dissenting); 594–7, 601 (Curtis J, dissenting).

22 *Dred Scott*, ibid (McLean J, dissenting).

23 *Dred Scott*, ibid (Curtis J, dissenting).

24 *Stanford v Kentucky*, 492 US 361 (1989).

25 *Roper v Simmons*, 543 US 551 (2005).

26 *Roper v Simmons*, 125 S Ct 1183, 1197–200 (2005).

> *The Paquete Habana*, then, it perhaps is appropriate to remind ourselves that the United States is part of the global community, that 'international law is part of our law,' and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with 'the customs and usages of civilised nations.'[27]

Justice Blackmun looked forward 'to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind.'[28]

In 1997, Justice Sandra Day O'Connor acknowledged off the bench that 'the flow of ideas from our Court to other tribunals around the world is well-chronicled, but we have not seen fit to reciprocate in kind. I think this will change, as we are asked to define our role within the international regime.'[29] In 2002, she asserted that 'although international law and the law of other nations are rarely binding upon our decisions in US courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.'[30]

Justice Ruth Bader Ginsburg concluded a distinguished lecture by stating:

> In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.[31]

Ginsberg referenced international law in her concurrence in *Grutter v Bollinger*, the affirmative action case that upheld the right to use this technique in US universities.[32] She cited international affirmative action programs and the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD) for the idea that such programs could be limited

27 Harry A Blackmun, 'The Supreme Court and the Law of Nations' (1994) 104 *Yale Law Journal* 39, 49. *The Paquete Habana*, 175 US 677 (1899) mentioned in this quote was the first case in which the US Supreme Court noted that federal courts could look to customary international law because it was part of the law of the US.

28 Blackmun, above n 27, 49.

29 Sandra Day O'Connor, 'Federalism of Free Nations' (1997) 28 *New York University Journal of International Law and Politics* 35, 41.

30 Sandra Day O'Connor, 'Keynote Address', above n 11, 350.

31 Ruth Bader Ginsburg and Deborah Jones Merritt, 'Affirmative Action: An International Human Rights Dialogue', Fifty-First Cardozo Memorial Lecture (11 February 1999) (1999) 21 *Cardozo Law Review* 253, 282.

32 *Grutter v Bollinger*, 539 US 306 (2003).

in time.[33] Another recent important human rights case, *Lawrence v Texas*, referred to ECHR decisions and the laws of other nations in its decision overturning sodomy laws.[34]

In his 2003 keynote address to the American Society of International Law, Justice Stephen Breyer quoted with full approval Justice Ginsburg's endorsement of comparative analysis in interpreting the Constitution and explained the pragmatic reasons 'why so many of us [on the Supreme Court] have taken this position.' He added, 'Justices John Paul Stevens and David Souter have referred to comparative foreign experience in several important recent opinions. And I have tried to explain, both in opinions and public remarks, why I believe foreign experience is often important to our work.'[35]

Finally, Justice David Kennedy rounds out our consideration of Supreme Court judges leaning favourably toward international law. He has said: 'The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions.'[36]

There has been a backlash against this approach. There have even been death threats against two justices because they referred to or supported the use of foreign or international law.[37]

On the dualist side, Justice Anthony Scalia has said: 'The basic premise of the court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.'[38] A nonbinding resolution in the US House of Representatives was even re-submitted stating that 'judicial determinations regarding the meaning of the laws of the US should not be based on the judgments, laws, or pronouncements of foreign institutions.'[39]

Now that I have mentioned the perspectives of selected countries, let us imagine the impact of the Age of Obama. If President Obama serves for eight years, and if he becomes a great president like Abraham Lincoln or Franklin

33 Ibid 344 (Ginsburg J, concurring); see Janella Ragwen, 'The Propriety of Independently Referencing International Law' (2007) 40 *Loyola Law Review* 1407, 1423.

34 *Lawrence v Texas*, 539 US 558 (2002).

35 Stephen Breyer, 'Keynote Address' (2003) 97 *American Society of International Law Proceedings* 265, 265.

36 *Roper v Simmons*, 125 S Ct 1183, 1200 (2005).

37 See Ruth Bader Ginsberg, '"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication' (Speech delivered before the Constitutional Court of South Africa, 7 February 2006) <http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html> at 20 March 2009.

38 *Roper v Simmons*, 125 S Ct 1183, 1226 (Scalia J, dissenting).

39 HR Res 97, 109th Congress (2005); Roger Alford, 'Misusing International Sources to Interpret the Constitution' (2004) 98 *American Journal of International Law* 157, 64–5.

Delano Roosevelt, it will have profound implications for our country and the world – including for the topic of the lecture.

In foreign policy, Obama is off to a good start. He has pledged to close the Guantanamo Bay Prison within one year, and is working on releasing, relocating or trying the detainees. He has announced the end to torturous practices like waterboarding. He is drawing down the troops in Iraq as promised. He is stressing communication, not confrontation, even with countries like Syria and Iran. The President made an initial phone call to Palestinian President Mahmoud Abbas and did an interview on Arab TV very early in his term. At the end of Obama's European trip, he will make a visit to Muslim Turkey at the end of this month. The President picked Senator Hillary Clinton for Secretary of State and sent her first to China, and then to the Middle East. Additionally, he has picked highly experienced special envoys for Palestine/ Israel, Afghanistan, and Pakistan.

There are some worrisome items as well. He is not in favour of doing a deep investigation or putting on trial any officials from the Bush administration for war crimes.[40] He is upscaling our involvement in Afghanistan by ordering 17,000 extra troops, and who knows where that will lead. That country has defeated many empires. I have a personal interest in this matter as my son is a cadet at West Point, our US Military Academy. The President may keep Afghan rendition camps. On another topic, the administration has withdrawn from the Durban update conference in Geneva instead of attending and making a major speech on the salience of race and racism in the 21st century.

In my view, there are a number of things that I am hoping that Obama will espouse in the realm of foreign affairs. This would involve bringing US practices in line with US lofty rhetoric. First, I wish that he will make very clear that the rule of international law is very important to the United States. I hope that he will announce US compliance with the Geneva Conventions, ICCPR, the *Convention against Torture* (CAT), ICERD, and other treaty obligations. The President should urge the ratification of the *Convention on the Rights of the Child* (CRC), and should 're-sign' the *Statute of the International Criminal Court* (ICC), which President Bush 'un-signed', and then he should urge its ratification by the US Senate.

Additionally, the President should invoke the doctrine of responsibility to protect the people of Darfur as well as urge the creation of a US Commission on Human Rights. He could enhance counterterrorism assistance to many

40 See Benjamin G Davis, 'Refluat Stercus: A Citizen's View of Criminal Prosecution in US Domestic Courts of High Level US Civilian Authority and Military Generals for Torture and Cruel, Inhuman and Degrading Treatment' (2008) 23 *St. John's Journal of Legal Commentary* 503.

nations. Democratisation assistance is even more important, assuming the nations in question want it. My consulting efforts on the Palestinian and Rwandan constitutions were financed through US democratisation aid.

I hope that our government will encourage the study on all levels of critical languages such as Arabic, Pashto, and Chinese, not to mention Spanish. The President should make sure that the US Justice Department does not issue new torture memos. He should call for an end to overly zealous surveillance techniques of Americans and foreign peoples. He should end the improper and discriminatory use of immigration policy for counterterrorism. It is extremely difficult for any Arab or Muslim males of certain ages to enter as a tourist. Finally, I hope that the administration will not create national security courts or other versions of military commissions.

One of the most important things that the new President can do is to help restore appropriate checks and balances to our government. There should be no lawless executive, nor lay down Congress. It was a conservative Supreme Court that had to reign in the Executive on issues like the access of Guantanamo Bay detainees to criminal procedural protections.

Maybe one day soon, the US and Australian administrations will learn something from South Africa, a great role model for invoking and respecting international human rights. Article 39 of the South African Constitution requires incorporation of international law and permits reference to foreign law.[41] The Constitutional Court is required to promote the values 'of an open and democratic society based on human dignity, equality and freedom.'

The Court cited the ECHR in its first decision outlawing the death penalty in the *State v Makwanyane* case,[42] and has looked to supreme courts of various countries including the US, Canada, Germany, India, Hungary and Tanzania.[43] One critic, South African Erika de Wet, has noted that the Constitutional Court leans toward citing European sources. It will cite nonbinding international human rights law from Europe as well as various nonbinding declarations over law from the *African Charter on Human and Peoples' Rights*, which is a binding treaty on South Africa.[44]

41 *Constitution of the Republic of South Africa* (1996), article 39(1).
42 *State v Makwanyane and Another* (1995) (3) SALR 391.
43 Ibid.
44 See Erika de Wet, 'The Friendly but Cautious Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2005) 28 *Fordham International Law Journal* 1529.

The *Government of South Africa v Grootboom* was one of the most important decisions regarding socio-economic rights and their perceived justiciability. One issue was whether the minimum core obligation under the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) was of relevance in determining whether the government had fulfilled its obligations under the South African Constitution with regard to the right to housing.[45] The Court found that the interpretation of the phrase 'progressive realisation' in article 2 by the ICESCR Committee was helpful in identifying the meaning of progressive realisation of the right to adequate housing in section 26 of the South African Constitution. The Court found this result even though South Africa had signed, but not ratified ICESCR. The opinion even looked at nonbinding General Comment 3. The extent of the government's obligation to provide shelter for children and their parents under section 28 of the Constitution had to be read in light of its obligations under the CRC, which South Africa had ratified. The Court ultimately found the government did have an obligation to provide shelter to children and their parents.

Another important case for reference to international human rights norms was *Minister of Home Affairs v Lesbian and Gay Equality Project and Others*.[46] In this case, one of the issues was whether article 16(3) of the *Universal Declaration of Human Rights* (UDHR), read with article 23 of the ICCPR, should be interpreted as conferring a legal recognition and protection to heterosexual marriage to the exclusion of other family models. The two articles state that men and women have a right to marry. Of course, they do not state that men can only marry women and vice versa.

The State had argued that the UDHR and the ICCPR only protected heterosexual marriages. The State also cited the UN Human Rights committee (HRC) in the *Joslin v New Zealand* case of 2002 in which the committee held that denial of marriage licenses to same sex partners in New Zealand did not violate the ICCPR.[47]

The South African Court held that the concept of rights can take new meanings. The ICCPR did not forbid same sex marriages. It should be noted that the South African Constitution is also radical globally as it forbids discrimination on grounds of sexual orientation in the article 9 equality clause.

The common law definition of marriage was held unconstitutional to the degree that it did not allow same sex couples to enjoy the benefits of marriage. The Court gave the State 12 months to pass new legislation or called for the word

45 *Government of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC).
46 *Minister of Home Affairs v Lesbian and Gay Equality Project and Others*, CCT60/04 (2005).
47 *Joslin v New Zealand*, 214, UN Doc A/57/40 (2002).

'or spouse' to be included after the words 'husband' in the marriage formula. The Court also mentioned the famous Australian *Toonen* decision from the HRC,[48] which found that prohibition on the grounds of sexual orientation was implicit in the ICCPR.

Now let us return to the effect that Obama might have over eight years. In the words of my countryman Martin Luther King, Jr, I have a dream. Imagine if Obama appoints a number of progressive judges who believe in the use of international human rights law in domestic courts. A justice like Dean Harold Hongjuh Koh of Yale Law School, who was a Clinton administration undersecretary for human rights and firmly believes in monism, would be great.[49] A justice like African American Harvard law Professor Charles Ogletree, who is a spiritual heir to the first black justice Thurgood Marshall, would be fabulous. Ogletree is a firm believer in human rights as well.

Imagine if Obama's eight year commitment to international human rights law was followed by an equal commitment by the next American President, perhaps Hillary Clinton.

In conclusion, we should remember that there was the heinous 1896 *Plessy v Ferguson* case, which upheld legal racial segregation in the US. The famous dissent by Justice Harlan where he spoke out against segregation ended up being cited more than 50 years later in the famous 1954 *Brown v Board of Education* majority decision. Maybe in less than this length of time in the 21st century, we will see Kirby dissents cited in the majority opinions in the Australian and US courts. Future jurists will think: what did Kirby have to say on the subject!!

Imagine a world where the US and Australian constitutions make clear that international law must be followed and foreign law should be consulted.

48 *Toonen v Australia*, Communication No 488/1992, UN Doc/CCPR/C/50/D/488/1992 (1994).

49 Harold Hongju Koh, 'International Law as Part of our Law' (2004) 98 *American Journal of International Law* 43.