Engaging with the United Nations Treaty Bodies: A Fruitful Dialogue?

JO EN LOW*

Abstract

There are seven core United Nations international human rights treaties under which committees of independent experts have been established to monitor their implementation. These committees produce a body of reports, concluding observations, comments/recommendations and views/decisions. The use of this output by national courts and tribunals contributes significantly to the development of international human rights law as it establishes the agreement of States parties on the interpretation of a treaty and facilitates the production of subsequent State practice. This paper examines the use of treaty body output by Australian courts and tribunals. It demonstrates that while Australian courts and tribunals are increasingly resorting to treaty body output as an aid in the interpretation of statutes and development of the common law as well as in the exercise and judicial scrutiny of administrative discretion, they have yet to engage in a 'fruitful' dialogue with the treaty bodies.

Introduction

There are seven core United Nations ('UN') international human rights treaties[1] under which committees of independent experts have been established to monitor their implementation.[2] With the exception of the Committee on Economic, Social and Cultural Rights,[3] these treaty bodies are established pursuant to provisions of the

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1 International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'); International Covenant on Civil and Political Rights ('ICCPR'); International Covenant on Economic, Social and Cultural Rights ('ICESCR'); Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'); Convention on the Rights of the Child ('CROC'); and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('ICRMW').

2 Human Rights Committee ('HRC'); Committee on Economic, Social and Cultural Rights ('CESCR'); Committee on the Elimination of Racial Discrimination ('CERD'); Committee on the Elimination of Discrimination Against Women ('CEDAW'); Committee Against Torture ('CAT'); Committee on the Rights of the Child ('CRC'); and Committee on Migrant Workers ('CMW').

respective treaty.[4] Their monitoring procedures include reporting procedures; individual[5] and inter-State complaint procedures;[6] and inquiry procedures.[7] These committees produce a body of output consisting of General Comments or Recommendations adopted by the committees; Concluding Observations (or comments in the case of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee) on the reports of individual countries; Views or Decisions adopted in a case submitted under an individual complaints procedure; the results of an inquiry; and the discussions between the Committee and State parties during the examination of State periodic reports ('treaty body output'). This body of practice has become significant in the interpretation and application of the treaties by the Committees, governments, courts and tribunals, lawyers, non-governmental organisations and others.[8]

There exists a great deal of commentary regarding the impact of the work of the UN human rights treaty body system on national courts and tribunals. The approaches taken by scholars have varied from the theoretical case-study analysis of Martin Scheinin on the Nordic and Baltic experiences, Yuji Iwasawa on the Japanese experience and John Dugard on the South African experience;[9] to the empirical, data-based work of Christof Heynes and Frans Viljoen.[10] Of these, the International Law Association Human Rights Law and Practice Committee Reports of 2002 and 2004 ('ILA Reports') represent the most comprehensive study undertaken on the impact of treaty body output on national courts, tribunals and institutions around the world.[11]

This literature demonstrates that by utilising the work of the UN human rights treaty system, national courts and tribunals effectively engage in a 'fruitful dialogue'[12] with the treaty bodies, contributing significantly to the normative development of the human rights movement. This dialogue generates a considerable body of doctrine in relation to the human rights treaties and in so doing assists with the domestic implementation of international human rights norms while clarifying the status of treaty body output as a source of international law. It ultimately facilitates the production of subsequent State practice in the application of the treaty, thereby establishing the agreement of the parties regarding its interpretation.[13]

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3 Established by a resolution of the UN Economic and Social Council.

4 International Law Association, *Interim report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals,* New Delhi Conference (2002), Committee on International Human Rights Law and Practice ('ILA Report 2002') at 2.

5 Only available with respect to four of the treaties: CERD, ICCPR First Optional Protocol, CAT, CEDAW Optional Protocol.

6 Optional and have never been used before any of the treaty bodies.

7 Only available with respect to two of the treaties: CAT, CEDAW Optional Protocol.

8 ILA Report 2002, above n4 at 3.

9 Philip Alston & James Crawford, *The Future of UN Human Rights Treaty Monitoring* (2000).

10 Christof Heynes & Frans Viljoen, *The Impact of the UN Human Rights Treaties on the Domestic Level* (2002).

11 International Law Association, *Final report on the impact of findings of the United Nations human rights treaty bodies,* Berlin Conference (2004), Committee on International Human Rights Law and Practice ('ILA Report 2004'); and ILA Report 2002, above n4.

12 Martin Scheinin, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in *The Future of UN Human Rights Treaty Monitoring,* above n9 at 15.

Australian courts and tribunals have yet to engage in a 'fruitful' dialogue with the UN treaty bodies. Courts and tribunals are increasingly resorting to treaty body output as an aid to the interpretation of statutes and development of the common law as well as in the exercise and judicial scrutiny of administrative discretion. It is evident that by referring to the relevant international standards, domestic decision-making is better informed. However, this emerging practice of referring to international human rights norms and the treaty body interpretation of these norms is still in its early stages of development.

The use of treaty body output remains on the periphery of mainstream Australian judicial discourse; much discretion lies with individual judges to determine the significance to be attached to the international instruments and jurisprudence. The evidence indicates that only a few individual judges are willing to exercise this discretion in support of international human rights law and that where they do, treaty body output seldom plays a decisive role, as it is used primarily to support conclusions reached on other grounds. Furthermore, the use of treaty body material is limited; it is usually drawn upon to confirm existing common law rights and principles. Courts and tribunals rarely use these materials to develop the scope of such principles or to explore international human rights norms that may not have a common law equivalent.

The Australian courts' use of treaty body jurisprudence to inform judicial interpretation of international human rights norms may be compared with the approach of the New Zealand courts. The New Zealand case law demonstrates that the use of treaty body output is not limited to a few key individuals; discussion of this material is extensive and features in the judgments of majority and dissenting judges. Furthermore, the courts effectively engage in a fruitful dialogue with the treaty body on developing and determining the scope of such norms while exploring the legal status of treaty bodies and their output.

The extent to which the courts and tribunals are willing to draw upon the treaty body material in the decision-making process is inhibited by the limited circumstances in which Australian courts and tribunals may legitimately refer to treaty body material. Yet it appears that even where they may do so, the courts and tribunals remain reluctant to fully utilise the available resources. A number of factors, including the utility of the treaty body material, could explain this reluctance but no one factor appears to be determinative.

Part I of this paper briefly outlines the research methodology adopted and makes some general observations regarding the use of treaty body output by Australian courts and tribunals. These observations focus on the frequency of reference to treaty body material. Part II considers the factors influencing the willingness of the courts and tribunals to refer to treaty body output and assesses the quality of the references.

13 See for example, article 31(3) of the Vienna Convention on the Law of Treaties ('VCLT').

PART I: THE DATA

1. Research Methodology

The existing international law literature concerning the impact of the work of the UN human rights treaty body system on national courts and tribunals has not addressed the Australian experience in any detail. Joanne Kinslor[14] and Devika Hovell,[15] for example, have provided an Australian perspective on the UN treaty bodies with a focus on the relationship between the UN treaty bodies and the Australian Government rather than the relationship of these bodies with Australian courts and tribunals. The International Law Association Human Rights Law and Practice Committee has produced two reports[16] which assessed the impact of the UN human rights treaty body output on national courts and tribunals around the world. However, it was an international survey that did not purport to be an exhaustive study of any particular jurisdiction and hence only briefly discussed Australia. The only study that has been conducted specifically into the use of treaty body output by Australian courts and tribunals is non-exhaustive and only provides examples of the use of treaty body output in Australian case law and public fora from 2001-2003.[17] Accordingly, this paper is based on a review of the relevant primary sources, that is, the case law and other adjudicative decisions of Australian courts and tribunals from the late 1970s to mid-2006 where there were references to the UN human rights treaty bodies or their output.

2. General Observations

The results indicate that there has been a substantial increase over the last four decades in the level of frequency with which courts and tribunals refer to international human rights norms and jurisprudence.

References to international human rights treaties in the Australian courts and tribunals have experienced a marked increase over the last four decades. A total of approximately 655 cases were found to have referred to international human rights treaties between 1979 and 2006. After the International Covenant on Civil and Political Rights ('ICCPR') came into force in 1976, only three decisions were handed down in the 1970s that referred to the ICCPR. However, this gradually increased with approximately 60 cases found to have referred to the ICCPR during the 1980s. The frequency of the references increased considerably during the 1990s with some 296 cases referring to the ICCPR and from 2000-2006, the references have become quite numerous. This pattern

14 Joanne Kinslor, '"Killing off" International Human Rights Law: An Exploration of the Australian Government's Relationship with United Nations Human Rights Committees' (2002) 8 *Australian Journal of Human Rights* 79 at 79–99.

15 Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297 at 297–301.

16 ILA Report 2002, above n4; ILA Report 2004, above n11.

17 Jason Söderblom, *Selected Materials on the Recent Use of UN Human Rights Treaty Body Output by Australian Courts and Public Bodies other than Courts* (2003) Australian Centre for International and Public Law <www.abo.fi/instut/imr/research/seminars/ILA/ILA_papers.htm> accessed 28 April 2007.

is more or less reflected in the references to the other treaties, taking into account their respective dates of ratification and entry into force.

Similarly, references to the treaty bodies and their output have increased over the same period. In the 1980s, only three relevant cases were found to have referred to treaty body output, none of which were at the state level.[18] This use began to increase during the 1990s with 30 cases found on both the Commonwealth and state level. Ultimately, over half of the relevant references across Australia were made in decisions handed down within the period 2000-2006.

However, viewed in context, the number of references to treaty body output has been relatively low. Although Australia is not a party to the *European Convention on Human Rights* ('European Convention'), there were about as many references to the European Convention as the ICCPR (approximately 169 references to the European Convention since 1982). The number of references to the European Convention was not as high as that of the ICCPR. However, the difference between the number of references to the Convention and the European Court ('ECtHR') was less significant than that between the ICCPR and the Human Rights Committee ('HRC'), that is, there was a higher percentage of references to the jurisprudence of the ECtHR. There were only 55 cases that referred to the European Convention without referring to the jurisprudence of the ECtHR. On the other hand, there were approximately 220 cases referring to the ICCPR that were not accompanied by references to the HRC.

This may be a reflection of the problems of access to and unfamiliarity with treaty body materials. Although the Office of the High Commissioner for Human Rights, Anne Bayefsky and AustLII websites currently provide search databases for treaty body materials, these are relatively recent and still developing. Most of the references to treaty body output have been extracted by courts from textbooks such as that of Sarah Joseph, Jenny Schultz and Melissa Castan.[19] In addition, the volume and range of Strasbourg case law far exceeds that of the treaty bodies and may discuss the norms in greater detail. There were also a number of cases where the ICCPR was referred to in passing and it may not have been relevant or useful to refer to the work of the HRC.

The clear patterns in use identified by the International Law Association Human Rights Law and Practice Committee reports[20] are also present in the Australian context. The overwhelming number of references documented in the two reports are to cases decided under individual communications procedures and to general comments or recommendations adopted by the treaty bodies; concluding observations, States parties' reports and other output have been referred to less frequently. The research on which this paper is based supports this finding. A search was conducted into the number of cases on the Australian Commonwealth and state level that refer to treaty body output. A total of 78 relevant cases were found. Of these, 40 referred to the 'views' of the

18 *Gerhardy v Brown* (1985) 57 ALR 372; *Re Harley* (1984) 6 ALN 295; *Koowarta v Bjelke-Peterson* (1982) 39 ALR 417.

19 Sarah Joseph, Jenny Schultz & Melissa Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed) (2004).

20 ILA Report 2002, above n4; ILA Report 2004, above n11.

committees and to General Comments or Recommendations. Of the remaining cases, many sources were merely referred to in the facts and while several States parties' reports were cited, only one case utilised concluding observations.[21]

The number of individual communications decided by the HRC far exceeds that of the other committees. As of 3 October 2006, a total of 1056 views were handed down by the HRC. In comparison, over the same period of time, only 176 cases were decided by the Committee Against Torture ('CAT'), 38 by Committee on the Elimination of Racial Discrimination ('CERD') and three by the CEDAW Committee.[22] With respect to the General Comments or Recommendations, both the HRC and CERD have adopted 31 while the CEDAW Committee has adopted 25. The CAT has only adopted one General Comment.

It is therefore not surprising to find that the majority of the references are to the case law and General Comments of the HRC. References to other Committees have been less frequent. On the Commonwealth level, 53 of the 71 relevant cases found referred to the work of the HRC. On the state level, half of the relevant cases utilised HRC output. This reflects a number of other factors such as the range of rights protected by the ICCPR, the preference domestic courts have for drawing on material that will help them to resolve a concrete case before them (hence the dominance of references to Views), the period of operation of the HRC (second longest of the treaty bodies) and a higher level of public awareness of the HRC and its work.[23] Some even consider the HRC to be 'the closest the world has ever come to an international court of human rights.'[24]

PART II: AUSTRALIAN COURTS AND TRIBUNALS

1. Willing But Not Able

A. The Australian Legal System

It is an established principle of Australian law that the international treaties to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into municipal law by statute. This is based upon the separation of powers doctrine which stipulates that the making of a treaty is an executive act while the performance of its obligations requires legislative action. However, it is now accepted in Australia that international norms may be used as an interpretive aid by the courts, at least to help resolve statutory ambiguity or to fill lacunae in the common law.[25]

21 *Strong v R* (2005) 216 ALR 219.

22 Of the three communications heard by the CEDAW Committee, two were held to be inadmissible.

23 ILA Report 2004, above n11 at 44.

24 Gudmunder Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller* (2001).

25 *Dietrich* (1992) 117 CLR 292; *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

In addition, the decision in *Teoh*[26] creates what some have referred to as a 'back-door'[27] method of giving effect to treaties in domestic law. In that case, a majority of the High Court held ratification of a treaty could give rise to a general legitimate expectation that administrative decision-makers would act in accordance with the terms of the treaty. This case has been subject to legislative attempts to overrule it[28] and executive attempts to limit its effect[29] while the High Court of Australia's ('High Court') criticism in *Lam*[30] indicates that if given the opportunity, the current Court may limit the operation of this principle. In addition, it is a procedural rule that does not require administrative decision-makers to consider the substantive rights contained in a treaty. Notwithstanding these developments, courts and tribunals have continued to apply the *Teoh* approach.[31]

The Australian approach to international law has been characterised as a manifestation of 'anxieties'[32] or a 'split personality'.[33] While Australia has proudly supported the international human rights framework through the ratification of six of the seven main human rights treaties[34] and has granted treaty bodies the authority to hear individual complaints against Australia, this enthusiasm cannot be said to extend to the domestic implementation process. Australia has not directly incorporated the majority of the international human rights treaties into domestic law. The only treaties that have been directly incorporated are the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') through the *Racial Discrimination Act* 1975 (Cth) ('RDA'), as well as elements of the CEDAW through the *Sex Discrimination Act* 1984 (Cth) ('SDA').

In 1991, Nicholas Toonen, a gay Tasmanian man, lodged a communication with the HRC claiming that the Tasmanian Criminal Code interfered with his right to privacy and constituted discrimination on grounds of sex. The HRC held that this legislation was in violation of the ICCPR.[35] In response, the Commonwealth Government enacted the *Human Rights (Sexual Conduct) Act* 1994 (Cth) overriding the offending provision of the Tasmanian Criminal Code. However, since then, Australia's relationship with the UN human rights treaty bodies has declined. The Government has failed to comply with

26 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

27 Wendy Lacey, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing' in Hilary Charlesworth, Madeleine Chiam, Devika Hovell & George Williams (eds), *The Fluid State: International Law and National Legal Systems* (2005).

28 The Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth), The Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth) and The Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth) all lapsed before being passed by Federal Parliament. South Australia is the only state Parliament to pass counter-legislation: *Administrative Decisions (Effect of International Instruments) Act* 1996 (SA).

29 Hilary Charlesworth, Madeleine Chiam, Devika Hovell & George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423 at 449.

30 *Lam v Minister for Immigration and Multicultural Affairs* [2003] HCA 6.

31 See for example, *Long v Minister for Immigration, Multicultural and Indigenous Affairs* [2003] FCAFC 218.

32 Charlesworth, Chiam, Hovell & Williams, above n29 at 446.

33 Philip Alston & Madeleine Chiam, *Treaty-making and Australia: Globalisation versus Sovereignty?* (1995) at 129.

34 With the exception of the ICRMW.

35 *Toonen v Australia,* Human Rights Committee, Communication No. 488/1992, 14 March 2003, UN Doc. CCPR/50/D/488/1992.

almost every decision of the HRC on a wide range of issues such as arbitrary detention,[36] mistreatment of children,[37] inhumane treatment of prisoners[38] and denial of the right to family life.[39] There also exists a measure of government resistance in relation to their reporting obligations.[40] The Government has also publicly rejected one of the Committee's findings on Australia[41] and adopted a series of treaty body reform measures which some have observed resemble a steady withdrawal from the system.[42] Such measures are based, in part, on constructive criticism of the UN treaty body system.[43] Generally, the Commonwealth has continued to adopt a low-key approach in response to the treaty bodies and does not publish or publicise the views of the treaty bodies. However, courts and tribunals remain as a valuable forum for the development of international human rights discourse.

(i) Ambiguity

In Australia, the ability of the courts and tribunals to refer to international law in the process of statutory interpretation is predicated on the presence of ambiguity[44] Where there exists a clear intention on behalf of Parliament to remove or interfere with fundamental rights and freedoms, courts and tribunals will be precluded from interpreting the statute consistently with international treaties. Thus, there exists a limited window of opportunity for the use of treaty body output. Even if ambiguity is loosely construed,[45] it is nonetheless required.

Re Woolley[46] is a good example of where advocates drew extensively on treaty body output and international human rights law to mount a constitutional challenge to the mandatory detention of infant asylum-seekers. In *Re Woolley*, children under immigration detention pursuant to sections 189 and 196 of the *Migration Act* 1958 (Cth) ('Migration Act') applied to the High Court for prohibition, *habeas corpus* and injunctive relief. They argued that those provisions of the Migration Act were unconstitutional. It was asserted that with respect to children, mandatory immigration detention was a form of punishment by the Executive and was contrary to the Chapter III of the Constitution

36 See for example, *A v Australia,* Human Rights Committee, Communication No. 560/1993, 3 April 1997, UN Doc. CCPR/C/59/D/560/1993.

37 *Bakhtiyari v Australia,* Human Rights Committee, Communication No. 1069/2002, 29 October 2002, UN Doc. CCPR/C/79/D/1069/2002.

38 *Cabal and Bertran v Australia,* Human Rights Committee, Communication No. 1020/2001, 7 August 2003, UN Doc. CCPR/C/78/D/1020/2001.

39 *Winata v Australia,* Human Rights Committee, Communication No. 930/2000, 26 July 2001, UN Doc. CCPR/C/72/D/930/2000.

40 'Transcript of Australia's hearing before the CERD Committee', 1394th meeting, 56th session of the Committee on the Elimination of Racial Discrimination, 22 March 2000.

41 See for example, UN Human Rights Committee, Concluding Observations on Australia, 24 July 2000, A/55/40 at [498]–[528].

42 Hilary Charlesworth, Madeleine Chiam, Devika Hovell & George Williams, *No Country Is An Island: Australia and International Law* (2006) at 88.

43 Daryl Williams, 'Reforming Human Rights Treaty Bodies' (1999) 5 *Australian Journal of Human Rights* 158.

44 *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476.

45 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (Mason J); Wendy Lacey, above n27.

46 *Re Woolley* (2004) 210 ALR 369.

and the doctrine of the separation of powers. As the Migration Act did not differentiate between the detention of adults and children, the Court found there was no ambiguity with respect to this. The question was whether the Act, by directing members of the Executive to detain unlawful non-citizens, was 'punitive' and 'penal' in nature such that Parliament had impermissibly authorised the Executive to exercise power that was the judicial function of adjudging and punishing criminal guilt. The High Court characterised such power as an incident of the executive power with respect to aliens[47] rather than an exercise of judicial power. Ultimately, the Court dismissed the application and held that both sections applied to unlawful non-citizens who were children and to the extent that they provided for the detention of children, they were constitutionally valid.

In the course of argument, Mr Griffith QC with Mr Horan and Mr Harris relied on the Convention on the Rights of the Child ('CROC') to support their submissions and proposed that the body of international jurisprudence on the human rights obligations of States in relation to the situation of asylum seekers in detention supports the argument that the mandatory detention of infant asylum seekers is arbitrary. The appellants argued that a range of immigration laws in countries such as Canada, United States of America, United Kingdom and New Zealand do not provide for mandatory detention. Of these countries, Canada and New Zealand provide expressly for the detention of minors. In addition, a number of HRC views such as *A v Australia*[48] and *Bakhtiyari v Australia*[49] were cited in support of the argument that the regime was arbitrary within the meaning of article 9 of the ICCPR.

In *A v Australia,* the Committee found that the detention of the author was arbitrary within the meaning of article 9(1) of the ICCPR and was also in breach of article 9(4) because the detention authorised by the Act was indefinite, prolonged, not open to review and not proportionate to the end sought.[50] It is important to note that this communication did not condemn the notion of immigration detention *per se.* The HRC in *Bakhtiyari v Australia* held that the detention of Mrs Bakhtiyari and her children constituted violations of articles 9(1), 9(4) and 24(1) of the ICCPR. In addition, the removal of Mrs Bakhtiyari and her children without awaiting the final determination of a separate proceeding was also a violation of articles 17(1) and 23(1). The Committee made three findings of violation in relation to the length of detention, the absence of alternatives to detention and the unavailability of 'substantive' judicial review to challenge the detention.[51]

In addressing this argument, Kirby J found that the constitutional argument based upon detention as 'inhumane' and therefore constituting 'punishment', must be proved

47 Synonymous with non-citizen: *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.

48 *A v Australia,* Human Rights Committee, Communication No. 560/1993, 3 April 1997, UN Doc. CCPR/C/59/D/560/1993.

49 *Bakhtiyari v Australia,* Human Rights Committee, Communication No. 1069/2002, 29 October 2002, UN Doc. CCPR/C/79/D/1069/2002.

50 *A v Australia,* Human Rights Committee, Communication No. 560/1993, 3 April 1997, UN Doc. CCPR/C/59/D/560/1993 at [9.4]–[9.6].

51 *Bakhtiyari v Australia,* Human Rights Committee, Communication No. 1069/2002, 29 October 2002, UN Doc. CCPR/C/79/D/1069/2002 at [9.2]–[9.4],[10].

by reference to the impact on, and consequences for, the particular parties.[52] He held that the evidence did not sustain this claim. He raised the work of the treaty bodies in relation to statutory construction. He acknowledged that the HRC had made several findings against Australia in relation to the detention of children but having regard to the language of the Act, there was no 'foothold'[53] for an interpretation differentiating between adults and children in the application of mandatory detention. Hence, where the law was clear and valid, the result of a 'deliberately devised' and 'deliberately maintained' policy of Parliament,[54] the Court had no authority to hold otherwise.

A similar conclusion to *Re Woolley* was reached in *Re Brown*[55] where members of the Administrative Appeals Tribunal ('AAT') held that the absence of ambiguity prevented them from considering whether the meaning of 'husband' and 'wife' could be influenced by the HRC interpretation of article 26 in *Toonen.* In this case, B and C were in a de facto relationship. When C died of HIV/AIDS, B applied for spousal benefits under section 81(1) of the *Superannuation Act* 1976 (Cth). This section provides entitlements to a 'spouse' where an 'eligible employee', such as B, dies before attaining the maximum retiring age and is survived by the spouse. The respondent's delegate refused the application on the basis that the applicant did not have a 'marital relationship' with C as defined by section 8A of the Act. At issue was the meaning of 'husband' and 'wife' and whether it could apply to partners in a homosexual relationship. The AAT held that the provision presupposed the existence of a marital relationship and the fact the persons must be of opposite sexes was inherent in the meaning of the words. The provision section 8A does not apply to other persons in similar or analogous situations.

On the other hand, as demonstrated by the High Court in *Al-Kateb v Godwin,*[56] 'ambiguity' can be a malleable concept. Where the language is quite clear and there is absolutely no room for importing uncertainty into the statutory provision(s), courts and tribunals will be precluded from resorting to international law to assist them with interpretation. However, where the case is less clear, it is evident that the exercise of judicial discretion is critical to a finding of 'ambiguity'.

In *Al-Kateb v Godwin*, the appellant was a stateless person who arrived in Australia without a visa. He was taken into immigration detention upon arrival and his application for a visa failed. He wrote to the Minister asking to be removed from Australia as soon as reasonably practicable but the Australian authorities failed to obtain the international cooperation necessary for his removal. His application to the Federal Court of Australia for a declaration that his continued detention was unlawful was dismissed. Therefore, at issue in the High Court was whether the continued detention of the appellant was lawful. McHugh, Hayne, Callinan and Heydon JJ (Gleeson CJ, Gummow and Kirby JJ dissenting) held that the Migration Act allowed for indefinite detention and that this did not infringe Chapter III of the Constitution. The majority was of the view that sections

52 *Re Woolley* (2004) 210 ALR 369 at 419, 420.
53 *Re Woolley* (2004) 210 ALR 369 at 421.
54 *Re Woolley* (2004) 210 ALR 369 at 423.
55 *Re Brown and Commissioner for Superannuation* (1995) 38 ALD 344.
56 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124.

189, 196 and 198 of the Act required the appellant to be kept in immigration detention until he was removed from Australia, as the words of sections 196 and 198 were unambiguous and too clear to be read subject to a purposive limitation or an intention not to affect fundamental rights. On the other hand, Gleeson CJ, Gummow and Kirby JJ found sufficient ambiguity in the Migration Act.

Gleeson CJ found the Act envisaged that the administrative detention of unlawful non-citizens would come to an end by the grant of a visa, which entitles the alien to enter the Australian community, or by removal of the alien from Australia.[57] Hence, although the application process for a visa may be uncertain in that it involves a lengthy process of decision-making, administrative and judicial review, the period of time in an ordinary case is finite.[58] In addition, in an ordinary case, the detention can be brought to an end upon the alien making a request to be removed.[59] However, the Act did not address the 'exceptional' cases where a visa application has been determined adversely to an alien or an alien has requested removal but removal is not possible in the circumstances which prevail at the time and which are likely to prevail in the foreseeable future.[60] As such, the provisions of the Act were ambiguous; the legislative intention to abrogate or curtail human rights or freedoms was not clearly manifested by unambiguous language.

Gummow J approached the issue by identifying the temporal elements in section 196(1) to keep the appellant in detention 'until he or she is … removed from Australia under section 198.'[61] There is also an element of process or outcome under section 198 which specifies that the person is to be removed 'as soon as reasonably practicable.'[62] This provision introduces an assessment of a period which is appropriate or suitable to the purpose of the legislative scheme, that is, to facilitate that removal of an alien from Australia. If it comes to a point where the alien cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of section 198 and it no longer retains the purpose of facilitating removal from Australia.[63] His Honour therefore held that in considering these provisions, it is important to 'eschew' a reading of the legislation which recognises a power to keep a detainee in custody for an unlimited time.[64]

Kirby J agreed with Gummow J and found that it was unlikely Al-Kateb would be removed in the foreseeable future. Accordingly, sections 196 and 198 of the Migration Act did not apply to his case and these sections did not sustain his continued detention.[65] His Honour declined to give the provision 'as soon as reasonably practicable' an open-ended interpretation because it must be read in light of the strong presumption, under the common law and international law, in favour of personal liberty and against indefinite detention.[66]

57 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 126 (Gleeson CJ).
58 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 126 (Gleeson CJ).
59 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 34.
60 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 126 (Gleeson CJ).
61 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 155 (Gummow J).
62 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 155 (Gummow J).
63 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 156 (Gummow J).
64 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 155 (Gummow J).
65 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 161 (Kirby J).

(ii) Legislative Action

A comparison with New Zealand highlights the extent to which the absence of a legislative bill of rights at the federal level influences the use of treaty body output. Like Australia, the ratification of international treaties is an executive act and ratified treaties do not form part of New Zealand domestic law unless they have been expressly incorporated by the legislature.[67] However, whereas Australia does not have a legislative instrument which explicitly guarantees the rights protected by international human rights conventions, New Zealand has the *Bill of Rights Act* 1990 ('BORA') which incorporates most of the provisions of the ICCPR into its domestic law.

The BORA ensures that courts will be guided by the international human rights conventions and the interpretation of these conventions by international human rights courts and other institutions. Section 6 of the BORA imposes an obligation on the judiciary to interpret statutes consistently with treaties. Hence the presumption of consistency has been accorded a wider operation in New Zealand than in Australia[68] and the use of international law in New Zealand is not limited to cases of statutory or common law ambiguity.[69]

However, where Parliament has clearly legislated inconsistently with its obligations under the BORA, section 4 does not allow the courts to invalidate such legislation. The New Zealand Court of Appeal (Richardson P, Gault, Thomas, Keith and Tipping JJ) in *Quilter*[70] illustrates the operation of section 4. The issue in that case was whether the *Marriage Act* 1955 allowed for marriages between persons of the same sex. The Registrar of Marriages had refused to accept notices of intended marriage lodged by three lesbian couples under section 23 of the Act and to issue marriage licences under section 24. The appellants argued that section 19 of the BORA required the Courts to give a modern interpretation on the Act and the concept of marriage. The respondent contended that no question of discrimination arose and even if it did, the BORA must yield to the clear intention of Parliament to recognise the traditional concept of marriage.

The Court (Richardson, Gault, Keith, Thomas and Tipping JJ) unanimously dismissed the appeal. They held that the wording and scheme of the *Marriage Act* could not accommodate same-sex marriages. It was the role of Parliament to change the legal situation of same-sex couples. However, the reasoning of the individual judges varied. Of the five judges, Richardson, Gault and Keith JJ were of the view that the actions of the Registrar did not constitute discrimination to begin with. On the other hand, Thomas and Tipping JJ felt that the Registrar's actions constituted discrimination. Nonetheless, due to the operation of section 4, both Thomas and Tipping JJ held that the *Marriage Act* must prevail.

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66 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 162 (Kirby J).

67 Alex Conte, 'From Treaty to Translation: The Use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand' (2001) 8 *The Canterbury Law Review* at 54–69.

68 Wendy Lacey, above n27 at 102.

69 Ibid.

70 *Quilter v Attorney-General* [1998] 1 NZLR 523.

It is worthwhile to observe that while the Court ultimately held that they were precluded from interpreting the legislation consistently with the treaties, Thomas, Keith and Tipping JJ[71] nonetheless addressed treaty body jurisprudence on discrimination and sexual orientation.[72] Of these judgments, it was Thomas J who made extensive use of the available jurisprudence in order to establish the broad nature of 'discrimination',[73] the 'reasonable and objective' basis of article 26[74] and the 'stand-alone' effect of article 26 which means that, irrespective of other provisions of the ICCPR such as article 23,[75] discrimination on grounds of sex or sexual orientation would be a violation of article 26.[76]

Section 4 of the BORA is therefore not dissimilar to the Australian common law principle that where there exists a clear intention on behalf of Parliament to remove or interfere with fundamental rights and freedoms, courts and tribunals will be precluded from interpreting the statute consistently with international treaties.[77] Furthermore, the Australian common law principle of consistency, that is, in resolving ambiguity in a statute, courts will favour a construction which accords with Australia's obligations under a treaty, on the basis that they presume that Parliament intends to legislate in accordance with, rather than contrary to, its international obligations[78] resembles section 6 in operation. Hence, the BORA does not necessarily provide the New Zealand courts with a larger window of opportunity in which to draw on international human rights jurisprudence but rather, the BORA provides New Zealand courts and tribunals with a stronger legal basis on which to refer to treaty body output. Section 6 of the BORA imposes a formal, legislative obligation that the common law of Australia does not.

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71 *Quilter v Attorney-General* [1998] 1 NZLR 523 at 530–531, 535–539, 543–547, 550–553 (Thomas J) at 560–570 (Keith J) at 576–578 (Tipping J).

72 *Adam v The Czech Republic*, Human Rights Committee, Communication No. 586/1994, 23 July 1996, UN Doc. CCPR/C/57/D/586/1994; *Araujo-Jongen v The Netherlands*, Human Rights Committee, Communication No. 418/1990, 22 October 1993, UN Doc. CCPR/C/49/D/418/1990 (1993); *Bhinder v Canada*, Human Rights Committee, Communication No. 208/1986, 9 November 1989, UN Doc. CCPR/C/37/D/208/1986 (1989); *Ibrahim Gueye et al v France*, Human Rights Committee, Communication No. 196/1985, 3 April 1989, UN Doc. CCPR/C/35/D/196/1985 (1989); *Jarvinen v Finland*, Human Rights Committee, Communication No. 295/1988, 25 July 1990; *Lindgren v Sweden*, Human Rights Committee, Communication Nos. 298/1988 and 299/1988, 9 November 1990; *Neefs v The Netherlands,* Human Rights Committee, Communication No. 425/1990, 15 July 1994, UN Doc. CCPR/C/51/D/425/1990 (1994); *Oulajin and Kaiss v The Netherlands*, Human Rights Committee, Communication Nos. 406/1990 and 426/1990, 23 October 1992 UN Doc. CCPR/C/46/D/406/1990 and 426/1990 (1992); *Pauger v Austria*, Human Rights Committee, Communication No. 415/1990, 26 March 1992, UN Doc. CCPR/C/65/D/716/1996 (30 April 1999); *Pepels v The Netherlands*, Human Rights Committee, Communication No. 484/1991, 15 July 1994, UN Doc. CCPR/C/51/D/484/1991 (1994); *Simunek, Hastings, Tuzilova and Prochazka v The Czech Republic*, Human Rights Committee, Communication No. 516/1992, 23 August 1996, UN Doc. CCPR/C/57/1; *Somers v Hungary*, Human Rights Committee, Communication No. 566/1993, 23 August 1996, UN Doc. CCPR/C/57/D/566/1993; *Sprenger v The Netherlands*, Human Rights Committee, Communication No. 566/1993, 23 August 1996, UN Doc. CCPR/C/57/D/566/1993; *Vos v The Netherlands*, Human Rights Committee, Communication No. 218/1986, 29 March 1989, UN Doc. CCPR/C/66/D/786/1997 (29 July 1999); *Toonen v Australia,* Human Rights Committee, Communication No. 488/1992, 14 March 2003, UN Doc. CCPR/50/D/488/1992 (1994); Human Rights Committee, General Comment 18 on Non-Discrimination, 37th Session, 9 November 1989.

73 *Quilter v Attorney-General* [1998] 1 NZLR 523 at 530–531 (Thomas J).

74 *Quilter v Attorney-General* [1998] 1 NZLR 523 at 546 (Thomas J).

75 Article 23(2) of the ICCPR expressly recognises the right of men and women to marry and found a family.

Accordingly, it could be argued that an Australian legislative instrument incorporating the provisions of a treaty would encourage greater use of treaty body output. For example, in *Al-Kateb,* McHugh J implicitly suggested that the absence of a bill of rights constrained his ability to read the Migration Act in light of international human rights law.[79] Certainly, there have been many findings to the effect that adoption of a bill of rights has made reference to the output of the treaty bodies frequent.[80]

However Australia's first bill of rights, the *Human Rights Act* 2004 of the Australian Capital Territory,[81] illustrates that it is unclear how this will develop in Australia. Although the impact of the Act is outside the scope of this study, it is worthwhile to note that despite the provision in section 31 of the Act encouraging use of international human rights jurisprudence in the interpretation of human rights, as of October 2006, of the cases heard after the Act came into force, only *Cornelius Stevens v Emily McCallum*[82] referred to the work of the HRC and only indirectly, quoting Kirby J in *TKWG*.[83] In addition, it is evident that despite the incorporation of the ICERD and CEDAW into domestic law through the RDA and the SDA, courts and tribunals have made little use of the Committees' output.

(iii) Extending the Boundaries with the Australian Constitution

In *Al-Kateb v Godwin,* there was a broader dialogue between McHugh and Kirby JJ on whether constitutional interpretation may be assisted by reference to international human rights law. McHugh J was clearly against the notion, stating that it is 'heretical' to claim that the Constitution should be read consistently with the rules of international law.[84] The Constitution cannot be read in light of international law rules that have come into existence since 1900[85] and given the widespread nature of the sources of international law, it is impossible to believe that when Parliament legislates, it has in mind or is even aware of all the rules of international law.[86]

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76 *Quilter v Attorney-General* [1998] 1 NZLR 523 at 552 (Thomas J). Two of the three couples (Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf) also lodged a complaint with the HRC. The authors' essential claim was that the ICCPR obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23 and paragraphs 1, 2, and 26 of the ICCPR. The Committee, however, held there was no violation on the basis that the right to marry expressly addressed by article 23(2) refers specifically to 'men and women' indicating that the obligation imposed by 23(2) was to recognise marriage only as a union between a man and a woman.

77 *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476.

78 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; Murray Gleeson, 'Global Influences on the Australian Judiciary' (2002) 22 *Australian Bar Review* 184.

79 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 144–5.

80 ILA Report 2004, above n11 at 44.

81 Came into force on 1 July 2004.

82 *Cornelius Stevens v Emily McCallum* [2006] ACTCA 13.

83 *TKWG v R* (2002) 212 CLR 124.

84 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 140 (McHugh J).

85 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 140 (McHugh J).

86 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 141 (McHugh J).

Kirby J, on the other hand, expressed views that were more or less in line with those he had pronounced on many previous occasions. His Honour has extended the principle of statutory construction to constitutional interpretation.[87] This approach goes further than the accepted principle of construction and is not supported by other members of the High Court. However, as it is clear from the patterns of use outlined in this paper, Kirby J usually draws on international human rights law principles to support a decision based on Australian legal principles and hence it cannot be said that Kirby J's approach drifts far from accepted practice. Kirby J cited from the international and regional human rights treaties[88] as well as the United States Supreme Court in *Atkins v Virginia*[89] and *Lawrence v Texas*.[90]

Although the High Court has touched upon many principles of international law relating to extra-territorial jurisdiction,[91] sentencing,[92] mandatory detention,[93] nationality[94] and the implied freedom of political communication,[95] it is unlikely, at this point in time, to accept the interpretative principle espoused by Kirby J.[96] Accordingly, it does not appear as though the boundaries, within which the courts and tribunals may legitimately refer to treaty body material, will be extended to include the Australian Constitution.

B. *The United Nations Treaty Body System*

The perceived utility of treaty body output is a key factor influencing the willingness of Australian courts and tribunals to refer to treaty body output. Due to the nature of the UN treaty body system, treaty body output is non-binding on State parties[97] and the material itself may be too general or mirror the problems experienced at a domestic level instead of resolving them. This perception of the material may influence the readiness of courts and tribunals to refer to the material where they may draw on domestic case law or the work of other international human rights bodies, such as the ECtHR, which provide binding adjudications on parties to the treaty.

(i) The Status of Treaty Body Output

Domestic judicial fora have expressed views on the non-binding effect of treaty body findings, as illustrated by the Irish Supreme Court in *Kavanagh v The Governor of Mountjoy Prison*[98] and the House of Lords in *Jones v Kingdom of Saudi Arabia*.[99] However, this does

87 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
88 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 171 (Kirby J).
89 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 171–172 (Kirby J).
90 *Al-Kateb v Godwin and Others* (2004) 208 ALR 124 at 171–172 (Kirby J).
91 *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311.
92 *Baker v The Queen* (2004) 210 ALR 1.
93 *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji* (2004) 202 ALR 201.
94 *Singh v Commonwealth* (2004) 209 ALR 355.
95 *Coleman v Power* (2004) 209 ALR 182.
96 Hilary Charlesworth, 'The High Court on Constitutional Law: The 2004 Term' (2005) 28 *University of New South Wales Law Journal* 1 at 5.
97 Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003).
98 *Kavanagh v The Governor of Mountjoy Prison* [2002] IESC 11.

not mean that the jurisprudence is without some 'special status' in so far as it purports to interpret the treaty or consider the treaty obligations of State Parties.[100] The examples indicate that although it is generally accepted that treaty body output does not constitute legally binding authority, the courts do not rule out its potential as an interpretive source of persuasive authority. As Dimitrijevic states, 'a statement of an authoritative body performing an important supervisory function cannot remain without consequences.'[101] The HRC and the CAT have emphasised that the legal norms which the treaty bodies pronounce are binding obligations of the States parties.[102]

Unlike their Australian counterparts, the New Zealand courts have elaborated on the scope of this status. This is evident in *Tangiora v Wellington District Legal Services Committee*.[103] The High Court (Gallen J) held that the HRC constituted a 'judicial authority' within section 19(1)(e) of the *Legal Services Act* 1991 and accordingly it fell within the list of bodies in respect of which legal aid can be granted. Gallen J was of the view that the phrase refers to bodies that are bound by the rules of natural justice and derive their power from the State, with an obligation to judge or give an opinion on matters before them.[104] By acceding to the Optional Protocol to the ICCPR, the Crown conferred jurisdiction on the HRC, fulfilling the requirement that a judicial body, or the right of access to the body, is given by the State.[105] While this judicial authority was not constituted by statute, statutory acknowledgement rather than an explicit reference can be sufficient for the purposes of section 19(1)(e).[106] After all, statutory acknowledgement of the ICCPR can be found in the BORA.

Gallen J also did not consider that decision-making or the ability to make binding recommendations are, of themselves, decisive elements in determining whether a body is judicial in nature.[107] The essential element is whether the purpose of the body is to resolve disputes between parties. The HRC is required to decide whether or not an individual's rights have been breached, a process analogous to the resolution of a dispute between the State and an individual citizen.[108] Accordingly, the manner in which evidence is received and heard by the HRC, the legal nature of proceedings and the legal experience of members of the Committee are of a sufficiently judicial nature to allow an analogy to be drawn with a court of law.

The New Zealand Court of Appeal reversed this decision in *Wellington District Legal Services Committee v Tangiora*[109] and held that the HRC was not any administrative tribunal

99 *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UHKL 26.

100 Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review* 27 at 27–52.

101 Vojin Dimitrijevic, 'State Reports' in Gudmunder Alfredsson, above n24 at 198,

102 ILA Report 2004, above n11 at 5.

103 *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118.

104 *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118 at 124 (Gallen J).

105 *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118 at 125 (Gallen J).

106 *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118 at 126–128 (Gallen J).

107 *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118 at 128 (Gallen J).

108 *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118 at 131–132 (Gallen J).

109 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129.

or judicial authority within the meaning of the *Legal Services Act*. The Committee was not called a Court, Tribunal or Commission in the Covenant or its drafting history,[110] its procedures are not those of a Court or tribunal-like body[111] and the wording of the Protocol was not the language of binding obligation.[112] Further, any general characterisation of the Committee as a judicial authority has to be made in the context of the *Legal Services Act* and there was no relevant international obligation by reference to which the *Legal Services Act* was to be interpreted in this case.[113] However, even in the Court of Appeal, an opinion was expressed by Thomas J (concurring) that although section 19(1)(e) of the *Legal Services Act* was intended to apply only to domestic tribunals and judicial authorities, the HRC might be considered a judicial authority beyond the legislation. His Honour stated that although the Committee may lack many of the characteristics of a judicial authority, such as the power to issue binding and enforceable decisions, when it reaches a 'view', it has made a definitive and final ruling on that claim.[114] He felt that non-compliance with the ruling should not 'detract' from the determination.[115] Ultimately, Thomas J considered the Committee to exercise a 'judicial or quasi-judicial function which may be sufficient to clothe it with the mantle of a "judicial authority"'.[116]

(ii) The Utility of Treaty Body Output

The output of treaty bodies may be difficult to use productively in a national case because for example, the General Comments or Recommendations are too general or the Views contain little or no persuasive reasoning.[117] This is a well-recognised characteristic of the treaty body material and stems, in part, from the resource constraints facing the system.[118] While many of the General Comments, Recommendations or Views provide cursory reasoning to support their conclusions, many are also well reasoned and detailed. Where it is the latter, the interpretation of international human rights norms can be improved by reference to the material. It has also been suggested that where international law experiences problems analogous to domestic law in construing the scope of certain principles of international human rights law, reference to international instruments and jurisprudence will not necessarily assist the courts in decision-making.[119]

110 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 134–135.
111 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 135.
112 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 136.
113 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 139–143.
114 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 144 (Thomas J).
115 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 144 (Thomas J).
116 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at 144 (Thomas J).
117 Andrew Byrnes, 'And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) at 365.
118 Elizabeth Evatt, 'Ensuring Effective Supervisory Procedures: The Need for Resources' in Philip Alston & James Crawford, above n9 at 461; See generally: Philip Alston, 'Interim Report of Study on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty Bodies', UN Doc. A/CONF.157/PC/62/Add.11/Rev.1, 22 April 1993; Philip Alston, 'Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System', UN Doc. E/CN.4/1997/74, 7 March 1997.
119 *AMS v AIF* (1999) 199 CLR 160.

However, by refusing to draw on this material based on its imperfections, the courts and tribunals miss the opportunity either to develop domestic law in conformity with internationally recognised standards or to explore the basis for refusal, thereby contributing to the process of establishing the agreement of the parties regarding the interpretation of a treaty. A comparison between a Federal Court decision, *Magno,*[120] with that of the HRC in *Kivenmaa v Finland,*[121] highlights the value of this dialogue.

In *Magno,* the Federal Court addressed section 7 of the *Diplomatic Privileges and Immunities Act* 1967 (Cth) ('DPIA') which declared that certain provisions of the *Vienna Convention on Diplomatic Relations*, including articles 22 and 29, have the force of law in Australia. Article 22 obliged Australia 'to take all appropriate steps' to protect the premises of another State's diplomatic mission 'against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity'. Article 29 obliged Australia to take the same measures to protect any attack on the person, freedom or dignity of a diplomatic agent. Section 15 of the DPIA authorised the Governor-General to make regulations, not inconsistent with the Act, to give effect to the Act. The Diplomatic Privileges and Immunities (Amendment) Regulations 2004 (Cth) ('SR No. 7') authorised the Minister to certify that a prescribed object should be removed pursuant to articles 22 or 29 of the Convention, and certain officers to remove this object.

In 1991, Geraldo Magno placed a number of white crosses and other objects (including a portable hut) on public land close to the Indonesian Embassy in the Australian Capital Territory. They were placed in response to the killing of Timorese civilians by Indonesia military forces in Dili. The Minister signed a certificate for the removal of the crosses pursuant to the SR No. 7 on the basis that it could lead to 'the impairment of the dignity or disturbance of the peace, of the mission or the head, or other diplomatic agent, of the mission.'[122]

Magno and others sought injunctive relief and a declaration that SR No. 7 was invalid and of no effect. Ryan J ordered that the question of validity be decided separately and prior to trial of any other question. Olney J held that SR No. 7 was invalid. The appeal was brought from that decision. In the Federal Court, Gummow and French JJ (Einfeld J dissenting) held that they were valid and the question of whether the Minister had acted within the power conferred by the regulations remained to be decided. As such, the question posed to the Court was narrowly construed and no argument was mounted regarding the implied constitutional freedom of political expression.

Gummow J discussed the relationship between an instrument embodying an international obligation of Australia and a municipal statute dealing with that subject matter and various issues it presents to Australian courts[123] but otherwise did not refer

120 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529.

121 *Kivenmaa v Finland,* Human Rights Committee, Communication No. 412/1990, 31 March 1994, UN Doc. CCPR/C/50/D/412/1990.

122 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 530.

123 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 533–536 (Gummow J).

to international human rights law in his decision. French and Einfeld JJ, on the other hand, discussed international human rights law principles in some detail.

French J analysed the principle of international law that diplomatic premises shall be inviolable. He drew from a wide range of literature,[124] international jurisprudence[125] and commentary[126] on the principle and recognised that it was 'not particularly precise'.[127] The scope of 'peace' and 'dignity' are not defined and cover a wide range of circumstances. He cited a range of sources as authority for the proposition that these terms extend to picketing,[128] published criticism of diplomats[129] and demonstrations that do not involve intrusion or physical[130] attack. However, he also recognised that British practice would not extend this concept to protect diplomatic missions from expressions of public[131] opinion, as long as such demonstrations outside diplomatic missions do not imperil the safety or efficient work of the mission.[132] He cited other sources of authority such as a decision of the Bow Street Magistrates Court[133] and the Supreme Court[134] (ACT). French J ultimately expressed the view that if the activity falls within a well-established tradition of free expression within domestic culture or that accepted in international conventions, including public comment on matters of domestic and international politics, it cannot invoke either article 22 or 29.[135] His Honour referred to articles 19 and 20 of the ICCPR.[136] He opined that it would be difficult to see how the crosses would amount to an infringement but kept this issue separate from whether SR No. 7 was valid in the first place.

In contrast, Einfeld J was of the view that the two issues were related.[137] His Honour took the approach of ascertaining whether SR No. 7 was authorised by the DPIA as they related to the obligation to protect embassies from impairment of dignity. As such, he felt it was necessary to canvas the interpretation of 'impairment of dignity' or 'attack on dignity'.

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124 See for example, Francis Mann, *Further Studies in International Law* (1990); Michael Hardy, *Modern Diplomatic Law* (1968).

125 See for example, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3.

126 See for example, International Law Commission, *Year Book of the International Law Commission* (vol. 2) (1958) at 95.

127 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 550 (French J).

128 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 551 (French J).

129 Ernest Satow, *Satow's Guide to Diplomatic Practice (*4th ed) (1957) at [354]; *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 551 (French J).

130 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 552 (French J).

131 *First Report from the Foreign Affairs Committee,* House of Commons, 1984–95 HC 127 at xvii; *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 552 (French J).

132 Rosalyn Higgins, *UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report* (1986) 80 *American Journal of International Law* 135; *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 553 (French J).

133 *R v Rogues* cited in the *First Report from the Foreign Affairs Committee,* above n131; *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 553 (French J).

134 *Wright v McQualter* (1970) 17 FLR 305.

135 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 555 (French J).

136 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 556 (French J).

137 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 564 (Einfeld J).

Einfeld J analysed the concept in the *Vienna Convention on Diplomatic Relations*[138] and State practice applying the Convention. With respect to the latter, he found that freedom of speech was a significant consideration, particularly in relation to political demonstrations outside embassies. In addition to the United Kingdom Report cited by French J, he discussed how the United States struck down similar demonstrations as contrary to the First Amendment.[139] More importantly, his Honour examined the domestic application of international human rights norms, referring to the relevant freedom of expression provisions in many international instruments such as the ICCPR, the European Convention, the American Convention on Human Rights and the African Charter of Human and People's Rights; together with domestic Bills of Rights.[140]

Einfeld J stated that a balance must be struck between the purpose of SR No. 7 in the context of the enabling Act and freedom of expression. He recognised that the ECtHR had not addressed this balance. In addition, he noted that the then recent accession of Australia to the First Optional Protocol of the ICCPR allows individuals to submit a complaint to the HRC and observed that although its pronouncements are not binding, they are persuasive.[141]

Einfeld J reached the conclusion that such regulations must 'minimise as far as possible interference with, and take full account of, the fundamental right of every person in this country to freedom of speech.'[142] The notion of reasonable proportionality was discussed in relation to the proportionality of the regulation in achieving their enabling purpose and *Tanner* was cited in support of this.[143] He ultimately held that SR No. 7 was not authorised by an Act which required steps to be taken to prevent impairment of the dignity of embassies consistent with freedom of expression and dismissed the appeal.[144]

The HRC communication *Kivenmaa v Finland* highlights the same difficulties in construing the scope of the freedom of expression protected under article 19 of the ICCPR. In that case, Kivenmaa and about 25 members of her organisation gathered across the Presidential Palace, distributed leaflets and raised a banner criticising the human rights record of a visiting Head of State. She was arrested for violation of an Act requiring prior notification of a 'public meeting'. Kivenmaa argued that the relevant gathering did not fall within the definition of 'public meeting'. The HRC found that the requirement to notify may fall within the permitted limitations in article 21 of the ICCPR but in this case, the gathering did not constitute a demonstration for the purposes of the Act and in applying it to such a gathering, the Finnish State acted beyond the permissible. This approach is very similar to that of Einfeld J in *Magno,* who also determined that the application of SR No. 7 was relevant to its invalidity.

138 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 565 (Einfeld J).
139 *Boos v Barry* 485 US 312 [1988].
140 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 568 (Einfeld J).
141 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 573 (Einfeld J).
142 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 580 (Einfeld J).
143 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 577 (Einfeld J).
144 *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 580 (Einfeld J).

The majority decision in *Kivenmaa* has been criticised as focusing on the breadth of the Finnish Act rather than the provisions themselves and this is evident in the dissenting opinion of Mr Kurt Herndl who felt that it is 'contradictory' to create a link between the purpose (legality) of the legislation and its application in a concrete case by holding the former valid and the latter invalid.[145] This approach is in line with the approach of French J, and indeed, with the way the issue was addressed in the Federal Court.

These decisions demonstrate the potential for domestic judicial institutions to engage with treaty bodies in order to find solutions to the challenges facing both international and domestic law. Where international law experiences problems analogous to domestic law in construing the scope of certain principles of international human rights law the value of this dialogue could be further developed by analysing the approaches adopted by the treaty bodies in their decisions.

Lastly, courts and tribunals could indicate that although international human rights law may not assist in making a determination, the courts and tribunals are willing, where possible, to consider it with an open mind. In *Royal Women's Hospital,*[146] a complaint was made against the Medical Practitioners Board of Victoria ('the Board') regarding the treatment of Ms X and the termination of her pregnancy at the Royal Women's Hospital ('the Hospital'). The Board conducted a preliminary investigation into the professional conduct of the medical practitioners identified by the complainant. The Board was refused access to certain medical records and obtained a search warrant for the relevant documents. The Hospital applied to the Magistrates' Court seeking an order that the seized documents be returned.

The principal issues raised by the Hospital related to statutory privilege and public interest immunity. The Magistrate found against the Hospital and it appealed to the Supreme Court. The trial judge dismissed the appeal. The Court of Appeal granted leave to appeal on the ground that the learned judge erred in failing to find that the documents should not be produced because they are protected by public interest immunity. The Court of Appeal (Warren CJ, Maxwell P and Charles JA) held that public interest immunity was not applicable and was limited to decision-making at the highest governmental levels.

Counsel for both sides (Mr Holdenson QC for the appellant and Mr Ginnane SC for the respondent) made submissions dealing with the relevance of international human rights conventions and the associated jurisprudence. They argued that in engaging in the exercise of balancing other dimensions of public interest against the public interest in full disclosure, the trial judge failed to have any regard whatsoever to the content of the relevant international conventions to which Australia is a party. As the Court concluded that public interest immunity was not capable of applying to documents of this kind, it was not necessary to address the issue of whether the trial judge had adequately engaged in the balancing exercise.

145 *Kivenmaa v Finland,* Human Rights Committee, Communication No. 412/1990, 31 March 1994, UN Doc. CCPR/C/50/D/412/1990.

146 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85.

On the other hand, Maxwell P commented that although it was not necessary to consider what guidance could be derived from the international human rights conventions in carrying out the balancing exercise, the breadth and quality of the submissions was of the highest order.[147] His Honour stated, that there is a 'proper place for human rights-based arguments in Australian law cannot be doubted.'[148] His Honour also acknowledged counsels' point that over the past two decades Australian courts have been prepared to consider the use of international human rights conventions in exercising a sentencing discretion;[149] in considering whether special circumstances existed which justified the grant of bail;[150] in considering whether a restraint of trade was reasonable;[151] and in exercising a discretion to exclude confessional evidence.[152]

His Honour touched upon the way in which this body of jurisprudence may assist the courts in the interpretation of statutes and the common law. He also encouraged practitioners to develop human rights-based arguments where relevant to a question in the proceeding and while the development of an Australian jurisprudence drawing on international human rights law may be in its early stages, further progress will occur if judges and practitioners work together to develop a common expertise.[153]

2. Willing and Able

As discussed above, due to the nature of the Australian legal system, there are limited circumstances in which courts and tribunals may legitimately refer to treaty body material. However, these circumstances are few and the constraints of the system may not be as limiting as they appear. There are, in fact, many situations in which courts may legitimately refer to treaty body output.

However, it is apparent that the use of the material remains on the periphery of mainstream Australian judicial discourse. Only a few individual judges will exercise judicial discretion in support of international human rights law and where they do, treaty body output is used primarily to support conclusions reached on other bases. Furthermore, courts and tribunals rarely extend the discussion to develop the scope of such principles or to explore international human rights norms that may not have a common law equivalent.

This section demonstrates that where courts and tribunals are willing and able to take advantage of this opportunity, the quality of the decision-making process is improved by utilising treaty body output to inform the decision-makers of the relevant international standards. Greater engagement with the treaty bodies would assist in exploring the scope of certain international human rights norms by establishing to what extent the national implementation of such norms should diverge from a uniform international practice.

147 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [70] (Maxwell P).
148 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [72] (Maxwell P).
149 See for example, R *v Togias* (2001) 127 A Crim R 23.
150 *Schoenmakers v DPP* (1991) 30 FCR 70.
151 *Wickham v Canberra District Rugby League Football Club Ltd* (1998) ATPR 41.
152 *McKellar v Smith* [1982] 2 NSWLR 950.
153 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [71], [74]–[77] (Maxwell P).

A. *Arbitrariness and proportionality*

In *Al-Masri,*[154] the Full Court of the Federal Court of Australia (Black CJ, Sundberg and Weinberg JJ) interpreted sections 189 and 196 of the Migration Act consistently with Australia's international obligations under articles 9(1) and 9(4) of the ICCPR. The respondent was a Palestinian from the Gaza Strip who had been placed in immigration detention on arrival in Australia pursuant to sections 189 and 196. He unsuccessfully sought a protection visa in Australia and consequently requested removal from Australia. However, permission for entry to the Gaza Strip or a neighbouring country had been refused and he remained in detention. The respondent commenced proceedings against the Minister seeking release from detention. The trial judge granted this. The Full Court upheld this decision, concluding that the power to detain a person under the Migration Act is impliedly limited to such time as the removal of the person from Australia is 'reasonably practicable', that is, there is a real likelihood of removal in the reasonably foreseeable future.

The Court accepted the general principle of statutory interpretation that in the event of ambiguity, statutes should be interpreted consistently with Australia's international obligations. The Court found the required ambiguity as the Act did not appear to envisage Al-Masri's situation. There was no clear and unambiguous intention to detain a person for whom there is no realistic prospect of removal and thus no real likelihood of any end to detention. Section 196, read in light of the provisions in section 198 that an officer must 'remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing to be so removed' was interpreted by the Court as assuming that detention would not continue for an unlimited duration.

The Court was of the view that their conclusion regarding the construction of section 196 was 'fortified' by reference to the established rules of international law.[155] They maintained that while the views of a committee such as the HRC lack binding precedential authority in an Australian court, it was legitimate to have regard to them as the opinions of an expert body established by the treaty. Accordingly, the question was whether the mandatory detention provisions should be construed to authorise and require detention that is arbitrary, contrary to article 9(1) of the ICCPR.

The Court referred to the *travaux préparatoires* of article 9 and relied on the HRC views in *van Alphen v Netherlands*[156] to demonstrate that 'arbitrariness' is not to be equated with 'against the law' but is to be interpreted more broadly so as to include a right not to be detained in circumstances which, in the individual case, are disproportionate or unjust. It also referred to *A v Australia*[157] to emphasise that while it was not *per se* arbitrary to detain individuals requesting asylum, every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention could be assessed.

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154 *Minister for Immigration and Multicultural And Indigenous Affairs v Al Masri* (2003) 197 ALR 241.

155 *Minister for Immigration and Multicultural And Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 273.

156 *van Alphen v Netherlands,* Human Rights Committee, Communication No. 305/1988, 23 July 1990, UN Doc. CCPR/C/39/D/305/1988.

157 *A v Australia,* Human Rights Committee, Communication No. 560/1993, 3 April 1997, UN Doc. CCPR/C/59/D/560/1993.

The jurisprudence of the ECtHR concerning article 5(1) of the European Convention on Human Rights was also referred to in order to support the view that article 9(1) is concerned not only that the deprivation of liberty is according to law, but also that the law and its application are not arbitrary. Particular reference was made to *Chahal v United Kingdom*.[158]

The Court concluded that as the interpretation favoured by the Minister required detention irrespective of the foreseeable prospects of removal, the personal circumstances of the individual and irrespective of the likelihood of the individual absconding, it was a 'compelling conclusion that detention of that nature would be arbitrary detention within the meaning of article 9(1).'[159] Hence, while the detention of Al-Masri was according to law and the law itself may not be arbitrary, its application in this given case was.

The Australian courts' use of treaty body jurisprudence to inform judicial interpretation of 'arbitrariness' may be contrasted with the approach of the New Zealand courts. The New Zealand use of treaty body output is far more comprehensive. For example, it features in the judgments of majority and dissenting judges who explore the scope of the international human rights norms by determining their applicability to the particular case at hand. In addition, the courts attach greater significance to the material than their Australian counterparts.

For example, the Supreme Court of New Zealand in *Zaoui v Attorney-General*[160] drew extensively on the work of the HRC in determining whether administrative detention for lengthy periods is justified in a national security context. This case therefore directly addressed the element of proportionality underlying the test of 'arbitrariness', that is, whether detention was necessary and reasonable will turn on whether or not it can be justified; the deprivation of liberty must be an appropriate method of achieving a purpose, such as the prevention of flight, interference with evidence or the recurrence of crime.[161]

In that case, Mr Zaoui had arrived in New Zealand and claimed refugee status. He was issued a security risk certificate under section 114D of the *Immigration Act* 1987. Mr Zaoui was detained under section 114O of the *Immigration Act* which provided for detention in penal institutions or other premises. Mr Zaoui applied to the High Court for review of the decision to hold him in prison on the ground that the warrant was *ultra vires*, as it restricted the places in which detention could be ordered. He also applied for *habeas corpus*, bail, variation of the warrant and a declaration that his detention or conditions of detention were in breach of BORA.

The High Court found that the warrant was not *ultra vires*, the detention was not unlawful, there was no jurisdiction to grant bail and there was no breach of the BORA. The Court of Appeal found, by majority, that the warrant was valid and that bail was not

158 *Chahal v United Kingdom* (1996) 23 EHRR 413.

159 *Minister for Immigration and Multicultural And Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 276.

160 *Zaoui v Attorney-General* [2005] 1 NZLR 577.

161 *van Alphen v Netherlands,* Human Rights Committee, Communication No. 305/1988, 23 July 1990, UN Doc. CCPR/C/39/D/305/1988.

available. In the Supreme Court of New Zealand, it was held that the High Court had jurisdiction to grant bail whenever anyone was detained under any enactment pending trial, sentence, appeal, determination of legal status or removal or deportation from New Zealand.

The relevant decision for present purposes was that of the Court of Appeal which held that his detention could become unlawful and arbitrary if it became indefinite or permanent, or if the delays rendered the continued detention inappropriate or unjust. However, it concluded (Hammond J dissenting) that the substantial delays reflected the difficulty of the issues involved and the detention was not arbitrary.

McGrath J cited from *van Alphen* in holding that the 'touchstones' of arbitrariness are 'inappropriateness, injustice and lack of predictability.'[162] He acknowledged that the detention could be arbitrary if the delays in the process rendered his continued detention inappropriate or unjust. However, his Honour preferred the authority of *Chahal v United Kingdom*[163] where the majority of the European Court held that the delays in the process were not excessive bearing in mind the detailed and careful consideration required.[164] McGrath J went on to discuss the views of the dissenting judges in this case and raised the relevance of *Ahani v Canada*[165] where the HRC took a stricter approach to the issue. The HRC held that the nine and a half month duration of the hearings to determine the reasonableness of a security certificate was so long that the detention was arbitrary. Here, McGrath J extended the discussion to include the views of the two dissenting opinions, citing from Nisuke Ando who held that where an alien is concerned, compelling reasons of national security would not render a period of nine and a half months unreasonably prolonged.[166] His Honour chose the balance struck in *Chahal* and by Nisuke Ando in *Ahani*.

Hammond J, on the other hand, held that the detention was arbitrary. He acknowledged that the tests for 'unreasonable delay' are still evolving in New Zealand law but felt that the Court had the institutional competence to 'draw the line' for arbitrariness.[167] He considered that the security element should not be an additional consideration. He concluded that there was nothing to suggest that releasing Mr Zaoui on bail would frustrate the aim of conducting a complex investigation and drew the analogy that if the complexity of a criminal trial cannot justify the length of pre-trial detention, neither can the complex investigations justify the length of detention here.

O'Regan J was in general agreement with McGrath J. However, in relation to the issue of bail, he disagreed with the proposition that the Court was unable to grant Mr Zaoui bail under its inherent jurisdiction. His Honour left open the possibility that a grant of bail could be an available remedy if the review process was not brought to a reasonably

162 *van Alphen v Netherlands,* Human Rights Committee, Communication No. 305/1988, 23 July 1990, UN Doc. CCPR/C/39/D/305/1988 at [86].

163 *Chahal v United Kingdom* (1996) 23 EHRR 413.

164 *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [91] (McGrath J).

165 *Ahani v Canada*, Human Rights Committee, Communication No. 1051/2002, 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002.

166 *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [95] (McGrath J).

167 *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [196] (Hammond J).

swift conclusion. He also highlighted that the inherent jurisdiction to grant bail may equally justify the granting of *habeas corpus* bail as described in the judgment of Hammond J. However, he declined to express a view on the issue.

Similar use of treaty body output was made by the New Zealand courts to reach the conclusion that intention (mendacity, bad faith or difference) was not relevant to the question of liability for unlawful and arbitrary detention[168] and that unlawful detention is arbitrary.[169] The views cited in support of this conclusion included *van Alphen v Netherlands, A v Australia* and *Mukong v Cameroon*.[170]

While some courts and tribunals have accepted the test of 'arbitrariness' espoused by the HRC, the reasoning of McGrath J and Hammond J in *Zaoui* demonstrates that it may produce inconsistent results in practice. It is therefore evident that this standard requires further development and national courts and tribunals could play a key role in this, for example, by refining the test in order to make it more precise or by considering to what extent an adaptation to domestic circumstances would be more appropriate.

B. *Special Measures*

The work of the CEDAW Committee was used in *Jacomb*[171] to interpret the term 'special measures' in the SDA. The contested rules of the Administrative Clerical and Services Union established how the executive of a branch was to be comprised. The rules provided that the executive must be comprised of a specified number of members from various areas of employment represented by the union. The numbers so specified included a minimum number of members who had to be women. Here, the number of women specified exceeded the proportion of female to male members in the areas of employment. It was on the basis of this disproportionate number that the applicant claimed the rules discriminated against men contrary to section 19 of the SDA. The applicant also claimed that the rules could not be justified as a special measure under section 7D of the SDA.

Crennan J outlined the legislative context and statutory history of the SDA and in particular section 7D, a new section that hitherto had not yet been considered by the Court. Her Honour observed that the objects of the SDA include giving relevant 'effect to certain provisions of the CEDAW.'[172] The explanatory memorandum and Hansard[173] on section 7D described that it replaced section 33 of the SDA in order to make two significant changes. First, special measures are not to be treated as a form of discrimination and instead they would be considered as part of the threshold question of whether there is discrimination. Consequently, it was removed from the exemptions part of the Act. Second, section 33 focused on the attainment of equal opportunities and

168 *Manga v Attorney-General* [2000] 2 NZLR 65.

169 *R v Goodwin* (No 2) [1993] 2 NZLR 390; *Manga v Attorney-General* [2000] 2 NZLR 65.

170 *Mukong v Cameroon*, Human Rights Committee, Communication No. 458/1991, 21 July 1994, UN Doc CCPR/C/51/D/458/1991.

171 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 81 ALD 1.

172 *Sex Discrimination Act 1984* (Cth) s3(a).

173 Hansard, *Attorney-General: Second Reading Speech for the Sex Discrimination Amendment Bill 1995 (Cth)*, 28 June 1995 at 2456.

ignored the historical and structural barriers impeding women's utilisation of formal equal opportunities. The amendment therefore looks at the end results of a practice that purports to achieve equality and as the CEDAW refers to measures 'aimed at accelerating *de facto* equality', the emphasis should be on measures designed to achieve real or substantive equality.

Crennan J highlighted the fact that the sections of the CEDAW referred to in the Hansard and section 3(a) of the SDA are in a schedule to the SDA. It has been suggested that a treaty expressed as a schedule in an Act may give it special significance in Australian law.[174] While the nature of this significance has yet to be determined,[175] it is viewed by the courts as a strong indication of Parliament's intention to incorporate a treaty.[176] Her Honour found that in adopting and implementing article 4(1) of CEDAW, Parliament chose to use some of the same words in section 7D. Accordingly, in the absence of any expression of intention to the contrary, section 7D of the SDA should be construed in conformity with CEDAW.

Crennan J was of the view that the phrase 'special measures' and the provision that a 'special measure' is not discriminatory (section 7D(2)) cannot be understood without recognising that the SDA implements the express wording of CEDAW or without recognising the context, object and purpose of the CEDAW. Her Honour therefore referred to General Recommendation No. 25,[177] adopted by the CEDAW Committee, to assist her in the process of interpretation. The Committee observed that State parties often equate 'special measures' with 'affirmative action' and 'positive discrimination' and the real formulation of article 4(1) is that the measures are designed to serve a specific goal. One of these goals is to achieve genuine equality between men and women. Hence, Her Honour held that the phrase 'special measures' was wide enough to include affirmative action; a 'special measure' was one that may on the face of it be discriminatory, but to the extent that it has overcoming discrimination as one of its purposes was to be characterised as non-discriminatory.[178]

Crennan J also discussed the phrase 'special measures' in the context of section 8 of the RDA. Her Honour quoted Brennan J in *Gerhardy v Brown* (who referred to the Permanent Court of International Justice Advisory Opinion on *Minority Schools in Albania*)[179] to highlight that special measures were those intended to achieve effective and genuine equality: 'equality in fact' rather than merely 'equality in law'. Consequently, 'special measures' in relation to sex discrimination is not to be treated any differently.[180]

Furthermore, Crennan J canvassed the approach of the United Kingdom, European community, United States of America, Canada and New Zealand on special measures

174 *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 743.

175 *B and Anor v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604.

176 *Re Marion* (1990) 14 Fam LR 427 at 451; *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982 at 999; *Minister for Foreign Affairs and Trade and Others v Magno and Another* (1992) 112 ALR 529 at 573.

177 Committee on the Elimination of Discrimination Against Women, General Comment 25 on Temporary Special Measures, 30th Session, 30 January 2004.

178 Ibid.

179 *Gerhardy v Brown* (1985) 57 ALR 372 at 516.

180 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 81 ALD 1 at 16 (Crennan J).

and affirmative action to reach the conclusion that flexible 'special measures' were widely recognised in differing legal systems as a valid method of redressing inequalities arising from race or sex.

Ultimately, Crennan J found that the rules were 'special measures' within the meaning of sections 7D and 19 of the SDA had no operation in those circumstances. The interpretation of 'special measures' provided by the CEDAW Committee was of considerable persuasive authority in this case. The approach adopted by her Honour demonstrates how international human rights law, specifically treaty body output, may be drawn upon to inform the court's interpretation of 'special statutes' enacted to implement the provisions of certain international human rights treaties.

C. *Rights of Political Communication*

The State electoral boundaries within Western Australia have been drawn so as to favour rural populations. The constitutionality of these electoral boundaries was challenged in *McGinty*.[181] It was argued that there existed a constitutional implication of representative democracy derived from either the federal Constitution or the *State Constitution Act* 1889 (WA) ('Constitution Act'). The High Court of Australia unanimously rejected the federal constitutional implication while a majority[182] rejected the implication based on the Constitution Act.

Another attempt was made to correct the unequal distribution of electors in Western Australia for the purpose of state elections in *Marquet*.[183] The issue facing the High Court of Australia was whether it was lawful for the Clerk of the Parliaments of Western Australia (the respondent) to present for Royal assent, the Electoral Distribution Repeal Bill 2001 (WA) ('the repeal Bill') and the Electoral Amendment Bill 2001 (WA) ('the amendment Bill'). Section 13 of the Electoral Distribution Act 1947 (WA) ('the 1947 Act') provided that 'it shall not be lawful to present to the Governor for Her Majesty's assent any Bill to amend this Act, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.' Neither Bill was passed by an absolute majority. The Full Court of the Supreme Court held that it was not lawful for the respondent to present the Bills to the Governor for assent. The relevant question in the High Court was whether there was a distinction between 'amend' and 'repeal' for the purposes of determining whether one or both of the Bills fell within the scope of section 13.

The majority of the High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) held that it was not lawful for the Bills to be presented as they both 'amended' the 1947 Act. The issue was whether the 1947 Act distinguished between those two concepts. As defining electoral boundaries was legally essential to enable the election of the Parliament, 'amend' was not restricted to legislative changes that take the form of leaving the 1947 Act in operation albeit with altered legal effect. 'Amend' must be

181 *McGinty v Western Australia* (1996) 186 CLR 140.

182 Brennan CJ, Dawson, McHugh and Gummow JJ; Toohey and Gaudron JJ in dissent.

183 *Attorney-General (WA) v Marquet* (2003) 202 ALR 233.

understood to include changing the provisions which the 1947 Act makes, no matter what legislative steps are taken to achieve that end. Repealing the 1947 Act would necessarily lead to the enactment of other provisions on that subject of electoral boundaries. This would be against the purpose of the 1947 Act, being to ensure that no change could be made to electoral districts save by an absolute majority of both Houses.

The majority did not feel that the principal espoused in cases such as *Dietrich,* that is, where ambiguity exists, reference to international norms may be used as an interpretive aid by the courts, was relevant. On the contrary, they held that the construction question 'cannot be resolved by classifying the particular proposals that are made for new electoral boundaries as "desirable" or "undesirable" or as advancing human or other rights of electors in Western Australia.'[184] This would import a 'qualitative assessment' to the issue of construction and would constitute a 'fundamental legal error.'[185]

Furthermore, the majority highlighted that even if the substantive provisions of the Act are antithetical to the standards of representative democracy established by international instruments, if the purpose of section 13 was to make it more difficult to change a system of electoral distribution that is contrary to international norms, then an argument that the section itself should be construed by reference to such norms is self-contradictory. Here, it may have been worthwhile to elaborate what the standards of representative democracy are. International human rights law does not establish a right to representative democracy *per se.* The relevant provision, article 25 of the ICCPR, outlines various rights of political participation and ensures that citizens have the right to participate in the conduct of public affairs, directly or through freely chosen representatives.

Kirby J (dissenting) did not begin by identifying the purpose of the legislation. Rather, he began with an analysis of the language in which that purpose is expressed. Quoting from *Trust Co of Australia Ltd v Commissioner of State Revenue,*[186] Kirby emphasised that 'if the text is relevantly clear, and applicable to the case in hand, no court may substitute its own view of what the law should be.'[187] He therefore felt that section 13 of the 1947 Act was confined in its operation to the word used, attaching procedural consequences to a Bill to 'amend' the 1947 Act and not to 'repeal' it.

Kirby J adopted three interpretive principles in this case. First, in relation to legislative power, he argued that the ability of Parliament to impose on future Parliaments restrictive procedures by which they are required to comply must only be permitted where clear and unambiguous language is used. Secondly, the adoption of an expansive interpretation of the word 'amend' would impede the passing of a law designed to terminate statutory provisions that have the tendency to diminish the effective operation of the system of representative democracy. This argument was founded on an interpretation favouring civil rights, where, absent clear legislative provision, fundamental rights will not be abrogated or impaired by general statutory language.

184 *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 at 245 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
185 *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 at 245 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
186 *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 197 ALR 297 at 311.
187 *Attorney-General (WA) v Marquet* (2003) 202 ALR 233 at 268 (Kirby J).

Lastly, Kirby J addressed the issue of human rights separately from that of basic civil rights. He argued that the obligations imposed by the ICCPR and the First Optional Protocol warrant a strict approach to section 13. He quoted from the HRC's General Comment 25[188] to support the view that the objective of this provision is to ensure the universality and equality of the right of citizens to take part in the conduct of public affairs.[189] He emphasised that the General Comment accepts that the ICCPR does not oblige any State to adopt any particular electoral system but insists that the vote of one elector should be equal to the vote of another.[190]

Kirby J then cited a number of individual communication and concluding comments[191] where the HRC has criticised restrictions imposed by State parties on free and equal exercise of the right to vote. He also referred to the Concluding Comments on Chile[192] and Zimbabwe[193] to highlight the Committee's criticism of those that have created 'enclaves of power' for particular groups sometimes favoured by former governmental regimes, sometimes reinforced by constitutional powers accorded to one legislative chamber to block initiatives adopted by the popularly elected chamber, aimed at removing the entrenched privileges. Kirby J concluded that based on the interpretation of article 25, the apportionment of electoral districts in Western Australia, given effect by the 1947 Act, was inconsistent with the jurisprudence of the HRC on the fundamental rights of the citizen to equal political participation in a democratic State provided for in the ICCPR.

The utilisation of treaty body material in this decision shed light on the concept of 'equal' in relation to the rights of political communication. It is clear that 'equal' in article 25 of the ICCPR does not mean 'equal effect' but rather, refers to 'equal' as a numerical value whereby each vote is equal even though the impact may vary. Hence, although 'positive discrimination' measures are permissible in certain circumstances, for example, the HRC has expressly approved a constitutional amendment prescribing that women receive at least one third of positions on elected local bodies as well as the reservation of elected positions for 'members of scheduled castes and tribes,'[194] it does not appear to be permissible in relation to the value of the vote itself. Therefore, on the basis of this approach, the 'positive discrimination' measures in Western Australia are impermissible because they discriminate between the value of the rural and metropolitan votes.

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188 Human Rights Committee, General Comment 25 on The right to participate in public affairs, voting rights and the right of equal access to public service, 57th session, 12 July 1996.

189 Id at [1], [7].

190 Id at [21],

191 *Landinelli Silva v Uruguay,* Human Rights Committee, Communication No. 34/1978, 08 April 1981, UN Doc. CCPR/C/12/D/34/1978; *Pietraroia v Uruguay,* Human Rights Committee, Communication No. 44/1979, 27 March 1981, UN Doc. CCPR/C/12/D/44/1979; Human Rights Committee, Concluding Comments on Hong Kong, 9 November 1995, UN Doc. CCPR/C/79/Add 57; Human Rights Committee, Concluding Comments on Paraguay, 3 October 1995, UN Doc. CCPR/79/Add 48.

192 Human Rights Committee, Concluding Comments on Chile, 30 March 1999, UN Doc. CCPR/C/79/Add 104 at [8].

193 Human Rights Committee, Concluding Comments on Zimbabwe, 6 April 1998, UN Doc. CCPR/C/79/Add 89 at [23].

194 Human Rights Committee, Concluding Observations on India (1998), UN Doc. CCPR/C/79/Add. 81 at [11].

D. Freedom of expression

In *Coleman v Power,*[195] the appellant Coleman was convicted before the Magistrates Court in Townsville on counts of obstructing a police officer, assaulting a police officer in the execution of his duty, distributing printed matter containing insulting words in contravention of section 7A of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld) ('the Vagrants Act') and using insulting words to a person in a public place in contravention of section 7(1)(d) of the *Vagrants Act*. The appellant had been protesting in Townsville. He was distributing pamphlets that contained allegations of corruption against several police officers. When approached by the first respondent, he pushed and said loudly, 'this is Constable Brendan Power, a corrupt police officer.' On the basis of this, he was charged with using insulting language pursuant to section 7(1)(d).

His appeal to the District Court of Queensland was dismissed. However, the Court of Appeal unanimously held that section 7A of the Vagrants Act was invalid and a majority of the court held that section 7(1)(d) was valid. The conviction under the former was quashed and the latter, upheld. The appeal against the remaining convictions was unanimously dismissed. At issue in the High Court was whether section 7(1)(d) was invalid to the extent that it constituted a burden on the implied freedom of communication about government and political matter established under *Lange.*[196] The Court addressed the meaning of the term 'insulting words' in section 7(1)(d).

Members of the High Court held differing views on the meaning and scope of 'insulting.' Gummow, Kirby and Hayne JJ were of the opinion that section 7 was to be given a narrow interpretation. 'Insulting' words should only cover those directed to hurting an identified person and were words which, under the circumstances, were provocative in that they were either intended to or were reasonably likely to provoke unlawful physical retaliation from the person to whom it was directed or some other who heard the words.[197] McHugh J adopted a broad approach, holding that 'insulting words' could refer to those calculated to hurt the personal feelings of a person and which did affect their feelings.[198] Callinan J felt that it should be construed to include those words likely or intended to provoke a breach of the peace.[199] Similarly, Gleeson CJ felt that although it should not be limited to a lawful or unlawful response and must be more than merely derogatory, it is the standard of public good order that must be applied.[200] Heydon J opted for the 'ordinary meaning' found in the 1981 Macquarie Dictionary and the 1989 Oxford English Dictionary.[201]

Kirby J applied his standard formula to the process of statutory interpretation. In the event of ambiguity, a construction of legislation should be preferred which avoids incompatibility with the Constitution. Secondly, a construction that would arguably diminish fundamental human rights (including those of international law) should not be

195 *Coleman v Power* (2004) 209 ALR 182.

196 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

197 *Coleman v Power* (2004) 209 ALR 182 at 183, 226 (Gummow, Kirby and Hayne JJ).

198 *Coleman v Power* (2004) 209 ALR 182 at 64 (McHugh J).

199 *Coleman v Power* (2004) 209 ALR 182 at 286 (Callinan J).

200 *Coleman v Power* (2004) 209 ALR 182 at 14 (Gleeson CJ).

201 *Coleman v Power* (2004) 209 ALR 182 at 260–262 (Heydon J).

preferred if an alternative construction is equally available. Lastly, courts should not impute to the legislature a purpose of limiting fundamental rights at common law. Accordingly, Kirby J was convinced that 'insulting' should not be given its widest meaning in the context of section 7(1)(d) of the Act.

In addressing the issue of constitutional conformity, Kirby J applied the test established in *Lange,* that is, whether the law constitutes a burden on the freedom of communication about governmental or political matters and if so, whether it is reasonably appropriate and adapted to achieve its ends in a manner that is compatible with the maintenance of representative and responsible government.[202] The alleged corruption of state police was held to constitute communications about government or political matters for the purposes of the Constitution and unless confined, 'abusive or insulting words' would have the potential to burden this communication. Kirby J preferred to address 'appropriate and adapted' using the formula of proportionality and on this basis, held that the interpretation favoured by Gleeson CJ and Heydon J would be 'intolerably over-wide' and inconsistent with the system of representative government.[203] This interpretation would also be inconsistent with the general freedom of speech under the common law.[204]

Kirby J's restrictive reading of section 7(1)(d) is also supported by the freedom of expression protected by international law. International law provides for freedom of expression in article 19 of the ICCPR, subject to certain exceptions. He cites *Kivenmaa v Finland*[205] and *Aduayom et al Togo*[206] as authority for the proposition that expression characterised as political expression is protected by article 19 of the ICCPR.

The widest meaning of 'insulting' was held to extend beyond the permissible exceptions to the freedom of expression set out in the ICCPR. Arguably, the interpretation of 'insulting' supported by the joint reasons could fall within the article 19(3)(b) exception of protection of the public order. However, while Kirby J acknowledged that the scope of 'public order' is unclear at international law, it does at least include 'prescription for peace and good order', public 'safety' and 'prevention of disorder and crime.'[207] Recognised limitations on this right include prohibitions on speech that may incite crime or violence.[208] Citing the HRC in *Faurisson v France,*[209] Kirby J argued that article 19 exceptions are to be construed narrowly. Other authorities used to support these conclusions include *Omar Sharif Baban v Australia*[210] and *Gauthier v*

202 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

203 *Coleman v Power* (2004) 209 ALR 182 at 240 (Kirby J).

204 *Coleman v Power* (2004) 209 ALR 182 at 246 (Kirby J).

205 *Kivenmaa v Finland,* Human Rights Committee, Communication No. 412/1990, 31 March 1994, UN Doc. CCPR/C/50/D/412/1990 at [9.3].

206 *Aduayom et al. v. Togo*, Human Rights Committee, Communication No. 422/1990, 423/1990 and 424/1990, 12 July 1996, UN Doc. CCPR/C/57/D/422/1990 at [7.4].

207 *Coleman v Power* (2004) 209 ALR 182 at 242 (Kirby J).

208 *Coleman v Power* (2004) 209 ALR 182 at 242 (Kirby J).

209 *Faurisson v France,* Human Rights Committee, Communication No. 550/1993, 8 November 1996, UN Doc. CCPR/C/58/D/550/1993.

210 *Baban et. al v Australia,* Human Rights Committee, Communication No. 1014/2001, 6 August 2003, UN Doc. CCPR/C/78/D/1014/2001.

Canada.[211] Reliance was also placed on the texts of Nowak[212] Joseph, Schultz and Castan[213] and Jayawickrama.[214]

E. The Right to a Fair Trial

Treaty body output has been used to assist the courts in establishing the scope of treaty principles that also have an equivalent in the common law, specifically, the right to fair trial enshrined in article 14 of the ICCPR. The dialogue between courts and the HRC on the right to fair trial draws together both domestic common law principles on 'fair trial' and international standards. However, as the use of treaty body output in this context is based almost solely on its ability to support the common law principles on fair trial,[215] it is questionable how the views of the HRC would be applied in a case where the interpretations of the principle diverge. Furthermore, it also raises the broader question of how the work of the treaty bodies and the international human rights norms they interpret could be used where there is no equivalent right recognised in the common law.

The High Court in *Dietrich*[216] highlights this. In that case, the applicant claimed his trial in the County Court of Victoria on a charge of importing not less than a trafficable quantity of heroin had miscarried because he was unrepresented by counsel. He could not fund legal representation for himself and the Legal Aid Commission would only provide assistance for a guilty plea. His application for the appointment of counsel under section 69(3) of the *Judiciary Act* 1903 (Cth) was rejected because it had been submitted out of time. An application for legal assistance to the Commonwealth Minister for Justice and the Attorney-General of the Commonwealth was also unsuccessful. A majority of the court allowed the appeal on the basis that although the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense, a trial of a person accused of a serious crime will be unfair if, by reason of a lack of means and the unavailability of other assistance, they are denied legal representation.[217] In dissent, Brennan and Dawson JJ held that no entitlement to be provided counsel at public expense existed under the common law and an unrepresented accused cannot of itself amount to a miscarriage of justice.[218]

The applicant argued, *inter alia*, that the right of an indigent accused to be provided with counsel at public expense was guaranteed by article 14(3) of the ICCPR. However, while the High Court expressed some support for the view that international human

211 *Gauthier v Canada,* Human Rights Committee, Communication No. 633/1995, 7 April 1999, UN Doc. CCPR/C/65/D/633/1995.

212 Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993).

213 Sarah Joseph, Jenny Schultz & Melissa Castan (eds), above n19.

214 Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002).

215 See for example, miscarriage of justice: *Dietrich v R* (1992) 109 ALR 385; *Nudd v Q* [2006] HCA 9; apprehended bias: *Antoun v The Queen* (2006) 224 ALR 51, *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644 and *Johnson v Johnson* (2000) 174 ALR 655; equality before the law: *Muir v R* (2004) 206 ALR 189; nolle prosequi: *Director of Public Prosecutions v B* (1998) 155 AR 539.

216 *Dietrich v R* (1992) 109 ALR 385.

217 *Dietrich v R* (1992) 109 ALR 385 at 386, 399–400, 417, 435–436, 445.

218 *Dietrich v R* (1992) 109 ALR 385 at 400–408, 418–427 (Brennan and Dawson JJ).

rights law may be used to aid the courts in the interpretation and development of the common law,[219] it did not assist the applicant because the Court was not being asked to resolve ambiguity but rather to declare that a right which has not been recognised by domestic law, should now exist.[220]

Furthermore, Mason CJ and McHugh J observed that the jurisprudence of the HRC as well as the ECtHR did not indicate that there was an absolute right of an indigent accused to be provided with counsel at public expense, but that a right to be provided with counsel at public expense will arise in cases where representation of the accused is essential to a fair trial, such as in capital cases or when the interests of justice so require.[221] The authority referred to included *Pinto v Trinidad and Tobago,*[222] *Robinson v Jamaica,*[223] *Monnell and Morris v United Kingdom*[224] and *Granger v United Kingdom.*[225] They considered this approach similar to that taken by the Australian common law.[226]

F. Torture

The majority of cases heard by the CAT have involved challenges under article 3 of the Convention Against Torture and and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention') to threatened deportation of individuals to states where they allege they run a serious risk of being tortured. This material has been cited by the court in *Nagaratnam*[227] as a source of authority for the interpretation of provisions of the Torture Convention. In that case, the Full Federal Court of Australia upheld an appeal against the refusal of a claim for refugee status by a Tamil from Sri Lanka. In relation to the applicant's claim that he had been subjected to torture, Lee and Katz JJ held (*obiter*) that the Refugee Review Tribunal's ('RRT') finding that the appellant had been tortured meant that if he were to be denied refugee status and returned to Sri Lanka, Australia could be in breach of its international obligations under article 3(1) of the Torture Convention. Their Honours held that based on the jurisprudence of the CAT,[228] the applicant had high prospects of succeeding in a claim against Australia for breach of article 3(1).[229]

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219 *Dietrich v R* (1992) 109 ALR 385 at 404, 416, 426, 434.

220 *Dietrich v R* (1992) 109 ALR 385 at 392.

221 *Dietrich v R* (1992) 109 ALR 385 at 393–95.

222 *Pinto v Trinidad and Tobago,* Human Rights Committee, Communication No. 232/1987, 20 July 1990, UN Doc. CCPR/C/39/D/232/1987.

223 *Robinson v Jamaica,* Human Rights Committee, Communication No. 223/1987, 30 March 1989, UN Doc. CCPR/C/35/D/223/1987.

224 *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205.

225 *Granger v United Kingdom* (1990) 12 EHRR 469.

226 *Dietrich v R* (1992) 109 ALR 385 at 393.

227 *Nagaratnam v Minister for Immigration and Multicultural Affairs* (1999) 164 ALR 119.

228 *Mutombo v Switzerland,* Committee Against Torture, Communication No. 13/1993, 27 April 1994, UN Doc. A/49/44 at 45; *Khan v Canada,* Committee Against Torture, Communication No. 15/1994, 4 July 1994, UN Doc. A/50/44 at 46; *Alan v Switzerland,* Committee Against Torture, Communication No. 21/1995, 8 May 1996, UN Doc. CAT/C/16/D/21/1995; *Kisoki v Sweden,* Committee Against Torture, Communication No. 41/1996, 8 May 1996, UN Doc. CAT/C/16/D/41/1996; *Tala v Sweden,* Committee Against Torture, Communication No. 43/1996, 15 November 1996, UN Doc. CAT/C/17/D/43/1996.

229 *Nagaratnam v Minister for Immigration and Multicultural Affairs* (1999) 164 ALR 119 at 129–130.

The CAT material has also been relied on as factual material to support a claim that a person may face torture if returned to a State where torture has been found. *Hanna*[230] illustrates this. The applicant in that case was an Egyptian national who, upon entering Australia, applied for a protection visa. His application was refused and the applicant sought a review of the decision. He was a Coptic Christian and claimed asylum on the basis that he feared harm if he returned to Egypt because he might attract the attention of Islamic groups as he had undertaken activities for the Egyptian intelligence service; he might suffer harm at the hands of the Egyptian government because of those activities; and he might be detained by Egyptian authorities on his return because he had applied for refugee status in Australia and was a Christian. Moore J in the Federal Court referred to a 1996 CAT Report in the facts.[231] This was in fact a reference to the Committee's consideration of the report submitted by Egypt under article 19 of the Torture Convention.[232] The reference to the CAT in the factual material is also evident in a number of decisions from the RRT, taken in the period 2000-2005.[233]

3. Able But Not Willing

There are many cases referring to a treaty that are not accompanied by references to the work of the relevant treaty body. Below are some examples of where the courts or tribunals did not refer to the treaty body output although to do so would have provided the court with a better understanding of the relevant international standards.

A. Nationality, National Origin, Special Measures and Arbitrariness

Macabenta[234] serves as a good example of where both counsel for respondent and the court could have been better informed by references to treaty body output on the meaning of 'nationality', 'national origin', 'special measure' and 'arbitrary'.

The respondent (Commonwealth) allowed persons from Sri Lanka, the former Yugoslavia, Iraq, Kuwait, Lebanon and the People's Republic of China ('specified countries') who arrived before specified dates to apply for permanent resident status. Section 10 of the RDA provides that a person of a particular race, colour or national or ethnic origin shall enjoy a legal right to the same extent as that enjoyed by persons of another race, colour or national or ethnic origin.

The applicant argued that the reference to 'national origin' in section 10 should be given a liberal interpretation so that it covers a person's race or descent. The choice of the specified countries is by reference to 'nationality' and that is equivalent to 'national origin'. It is therefore not concerned with distinctions between Australian and non-Australian citizens but between different non-Australian nationals. The applicant sought

230 *Hanna v Minister for Immigration and Multicultural Affairs* [2000] FCA 1413.

231 *Hanna v Minister for Immigration and Multicultural Affairs* [2000] FCA 1413 at [8].

232 Supplementary reports of States parties due in 1996: Egypt, 28 January 1999, CAT/C/34/Add.11.

233 See for example, N05/52021 [2005] RRTA 325 (29 November 2005); N04/49611 (17 November 2004); N04/48431 (13 July 2004); and V01/12864 (10 October 2003).

234 *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 154 ALR 591.

a declaration that section 10 entitled her to enjoy the same right to apply for permanent resident status as persons from the specified countries who arrived before the specified dates. The applicant also argued that the concept of indirect discrimination was imported into section 10 of the 1975 Act.

Tamberlin J cited from a range of common law authorities including *Ealing, Australian Medical Council* and *De Silva*[235] to establish that 'nationality' and 'national origin' are two different concepts although they may overlap. He cited Merkel J in *DeSilva* who held that 'national origin' in section 9(1) of the RDA does not mean nationality that has no connection with national origin. Hence, he concluded that the reference to 'national origin' in section 10 should be given the same meaning. He also stated that as article 1(3) of ICERD refers to 'nationality' if the legislation had intended the wider term 'nationality' to control the application of the law, they would have used the term. The term 'national origin' was also held to be more readily determined with greater certainty.

Rather than relying merely on the use of the term in article 1(3) of ICERD, it may have been beneficial for Tamberlin J to refer to similar authority in the work of the HRC addressing 'national origin' as distinct from 'nationality'. There are a series of communications where the HRC has found nationality to constitute 'other status' for the purpose of article 26 as opposed to incorporating the concept into 'national origin'.[236]. The CERD Committee, on the other hand, has not directly addressed this issue. However, in *Ahmed Habassi v Denmark*[237] the Committee implied that nationality is not an appropriate factor in determining a person's will or capacity to reimburse a loan but, notwithstanding that the State party raised the issue, the Committee refrained from making any pronouncements as to whether 'national origin' in the context of the ICERD could encompass 'nationality'. In that case, the CERD Committee ultimately held that it was necessary for a proper investigation to be conducted into the real reasons behind the bank's loan policy vis-à-vis foreign residents in order to ascertain whether or not criteria involving racial discrimination were being applied.

In the course of argument in *Macabenta*, the applicant referred to a HRC Communication, *Adam v Czech Republic*.[238] The proceeding concerned an application by an Australian citizen for restitution of property confiscated by the Czechoslovakian government in 1949. The claim was rejected on the basis that the applicants did not fulfil the requirements of Czech citizenship or permanent residency. The HRC concluded that the refusal of restitution to non-citizens of the Czech Republic violated their rights. Tamberlin J distinguished this from the present case on the basis that the criteria for

235 *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 154 ALR 591 at 596–598 (Tamberlin J).

236 *Gueye v France,* Human Rights Committee, Communication No. 196/1985, 6 April 1989, UN Doc. CCPR/C/35/D/196/1985; *Adam v Czech Republic,* Human Rights Committee, Communication No. 586/1994, 25 July 1996, UN Doc. CCPR/C/57/D/586/1994; *Karakurt v Austria,* Human Rights Committee, Communication No. 965/2000, 29 April 2002, UN Doc. CCPR/C/74/D/965/2000.

237 *Habassi v Denmark*, Committee on the Elimination of Racial Discrimination, Communication No. 10/1997, 17 March 1999, UN Doc. CERD/C/54/D/10/1997.

238 *Adam v The Czech Republic*, Human Rights Committee, Communication No. 586/1994, 23 July 1996, UN Doc. CCPR/C/57/D/586/1994.

selection adopted by the Czech Republic was *arbitrary,* whereas the Australian government policy, by establishing a selection of countries and cut-off dates, could not be considered arbitrary.

In *Adam v Czech Republic*, the claimants had inherited the property of their father, who was a Czech citizen. The Committee (majority) observed that the relevant legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. However, as the original entitlement to their father's property by virtue of inheritance was not predicated on citizenship, the Committee found that the condition of citizenship in the legislation was unreasonable. Nisuke Ando in a separate opinion noted that the ICCPR does not prohibit legitimate distinctions based on objective and reasonable criteria or define or protect economic rights as such. Consequently, he advised that the Committee should exercise 'utmost caution' in dealing with questions of discrimination in the economic field as restrictions or prohibitions of certain economic rights, including the right of inheritance or successions, which are based on nationality or citizenship, may well be justified as legitimate distinctions.[239]

It is not clear whether distinctions made on the basis of citizenship or nationality would be 'arbitrary' in the case of *Adam v Czech Republic* or in *Macabenta.* As discussed above, the jurisprudence indicates that it could be interpreted either way. Regardless of the difficulties associated with the standard of 'arbitrariness', if Tamberlin J were to distinguish *Adam v Czech Republic* on the basis that the Australian government policy was not arbitrary, his decision could well have been informed by the relevant international standard for what is considered 'arbitrary'.

The respondent contended that section 10 could have no operation, as the visas were a 'special measure' to which article 1(4) of the CERD applies. The respondent's argument was based on a flawed understanding of the concept. Tamberlin J correctly recognised that the visas were designed to meet a specific problem and were not designed for the purpose of securing the advancement of the beneficiaries in order that they may enjoy and exercise human rights and fundamental freedoms.

B. Freedom of Expression and the Public Order Exception

In *Bennett,*[240] the applicant applied for judicial review of a decision of the Human Rights and Equal Opportunity Commission ('HREOC') declining to continue an inquiry into complaints against the Chief Executive Officer ('CEO') of the Australian Customs Service. The applicant complained of infringement of his freedom of expression, and of discrimination on the basis of his trade union activity and political opinion. Before the Federal Court, the central issue was the validity of regulation 7(13) of the Public Service Regulations 1999 (Cth) which provided that an employee of the Australian Public Service must not disclose official knowledge of anything or any information about public

239 *Adam v The Czech Republic*, Human Rights Committee, Communication No. 586/1994, 23 July 1996, UN Doc. CCPR/C/57/D/586/1994.

240 *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433.

business. An ancillary issue was whether, irrespective of the validity of regulation 7(13), the direction to the applicant was lawful having regard to the duty of loyalty to the employer and the exception in article 19(3) of the ICCPR to freedom of expression as is provided by law and necessary for the protection of public order.

Finn J held that regulation 7(13) was invalid, allowed the application and set aside the HREOC decision. It manifestly failed the test in *Lange*.[241] As a burden on the constitutional freedom of communication, it was not reasonably and appropriately adapted to furthering the general end relied upon (the efficient operation of government). Even if regulation 7(13) was valid, it could not be used as the basis for applying the exception in article 19(3) of the ICCPR, since it was not necessary for the protection of public order. Finn J was of the view that the regulation was not concerned with protecting confidential information and whatever the limits of the term 'public order', it would not extend to furthering the efficient conduct of government (which is the purpose of the regulation on which the Commonwealth relies). That purpose hardly qualified as a 'fundamental [principle], consistent with respect for human rights, on which a democratic society is based.'[242]

As an exception in an article of the ICCPR was directly raised, the court's understanding of the term 'public order' and what it entails may have benefited from reference to the treaty body material on the article. For example, in *Coleman v Power*, Kirby J cited some recognised exceptions such as 'prescription for peace and good order' and limitations such as prohibitions on speech that may incite crime or violence.[243]

Moreover, it may have been worthwhile to discuss *Faurisson v France*[244] because it would further clarify the balance between freedom of expression and the stated exceptions in article 19. In that case, a separate opinion issued by Ms Evatt, Ms Quiroga Medina and Mr Klein confirmed that the word 'necessary' imports 'an element of proportionality' into article 19(3); the law must be appropriate and adapted to achieving one of the ends enumerated in article 19.[245] This test is not dissimilar from that of *Lange*[246] and would have served as a good method of linking an interpretation in domestic law with that of international human rights jurisprudence. Critical analysis of the operation of the test in different contexts could also highlight some of its deficiencies, encouraging the HRC and national courts and tribunals to discuss methods of improving the utility of this test.

241 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

242 *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433 at [113].

243 *Coleman v Power* (2004) 209 ALR 182 at 242.

244 *Faurisson v France,* Human Rights Committee, Communication No. 550/1993, 8 November 1996, UN Doc. CCPR/C/58/D/550/1993.

245 *Faurisson v France,* Human Rights Committee, Communication No. 550/1993, 8 November 1996, UN Doc. CCPR/C/58/D/550/1993 at 8.

246 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

Conclusion

Australian courts and tribunals are increasingly resorting to treaty body output as an aid to the interpretation of statutes and development of the common law as well as in the exercise and judicial scrutiny of administrative discretion. This practice of referring to the relevant treaty body materials provides the courts and tribunals with a better understanding of the relevant international standards. Contrary to general perceptions, the common law provides a number of opportunities for courts and tribunals to resort to treaty body output.

However, much discretion lies with individual judges to determine the significance to be attached to the international instruments and jurisprudence and few are willing to exercise this discretion in support of international human rights law. Treaty body output is primarily used to support conclusions reached on other grounds and to confirm existing common law rights and principles. Courts and tribunals rarely draw on the material to develop the scope of such principles or to explore international human rights norms that may not have a common law equivalent. Accordingly, the use of treaty body material is limited; the courts and tribunals have yet to engage in a 'fruitful' dialogue with the UN treaty bodies.

Australian courts and tribunals generally fail to fully appreciate that there is value in using the treaty body output as influential authority. Australian courts and tribunals should acknowledge that treaty body output is not necessarily either useful or useless, but rather, the material may be useful to varying degrees in different circumstances.

In addition, although a constitutionally entrenched or legislative bill of rights strengthens the legal basis on which courts and tribunals may refer to international human rights jurisprudence, it is unclear whether this would encourage greater use of treaty body material in Australia if counsel and the individuals presiding over the courts and tribunals remain unaware of the availability and utility of such resources.

Therefore, the extent to which the courts and tribunals are willing to draw upon the treaty body material in the decision-making process is primarily influenced by its perceived lack of utility, the legal basis on which Australian courts and tribunals may legitimately refer to treaty body output, and general unfamiliarity with treaty body output. There are, however, positive indications that this dialogue between Australian courts and tribunals and the UN treaty bodies will be enhanced by the continuing development of treaty body output and the ever-increasing appreciation of the material among advocates and the judiciary.