

## **The High Court on Constitutional Law: The 2004 Term**

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### Speaking notes

I have the status of an interloper as an international lawyer among constitutional lawyers. As a young academic, I was required to choose between teaching constitutional law and international law: both were considered so large and autonomous an area that they could not be managed by a single person. With some regret, I chose the monastic life of an international lawyer over the bright lights of constitutional law. So, even though it's 17 years later, the invitation to speak today was particularly sweet.

The invitation also reflects the fact that it's no longer possible to think of international law and national legal systems as distinct and separate. In fact, I want to argue that the approach favoured by the majority of the High Court -- the traditional common law dualist approach to international law, the idea that the systems have quite different spheres -- is an outmoded one that will reduce the ability of the Australian legal system to respond to the challenges of this century. So, it will be no surprise that the lense I'll use to look back over the work of the High Court last year is that of international law.

Before I turn to 2004, it's worth reflecting on the way that the High Court reacted to international law in its first 100 years. There has been a fair amount of academic commentary on this and I simply want to sketch the major trends to set the scene for my international lawyer's scrutiny of the past year in the life of the High Court. The imagery of romance is useful I think to describe the High Court's attitude to international law over the last century: the Court has both embraced and spurned the 'law of nations' at various times. Overall, its attitude has been one of ambivalence; even the moments of embrace have been lacking in passion.

Of course a major issue for the High Court in constitutional cases is that the Constitution does not contemplate a large role for international law. At Federation, international law did not appear an important source of law. Moreover, it was accepted that Australia did not have the power to enter into treaties itself, and that Great Britain would act on its behalf in this respect. The Constitution contains only two references to international law: the external affairs power in section 51 (xxix) and the ineffective section 75 (I) grant of jurisdiction to the High Court in matters '[a]rising under any treaty.'<sup>1</sup> So, it is likely that

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<sup>1</sup> The 1891 draft of the Constitution however included a startlingly broad provision (adapted from the United States Constitution) that would have made all treaties entered into by the Commonwealth 'binding on the courts, judges and people of every state, and of every part of the Commonwealth' and capable of overriding inconsistent state law. This provision did not survive into the final version of the Constitution

an originalist would be very skeptical of any invocation of international law outside the constitutional text.

What is the relationship between the Australian legal system and international law? The High Court has given a series of rather confused answers to this question. With respect to international agreements to which Australia is a party, it has generally insisted that, for a treaty or convention to have any direct domestic effect, the agreement must have been adopted into Australian law through legislation (the ‘transformation’ approach).

In the case of customary international legal principles, the Court has wavered on whether there needs to be specific domestic legislative implementation or whether Australian law already incorporates such principles. In *Chow Hung Ching* (1949) for example Chief Justice Dixon spoke of customary international law as a source rather than as a part of Australian law, but Justice Starke implied a closer relationship by suggesting that a universally recognised rule of custom should be applied by Australian courts, unless it was in conflict with statute or the common law (the ‘incorporation’ approach).<sup>2</sup>

Overall, the High Court has adopted a ‘dualist’ approach, which regards national and international legal systems as quite distinct. To an international lawyer, the high water mark of this approach is *Horta v. Commonwealth* (1994), a challenge to Commonwealth legislation implementing a bilateral maritime boundary treaty with Indonesia on the ground that the treaty was invalid at international law and thus not properly a matter under the external affairs power. It was argued that the treaty, which created a regime for exploitation of the sea bed between Australia and East Timor, contravened the basic international law principle that territory could not be acquired through the use of force. Indonesia’s 1975 invasion of East Timor thus could not give it valid title over the East Timorese sea bed. The High Court unanimously and briefly dismissed the challenge. It held that the external affairs power did not require that the treaty being implemented be consistent with international law.

The High Court has encountered international law in an increasing range of contexts. Much of this has been in its jurisprudence on the external affairs power, which I will not deal with here. But international law is also invoked in the context of the common law and of techniques of statutory and constitutional interpretation.

To look first at the common law: The closest embrace of international law with respect to the development of the common law is in *Mabo* (1992). Justice Brennan described the relationship in this way, drawing on both the transformation and incorporation approaches: ‘The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the

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because of its implication that Australia had the power to enter into international agreements independently of Great Britain.

<sup>2</sup> The High Court has wrestled with the problems of determining the status of an asserted norm of custom in both *Chow Hung Ching* and *Polyukhovich*, indicating that an uncontroversial, widely accepted norm of custom will be more readily regarded as part of Australian law by the High Court.

common law, especially when international law declares the existence of universal human rights.’

But this statement was tempered by the qualification: that international law could not be used to interfere with the ‘skeleton of principle which gives the body of our law its shape and internal consistency’. In other words, Justice Brennan’s celebrated words appeared in a limited context: this was clear from the much less ardent approach to international law the same year in *Dietrich*, in which the High Court discussed the possibility of a common law right to a fair trial based on international standards. Mason CJ and McHugh J (who identified such a common law right) rejected the idea that international guarantees of legal representation were part of the Australian common law in the absence of specific legislation. Justice Brennan by contrast presented international law as a ‘legitimate influence’ on the common law as a method of tapping into the contemporary values of the community, although in the end he found no common law right to a fair trial existed.

In 1995, in *Teoh*, international treaties were given a significant role in administrative law. This decision prompted an intense political and legal controversy that still echoes today,<sup>3</sup> but, at least to an international lawyer, it reads as a very modest and cautious precedent. For example, Mason CJ and Deane J stated that the influence of international legal principles on the common law would depend on factors such as the nature and purpose of the international legal norm, its degree of international acceptance and its relationship with existing principles of domestic law. And of course the current High Court sent a strong signal in 2003 *Lam* that it was keen to overrule *Teoh*.

Another role for international law contemplated by members of the High Court in the interpretation of legislation and the Constitution. In *Polites* (1945) a majority of the Court accepted that statutes should be interpreted in accordance with international law, unless Parliament clearly shows its intention otherwise. This principle of construction has a long history in British courts and is based on the presumption that Parliament will legislate consistently with international law. A somewhat weaker version of this principle was endorsed in *Chu Kheng Lim v. Minister for Immigration* (1992) where Brennan, Deane and Dawson JJ referred to the use of treaty provisions accepted by Australia in the case of statutory ambiguity. In *Teoh*, Mason CJ and Deane J reiterated the principle and gave it greater impact by arguing that the notion of ambiguity should be broadly understood. They stated that ‘If the language of the legislation is susceptible of a construction which is consistent with [international law], then that construction should prevail.’

Justice Kirby has extended this principle of construction to constitutional interpretation, although he is invariably alone on this issue. For example, Kirby J’s dissent in *Kartinyeri* (1998) accepted the plaintiff’s argument that the races power should be read in light of international standards of non-discrimination. He spoke of an interpretative principle

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<sup>3</sup> The then Minister for Foreign Affairs (Gareth Evans) and the Attorney-General (Michael Lavarch) sought to override the impact of the decision in an unprecedented formal statement, a move emulated in 1997 by their Liberal Party successors, Alexander Downer and Daryl Williams. Both the Keating and Howard governments unsuccessfully attempted to legislate to overcome the effect of the decision.

that, where the Constitution is ambiguous, the High Court 'should adopt the meaning which conforms to the principle of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.' The Kirby approach goes further than the accepted principle of construction in the case of ambiguity. In *Newcrest Mining* (1997) Kirby J said 'To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights.' He also introduced the idea, repeated in *Kartinyeri*, that the Constitution spoke not just to the people of Australia but also to the international community.<sup>4</sup>

To an international lawyer, these seem quite modest claims: moreover Justice Kirby has consistently reiterated the dualist principle of the Australian legal system and the 'interstitial' process by which international treaty norms may affect the interpretation of ambiguities in the Constitution and statutes and the development of the common law.<sup>5 6</sup> He is also always careful to use international law principles as subsidiary arguments, mere adjuncts to a decision based on Australian legal principles.<sup>7</sup>

Despite the caution of the Kirby approach with respect to the interpretation of the Constitution, other members of the High Court have firmly repudiated it. For example, in *AMS v AIF* Chief Justice Gleeson and Justices McHugh and Gummow wrote 'As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.'<sup>8</sup>

So, as we come into the 21<sup>st</sup> century, we can see that the High Court is in a very wary phase of its relationship with international law; international law is presented as a potentially chaotic source of norms whose impact on the Australian legal system needs to be closely confined. This has also generally been the approach of the academic constitutional law community; for example Amelia Simpson and George Williams have cautioned against too eager an embrace of international law in constitutional interpretation because of international law's vagueness.<sup>9</sup> While they see the use of international law as inevitable and are sympathetic to this project, Simpson and Williams describe many international legal standards as indeterminate and lacking concreteness and recommend that they be used only in relatively limited circumstances. For his part, Greg Craven has sternly criticized the effect of what he calls 'internationalism' as a profound influence on an ethically suspect High Court. Reservations about the use of

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<sup>4</sup> This is somewhat more radical than other members of the court in *Kartinyeri*. Although Justice Gaudron was prepared to acknowledge the inherent claim to human rights of all people and the fundamental nature of the international law prohibition on racial discrimination, she argued that the norm could not restrain Commonwealth legislative power. For their part, Justices Gummow and Hayne accepted that Australian laws should be interpreted as far as possible in conformity with international law, but held that 'unmistakeable and unambiguous' language will override international law.

<sup>5</sup> Eg *Re East; ex parte Nguyen* (1998) 196 CLR 354, 380-381.

<sup>6</sup> Eg *Ibid*; *Hindmarsh Island* at 417-418.

<sup>7</sup> For Justice Kirby's own account of some of these cases see 'Domestic Implementation of International Human Rights Norms' 5 *Australian Journal of Human Rights* 109 (1999).

<sup>8</sup> *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

<sup>9</sup> Amelia Simpson & George Williams, 'International law and constitutional interpretation' 11 *Public Law Review* (2000) 205.

international law are perhaps reinforced by politicians and media commentators who depict international law as the frolic of jet setting lotus eating judges: eg when the Chief Justice made a reference to international law at an International Bar Association conference in 2002, he was upbraided in *The Australian* for “being like some rich kid discovering the Church of Scientology”.

Where then do cases decided in 2004 fit into this rather parochial picture?

My first observation is that international law appeared in some guise in a surprising number of constitutional cases decided by the High Court in the past year. For example, international law re jurisdiction over extra territorial offences (*re Alpert*), international law re mandatory detention, re law of nationality and the meaning of the term ‘alien’,<sup>10</sup> re elections (*Mulholland*), international law of extradition,<sup>11</sup> and private international law.

A second observation is that most invocations of international law are controversial. They often prompt a clear split between Justice Kirby and all the other members of the High Court. In this sense, international law is regularly associated with the dissenting view in cases, perhaps exacerbating its marginalized image. I have heard counsel who regularly appear before the High Court reflect that it is bad tactics to make an argument based on international law before the Court because it is immediately tainted as flaky or implausible.

A third observation is that a significant number of constitutional cases involving international law in 2004 have Middle Eastern names: Iranian, Iraqi, Palestinian, Afghan – and that they involve questions of the interpretation of the Migration Act. Eg *Behrooz*, where an Iranian man who had escaped from an immigration detention centre argued that he could not be held guilty of an offence under the Migration Act for escaping because the harsh conditions of the Centre meant that it could not qualify as an immigration detention centre. The majority of the Court had little difficulty in concluding that, whatever the conditions, Mr Behrooz *had* escaped from immigration detention. In *Behrooz* Justice Kirby was the only member of the High Court to look at international law standards on conditions of detention. He drew on the international law re arbitrary detention to reinforce his preferred interpretation of provisions of the Migration Act, arrived at through domestic law principles. He argued that there was no need to locate an ambiguity in legislation before interpreting it to be consistent with both treaty and customary international law.<sup>12</sup>

In 2004, Justice Kirby remained cautious in his use of international law: he always repeats the dualist mantra that international norms do not bind Australian courts unless incorporated by domestic law, but emphasizes the value of these norms as providing the context for the High Court’s interpretative and constitutional functions. Thus in *Baker* (Oct 2004) Kirby argues that given the accepted rule of statutory construction that ordinary statutes should be construed as far as possible to ensure that they do not operate

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<sup>10</sup> *Tania Singh v Cth* [2004] HCA 43.

<sup>11</sup> *Truong v The Queen* [2004] HCA 10.

<sup>12</sup> Para 127.

in breach of international law, there is no reason why the Constitution itself should be construed in a more parochial way. He makes the same point in *Fardon v A-G* and *ex parte Alpert*. This argument was mainly ignored by the other members of the High Court. The debate about the proper role of international law has become something of a dialogue of the deaf, with participants racking up an increasing list of self-citations. However, occasionally there is a more direct engagement – for example in *Coleman v Power* between the Chief Justice and Justice Kirby.

In two cases last year, Justice Kirby acknowledged limits to the value of international law in statutory interpretation: in *Minister for Immigration v B*, he notes that the High Court cannot invoke international law to ‘override clear and valid provisions of the Australian national law.’<sup>13</sup> Again in *re Woolley* decided in October 2004, Justice Kirby acknowledged that the provisions relating to mandatory detention in the Migration Act as applied to children might be inconsistent with international law, but that the wording was so clear, that “a national court, such as [the High Court], is bound to give effect to it according to its terms. It has no authority to do otherwise.”<sup>14</sup> Justice Kirby’s final para in *re Woolley* however indicates his distaste for and distancing from the outcome of the case:

recent authority of this Court repeatedly confirms the lawfulness and validity of the applicants’ detention. It does so notwithstanding the extended duration of the detention, the status of the respondents as children, the arguable breach of international obligations and the unfortunate consequences that I would be prepared to assume such prolonged detention of children occasions.<sup>15</sup>

But the most striking High Court interaction with international law in 2004 came in the *Al Kateb* case. Mr Ahmed Ali Al-Kateb was born in Kuwait in 1976 to Palestinian parents. He arrived by boat in Australia in December 2000 claiming refugee status and was placed in detention. There was no dispute that he is a stateless person – that is under the international Convention on Stateless Persons he is an individual ‘who is not considered a national by any State’ because Kuwait did not consider him a citizen and Palestine does not have the capacity to grant citizenship. Mr Al-Kateb applied for but was refused a protection visa to stay in Australia. After failed legal challenges to this refusal, he wrote to the Minister for Immigration in 2002 asking to be sent back either to Kuwait or to Gaza. No country would accept him however.

The High Court then had to determine whether or not under the Migration Act the Minister for Immigration can detain individuals like Mr Al-Kateb until another country is prepared to accept him. Members of the High Court conceded that the likelihood of Mr Al-Kateb’s acceptance by another country was remote in current circumstances and that his detention in Australia would be indefinite. The Migration Act states that a non-citizen unlawfully in Australia who asks to be removed from Australia must be removed

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<sup>13</sup> Para 171.

<sup>14</sup> Para 201.

<sup>15</sup> Para 213.

‘as soon as reasonably practicable’. It also allows the continued detention of such a person ‘until’ they are removed.

Mr Al-Kateb’s first argument was one of statutory interpretation: the wording of the Migration Act implied that, when it became clear that his removal from Australia was not in fact practicable, the Minister could not continue to hold him in detention. Although three members of the High Court (Chief Justice Gleeson and Justices Gummow and Kirby) agreed with this interpretation, on the basis that the possibility of indefinite detention was not expressly contemplated by the legislation, the majority of the Court (Justices McHugh, Hayne, Callinan and Heydon) did not. In the words of Justice McHugh, the outcome for Mr Al-Kateb was ‘tragic’, but the provisions of the Migration Act clearly required it.

The *Al-Kateb* case also raises the scope of the Commonwealth government’s power under the Constitution to legislate with respect to ‘aliens’ or non-citizens. The majority of the High Court decided that this legislative power allowed more than merely determining the status of an alien who entered Australia and holding them for removal if so required. Indeed the purpose of the power permits the ‘exclusion from the Australian community’ by ‘segregation’ of aliens. This expansive reading of the power seems extraordinary. It suggests that the Commonwealth Parliament can place broad restrictions on non-citizens to prevent them from becoming part of the ‘Australian community’. My ANU colleague, John Williams, has suggested that this might extend for example to a law preventing a non-citizen from entering or joining iconic Australian institutions such as the Melbourne Cricket Ground?

The case is particularly striking because of the direct and lengthy debate between Justices McHugh and Kirby on the relevance of international law: there is a point to point engagement and each judge passionately refutes the other’s arguments (indeed, I kept wondering how many times they had redrafted their judgments in response to each other). Justice Kirby seems intent on showing that their views are not so far apart, while Justice McHugh seems very keen to demolish Kirby J’s arguments. Justice Hayne also disagreed with Kirby J re international law but did not linger on this point.<sup>16</sup>

Justice Kirby’s arguments about international law in *Al Kateb* are all familiar, and he uses his favourite sources: Dean Harold Koh, US Supreme Court in *Lawrence v Texas*, Bangalore Principles; international and regional human rights treaties. As is his tradition, he emphasizes that his international law arguments are simply additional to those of the more familiar statutory interpretation techniques and constitutional principles used by Justice Gummow.

The tone of the exchange is quite charged: Justice McHugh uses rather bald and dismissive language, reminiscent of that of Justice Scalia, to respond to Kirby J, while Justice Kirby quotes previous statements of Justice McHugh to emphasise the latter’s inconsistency. Justice McHugh presents the rules of international law as numerous and difficult to locate,<sup>17</sup> an impossibly large set of principles for legislators to be aware of.

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<sup>16</sup> Para 238.

<sup>17</sup> 63 - 65

Use of international law developed since 1900 would, according to Justice McHugh, constitute an illicit judicial amendment of the Constitution.<sup>18</sup> He argues that there is a difference between taking into account political, social and economic developments since 1900 in constitutional interpretation on the one hand and what he characterizes as binding *rules* of international law on the other.<sup>19</sup> This would lead, McHugh J remarks dismissively, to judges requiring a loose leaf copy of the Constitution. This does not seem a persuasive argument in a constitutional court which has developed evolving understandings of the constitutional text, not least in the implied rights cases. Justice Kirby makes the fairly obvious response that in fact judges do have such copies of the Con, elaborating the text by historical materials, judicial decisions and so on.<sup>20</sup>

In a striking passage at the end of his judgment, Justice McHugh diagnoses the lack of an Australian bill of rights as the reason for his narrow interpretation of the Migration Act. He implies that an Australian bill of rights would provide a type of permission to the judiciary to look beyond their borders and take international law into account.<sup>21</sup> Of course, we can understand the basis of such an argument: the UK Human Rights Act, for example, seems to have wrought an astonishing change to the approach of the UK courts to issues of human rights; for example the recent decision in *A (FC) v Sec of State for the Home Department* is an extraordinary decision to read for a common lawyer. The House of Lords used the HRA to declare that the indefinite detention of suspected terrorists who were foreign national as “the antithesis of the right to liberty and security of the person.”

Justice McHugh’s proposition that the High Court must await the happy day when there is an Australian bill of rights to take international human rights law into account does not recognize that these principles are readily available now to the High Court.

## Conclusion

In 2004, then, the High Court’s portrayal of international law is as inherently vague, uncertain and open-ended, or a source of foreign and chaotic norms. To an international lawyer at least, this is a caricature. It is true that some international law principles are expressed in general terms, but there are also many forms of international jurisprudence that can assist in interpreting international standards.<sup>22</sup> The internet now allows easy access to such materials, whereas even a few years ago they were quite difficult to track down.<sup>23</sup> To an international lawyer, the fears of the uncertainty of international law are overstated. Concepts regularly used in domestic law, such as ‘reasonableness’, or

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<sup>18</sup> 68

<sup>19</sup> 71

<sup>20</sup> 183.

<sup>21</sup> para 73.

<sup>22</sup> For example, Justice L’Heureux-Dubé of the Supreme Court of Canada drew on a variety of international materials in *Ewanchuk* to discuss the scope of common law defences to sexual assault charges. She looked at treaty texts, general recommendations of United Nations treaty bodies and resolutions of the United Nations General Assembly.

<sup>23</sup> See however Stephen Toope’s caution about the overly limited use of materials by Canadian judges to assist in treaty interpretation. ‘The uses of metaphor: international law and the Supreme Court of Canada’ *Canadian Bar Review* (2000) 530.



‘forseeability’, are no less vague and require considerable interpretation in particular contexts. The anxious references made by Justice McHugh in *Al Kateb* to the fact that there are 900 treaties to which Australia is a party give an inaccurate sense of the breadth of international law. Only a small number will be relevant to any particular decision. There are more High Court decisions than there are treaties that bind Australia and yet no one suggests that they should not be referred to in litigation.

There seems to be an assumption in the High Court that, if international law is accepted as a serious source of law, the floodgates will be opened to a wave of vague and foreign norms at odd with Australia’s legal culture. There has been a sense that it is ‘all or nothing’ with respect to international law – it either binds fully or it does not bind; it is either relevant or irrelevant. The reaction of most members of the High Court has thus been one of maintaining a clear divide between the national and international legal systems. There is also a sense in the 2004 judgments of the High Court that international law is somehow a source of law that sneaks up behind innocent Parliaments to thwart their democratic will. This is a difficult proposition to maintain since the 1996 treaty reforms which gave Parliament a much greater role in decisions about treaty participation.

A more productive way to understand the potential of international law in Australian law may be as ‘influential authority’ rather than as part of a binary system of ‘binding’ or ‘non-binding’ norms. Canadian academics have developed the idea of ‘influential authority’ in the context of the Canadian Supreme Court decision in *Baker v Canada*.<sup>24</sup> They argue that this points to the imperative exerted by international norms although they are formally non-binding. ‘[R]ather than demanding that their actual terms be enforced [as rights], these influential sources instead insist that they be addressed, considered, weighed in the course of justifying a decision upon which they might rightly be thought to bear. They demand, one might say, respect as opposed to adherence with their terms.’<sup>25</sup> This approach allows a more fluid, flexible and subtle approach to international law.<sup>26</sup>

I should make it clear that, although I am an international lawyer, I am not arguing for some sort of homogenous world-wide interpretation of international legal standards. Indeed, I think it rather requires seeing the use of international law as a process of translation.<sup>27</sup> In other words, the outcome of the translation of international law may not always be the same in different legal cultures: ‘translation owes fidelity to the other language and text but requires the assertion of ones own as well.’

The High Court will continue to brush up against areas of international law. Few areas of social and commercial life will be untouched by international standards and norms. Its

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<sup>24</sup> [1999] 2 SCR 817.

<sup>25</sup> Mayo Moran at 4

<sup>26</sup> In *Baker* for example Justice L’Heureux-Dubé wrote that ‘the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.’<sup>26</sup>

<sup>27</sup> ‘Here and there: international law in domestic courts’ (2000) 32 *New York University Journal of International Law and Policy* 501.

current approach rules out an important source of principles; the High Court seems to celebrate being home, alone. In this era of a semi-permanent war against terror, and the trend of the executive government to assert self-defining powers, it is especially important that our highest court develop a less parochial, less deferential sensibility to government action if it is to give any substance to the idea of the rule of law. The war on terror is, above all, a war of ideas.<sup>28</sup> As Thomas Friedman noted recently “The greatest restraint on human behaviour is not a police officer or a fence, but a community and a culture.” There is a risk that Australian law makers will respond to the global threat of terror by enacting more and more laws that erode our commitment to individual rights. The High Court has an important role in strengthening our legal culture so that it can resist the excesses of unchecked governmental power. International law can make an important contribution to this task.

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<sup>28</sup> T Friedman *New York Times* 10 Feb 2005.