



ANU LAW STUDENTS' SOCIETY

LAWS2250 International Law 1st Semester 2008

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Question 1

85/100

Introduction

The enactment of the NSW legislation gives rise to international law issues both on the international and domestic plane

1) Whether lobbying NZ government may be an effective course of action, and what may be achieved

As the ADPC is a non-governmental organization, it cannot challenge Australia's actions on the international plane. Only states are allowed to be parties before the ICJ (ICJ Statute). Therefore, lobbying NZ to take action will result in a more effective outcome for the ADPC.

What may be achieved?

The NZ Government could argue that Australia has breached its treaty obligations under the ICCPR and its protocol and that Australia's 'declaration' is in fact an invalid reservation to the protocol.

Has Australia breached its treaty obligations?

The primary means of interpretation must be the text of the treaty, which is to be interpreted in good faith in accordance with the ordinary meaning of the words (VCLT Art 31(1)). The context, object and purpose of the treaty must also be assessed (VCLT Art 31(2)). Despite the ICCPR coming into force before the VCLT, the VCLT has been held to encompass customary international law (Fisheries Jurisdiction), therefore, Australia's treaty obligations should be interpreted using these criteria.

Art 6(1) of the ICCPR upholds the inherent right to life as fundamental. The text of the optional protocol explicitly states that no-one within the jurisdiction of the state party shall be executed, all necessary means should be taken to abolish the death penalty and no federal state shall be excepted.

The NSW legislation is contrary to art 6(2) of the ICCPR as the court merely 'recommends' the death penalty as opposed to making a final judgment. The Australian government has not taken all necessary means to abolish the death penalty as it has merely made an executive statement and it is not apparent that it has made any serious attempts to overrule the NSW legislation, as is in its power under s109 of the Constitution.

NZ could effectively argue that the NSW legislation is inconsistent with Australia's treaty obligations. This argument would be strengthened by the Cth Attorney General's own admission that 'the NSW parliament may place Australia in breach of its international obligations'. Australia's only defence would be its 'declaration'.

Is the 'declaration' a reservation?

A reservation may purport to exclude or modify the legal effect of certain provisions of the treaty in their application to that State (VCLT Art 2). Any statement may constitute a reservation, regardless of how it is phrased or named (VCLT Art 2). To identify whether Australia's 'declaration' was in fact a reservation, the court will assess the substantive content and the legal effect it purports to produce (Belitas, ILC Draft Articles). Reservations must not be prohibited by the treaty or incompatible with the object and purpose of the treaty (VCLT Art 19).

Australia's declaration does exclude or modify the application to the convention, it interprets the protocol 'not to apply' to certain offences. This statement is clearly a reservation disguised as a declaration as it not only modifies Australia's obligations under the treat, but arguably goes against the entire purpose of the protocol, which if interpreted according to VCLT Art 31 in context, appears to be the protection of human life and the prohibition of the death penalty. Furthermore, as reservations are not permitted to the treaty, this is clearly invalid.

If NZ successfully argues this in an international court it may be able to seek a judgment that Australia is in breach of its treaty obligations and therefore should retract the NSW legislation. Material breach could be used to modify relationship between NZ and Aus so those provisions would not apply but this would not be desirable as the main aim is to ensure that NSW does not carry out the death penalty.

2) What international legal arguments may be presented to the NSW courts?

Has the treaty/ies been transformed?

In Australia, a strict transformation approach applies (Chow Hung Chung, Dietrich). For international law to directly apply in Australia, it must be incorporated into our municipal law. From the facts, there is no evidence that the ICCPR or its protocol have been transformed into domestic law. The Cth statute was enacted before Australia signed or ratified the treaties and the NSW legislation does not refer to the treaties. Therefore different international legal arguments will have to be relied on in an Australian court. As discussed in part one, Australia is likely to have breached its treaty obligations by the NSW statute, however Australian legislation does not become invalid because it is inconsistent with international law (Polites).

Statutory Interpretation

If the language of the NSW statute is susceptible to a construction that is consistent with the terms of the ICCPR and its protocol, that construction should prevail (Teoh).

Looking at the language of the NSW legislation, s10 states that the court 'may recommend' the death penalty. The language is somewhat open, however it is unclear whether a construction of this legislation that is in line with the ICCPR and its protocol is even possible.

Applying the rules of treaty interpretation (VCLT Art 31(1) and (2)), the prohibition of execution in Art 1(1) of the protocol in the context of the ICCPR provisions concerning right to life, appears to be absolute. Any legislation authorizing the death penalty would then be inconsistent with the treaty obligations.

As parliamentary intention to allow the death penalty appears to be clear in this case, Australia's municipal law must prevail (Re Woolley).

Similar to the facts in Re Woolley, where the court held that the parliament's intention to detain children was clear, the court must uphold the legislation and is 'bound to give effect according to its terms'. Therefore, this argument is unlikely to succeed.

Customary International Law

If the right to life (In ICCPR Art 6(1)) can be established as CIL (by showing *opinio juris* and state practice), noting that the fundamental nature of this right has been applied as CIL in some international courts (Prosecutor v Dario Korduc), it may be argued that universal crimes do not require positive acts of transformation to be incorporated into international law (Merkel J, dissent in Mulyarimma). However this is merely a minority view in Australia at the moment so is unlikely to succeed.

3) Whether the sentencing review ombudsman would be under an obligation to take into account Australia's international obligations

Whilst the ombudsman is not obliged to take into account international law obligations per se, the ratification of the ICCPR and its protocol could lead to a legitimate expectation that the ombudsman would take these obligations into account (Teoh).

Teoh referred to an executive decision to reject a visa application, and the court held that the decision maker ought to have taken Australia's international treaty obligations into account. Although the ICCPR and its protocol have not been formally incorporated, the ratification of the treaty provides criminals with the 'legitimate expectation' that their right to life and the prohibition of the death penalty will be considered.

This is, however, a procedural application, not a substantive right (Teoh). Therefore, the ombudsman can take the IL obligations into account and then act contrarily to them anyway. Therefore, he is not obliged to act consistently with the ICCPR. **(85/100)**

Essay Questions: Part B(1)

This statement by the ICJ was merely a means of skirting the issue of consent in deciding a contentious issue.

Article 65(1) of the ICJ's own statute states that the request must concern a legal question, not one of political nature. This provision is intended to restrict advisory opinions to just that, opinions, rather than the settlement of disputes without the consent of parties. The Wall case involved the construction of a wall in Palestinian territory, this set of facts appears to be very specific and not 'located in a broader frame of reference than a bilateral dispute'. It would be difficult to argue that the opinion would/ has applied to other instances of the building of a giant wall along state borders.

The principle of consent is vital to upholding State sovereignty; that all States must consent to the international law that is applicable to them. It could be argued that without consent of a party (to what was clearly a contentious dispute in the case of the wall opinion) no decision could be applicable to the non-consenting State.

Whilst an advisory opinion may be useful to solve a current legal issue, doing so without the consent of the parties clearly violates their sovereign rights. The ICJ has held that it cannot determine the obligations of states not present (and thus not consented to) the dispute (East Timor Case). Surely this principle also applies to determining the law surrounding their dispute and administering recommendations regarding the obligations of the non-consenting party.

If the ICJ did not intend to comply by its own rules of consent, it should have expressly noted, as opposed to skirting the issue using a poor application of facts and legal criteria in the situation. **(7/10)**

Part B(2)

a) The decision in Al-Kateb was legally correct because it is representative of the 'law' in Australia. For international law to be transformed into domestic law a positive act of transformation is necessary (Chow Hung Ching). Although signing and ratifying treaties creates a 'good faith' expectation that States will not act inconsistently with their obligations (VCLT Art 18) and possibly a legitimate expectation (Teoh), no obligations are transformed into domestic law until they have been clearly transformed.

Although there have been objections, particularly that of Kirby J in Al Katab, that international law should be used to interpret our Constitution, Von Doussa's statement that his decision is legally correct holds true today.

b) An introduction of a statutory charter of rights may not ensure more 'moral' judicial decisions. Judges are bound to apply the law, not moral principles, and whilst codifying some set of 'rights' may increase the likelihood that laws are moral, it does not ensure that morality will prevail.

In a pluralistic society such as ours, it is difficult to agree on any set of rights to be codified. As rights involve imposing duties on others, they may not ensure greater 'morality'. For example, a right to sovereign supremacy could include upholding Australian born peoples' rights at the expense of immigrants. Whilst this is an extreme example, it illustrates that merely implementing a statutory list of rights is not the answer.

To ensure a situation such as Al Kateb does not occur again, international obligations could be required to be passed and transformed by the legislature at the time of ratification, this would ensure that Australia took its international obligations seriously by transforming them immediately and also reflect the large body of human rights treaties into Australian law so that the judges would not have to rule inconsistently with human rights when applying the law.

(7/10)