

A Note on International Human Rights Law for Counsel for David Hicks

The Relevance of the ICCPR

1. If an international convention to which Australia is a party has not been incorporated into Australian municipal law by statute, it cannot operate as a direct source of individual rights and obligations under Australian municipal law.¹ However, an unincorporated treaty may be invoked in various ways in the conduct of domestic affairs.² A statute of the Commonwealth or a State is to be interpreted and applied, as far as its language permits, so that it is in conformity with Australia's obligations under an international convention (at least in the case where the legislation is enacted after, or in contemplation of, Australia's entry into the relevant convention).³
2. An international human rights convention to which Australia is a party can:
 - (a) be a legitimate and important influence on the development of the common law;⁴
 - (b) serve as an indication of the value placed by Australia on the rights provided for in the convention and as an indication of contemporary values;⁵
 - (c) be relevant to the interpretation and application of legislation. Legislation should be interpreted, so far as its language permits, consistently with human rights;⁶ and
 - (d) be weighed as a factor in the exercise of judicial discretion.⁷

¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J.

² See the examples given by McHugh and Gummow JJ in *Re Minister for Immigration & Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [100].

³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ.

⁴ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 42 per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292 at 321 per Brennan J and at 360 per Toohey J, who referred to an international agreement being used as a guide when the common law is unclear; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J.

⁵ *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 75 (the approach in *Schoenmakers* (and other Federal Court cases) to the test for granting bail under the *Extradition Act 1988* (Cth) was overruled in *United Mexican States v Cabal* (2001) 209 CLR 165); *Dietrich v R* (1992) 177 CLR 292 at 321 per Brennan J; cf *Baker v Minister of Citizenship and Immigration* [1999] 2 SCR 817 at 860-862.

⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

“A decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community than if they are simply derived from the experience and predilections of a particular judge.”⁸

Exercising Judicial Discretion

3. Section 104.4 of the Code provides that 'the issuing court *may* make an order under this section...' The use of the term 'may' in the provision implies judicial discretion operates in the exercise of the power granted by the Code.⁹ The International Covenant on Civil and Political Rights (ICCPR) is relevant in the exercise of that discretion.¹⁰

Presumption Against Abrogating Fundamental Rights

4. At common law, there is a rule of statutory interpretation that the courts will presume that Parliament does not intend to abrogate or curtail fundamental rights and freedoms.¹¹ It is well established that Parliament must use clear and unmistakable language to abrogate or curtail fundamental common law rights.¹²

courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or

⁷ See generally, Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108. See also *DPP v TY* [No 3] VSC 489, [49]; *Ragg v Magistrates' Court of Victoria & Corcoris* [2008] VSC 1 (24 January 2008), [41]; *Tomasevic v Travaglini* [2007] VSC 337, [73]-[74] and *In re TLB* [2007] VSC 439, [16]-[20]; *R v Hollingshed* (1993) 112 FLR 109 at 115; *Walsh v Department of Social Security* (1996) 89 A Crim R 65; *R v Togiass* (2001) 127 A Crim R 23 at 37 [85] per Grove J, 43 [123] per Einfield JA; *McKellar v Smith* [1982] 2 NSWLR 950 at 962F.

⁸ M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 526.

⁹ In *Ragg v Magistrates' Court of Victoria & Corcoris* [2008] VSC 1, the Supreme Court of Victoria stated that international human rights may be relevant to the exercise of a judicial power or discretion where the human rights instrument in question is relevant to the subject matter of the case and where the consideration of the instrument is not inconsistent with applicable legislation or the common law. See also *Tomasevic v Travaglini* [2007] VSC 337, [73]-[74] and *In re TLB* [2007] VSC 439, [16]-[20].

¹⁰ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹¹ See *Coco v The Queen* (1994) 179 CLR 427, 436ff (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹² *Bropho v Western Australia* (1990) 171 CLR 1, 17.

freedoms in question, and has consciously decided upon abrogation or curtailment.¹³

Relevant International Human Rights

Rights may only be subject to Reasonable Limitations

5. The Code requires that the Court be satisfied that each obligation, prohibition and restriction to be imposed be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.
6. The concepts “reasonably necessary” and “reasonably appropriate and adapted”, have been considered in international and comparative law. In *General Comment 31*, the UN Human Rights Committee stated that, where legislation may restrict fundamental rights and freedoms,

States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.¹⁴
7. Similarly, the Supreme Court of Canada has held that any limitation on human rights under legislation should be ‘proportionate’, which requires that it be demonstrably justifiable, pursue a compelling and legitimate aim, be reasonably and rationally connected to that aim, not operate in a way that is in any way arbitrary or irrational, and be the minimal impairment necessary to achieve the aim.¹⁵
8. In the recent decision in *Roach v Australian Electoral Commission & Anor*, the High Court of Australia took a similar approach to the term ‘appropriate and adapted’, equating it with the principle of ‘proportionality’ and stating that ‘What

¹³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ). See also the useful discussion of the principle and relevant authorities by the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Mohammad Al Masri* (2003) 126 FCR 54, 75ff (Black CJ, Sundberg and Weinberg JJ).

¹⁴ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

¹⁵ See, eg, *R v Oakes* [1986] 1 SCR 103, 136, 139; *Zundel v R* [1992] SCR 731; *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, 335.

upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted'.¹⁶

9. The burden of showing that the control order is necessary, and that the proposed conditions are proportionate, rests with the applicant for the order.
10. In the present case, three internationally recognised human rights are relevant, namely:
 - (a) the right to liberty and security of person;
 - (b) the right to privacy; and
 - (c) freedom of movement

Of these, the right to freedom of movement is most apposite, and our submissions will be confined to that right.

Freedom of Movement

11. The right to freedom of movement is enshrined in Article 12 of the ICCPR as follows:
 1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
 2. *Everyone shall be free to leave any country, including his own.*
 3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant.*
 4. *No one shall be arbitrarily deprived of the right to enter his own country.*

Relevant aspects of the right

12. An authoritative statement relating to the scope and operation of Article 12 of the ICCPR indicates that the right to freedom of movement has a broad application. General Comment 27¹⁷ notes that a law restricting freedom of movement by detaining an individual will breach the article *unless* it is:
 - Necessary in a free and democratic society;
 - Provided for by law; and

¹⁶ *Roach v Australian Electoral Commissioner & Anor* [2007] HCA 39, [85] per Gummow, Kirby and Crennan JJ.

¹⁷ Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

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- Consistent with other covenant rights.

Reasonable limitations

13. Limitations on the right to freedom of movement must be lawful, compatible with other rights in the covenant, as well as necessary and proportionate. To be proportionate, all restrictive measures must be appropriate to their legitimate function. They must be the least intrusive instrument among those which might achieve the desired result. Finally, they must be proportionate to the interests being protected. This is defined in s 104 of the Code to be protection of the public from a terrorist act.
14. While national security has been held to be a permissible purpose for interference, it has been emphasised that this can justify derogations from international obligations only in circumstances where there is a grave case of political or military threat to the entire nation.¹⁸

Relevance of the right in this proceeding

15. The Centre understands that the terms of the control order sought require that Mr Hicks report to a specified South Australian police station at specified times and frequencies. Given that the statutory purpose required is the purpose of protecting the public from a terrorist act, the question to be asked is whether that purpose is achieved in a proportionate way (ie, in proportion to his right to freedom of movement) by requiring Mr Hicks to report in the manner sought. In doing so, the Court should determine whether the term imposed is the least intrusive instrument to achieve the desired result.
16. Similarly, confining Mr Hicks to his home between the hours of midnight and 6am is a fetter on his freedom of movement. The same questions should be asked in relation to that aspect of the order.
17. The restrictions on Mr Hicks's movements should be precise and circumscribed, in addition to being the least restrictive method of achieving the aim of the legislation.
18. Any term of a control order should only be imposed by the Court if it is satisfied for itself that the term is justified by reference to national security, and further, that the term is proportionate to the need so demonstrated, when regard is had to the right to freedom of movement.

¹⁸ See: *The Strasbourg Declaration on the Right to Leave and Return*, UN Doc E/CN.4/Sub.2/1988/35/Add.1 (1988); and: *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

Brian Walters

Neil McAteer