The determination of customary international law in Australian courts

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1. Introduction

The extent to which customary international law automatically forms part of Australian domestic law remains unresolved. There is no Australian constitutional provision dealing with this issue. Recent trends suggest that certain rules of customary international law may be adopted as part of the domestic common law, but the body of customary international law is not directly incorporated. It has been held, for instance, that genocide is not an offence in Australian domestic law, simply because it is an international crime under customary international law over which states may exercise universal jurisdiction. In that case, there was no disagreement between the parties to the case as to the status of the crime of genocide as a matter of customary international law. No difficulties arose, therefore, in establishing the content of the customary international law with respect to genocide. The real issue was the extent to which that law formed part of Australian law. On that there was disagreement between the parties and judges. In other areas of Australian law, customary international law may either operate directly (such as the rules of sovereign immunity to the extent they are not provided for in statutes), or else be relevant in interpreting domestic legislation. There is a presumption that statutes are not intended to violate rules of international law.

Cases do, therefore, arise in Australian courts where it is necessary to determine the content of customary international law. A further reason that determining the content of customary international law is sometimes necessary is because the validity of certain legislation under Australia’s federal Constitution may depend on showing that it is reasonably appropriate and adapted to giving effect to some international law obligation to which Australia is subject. If the obligation arises as a matter of treaty law, a court can interpret the relevant treaty, applying the principles contained in the Vienna Convention on the Law of Treaties. The situation where customary international law provides the reference point is often more difficult, as often the content, or even the existence of, customary international law is uncertain.

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The proof of customary international law in international tribunals is often difficult, and the theoretical rules for establishing such law are themselves controversial and do not always appear very relevant in practice. Some of these issues arose in Polyukhovich v. The Commonwealth (the “War Crimes” case), where the validity of Australia’s war crimes legislation was attacked on the basis that it did not conform to international law. This paper reviews the approach to the issue adopted in that case as illustrative of some of the issues that arise in domestic courts when seeking to establish international law.

2. Materials relied upon to establish international law

Before examining the War Crimes case, it is useful to mention the way in which international law is proved in Australian courts. There are no constitutional or statutory provisions that regulate the means by which courts ascertain and apply rules of international law. The Australian common law system is adversarial so the courts look largely to counsel to put the argument and to be responsible for putting before the court the relevant material. Unlike foreign law, international law is not proved as a fact on the basis of expert evidence, but is ascertained essentially in the same way as a rule of domestic law. For this purpose, reliance will be largely placed on whatever material counsel consider relevant and put before the court. This usually results in reliance being placed on leading international law textbooks in the English language, and cases from other jurisdictions that may have dealt with a similar issue.

Thus, in the War Crimes case, the court was referred to the Nuremberg Tribunal, decisions of the United States military tribunal established after World War II, and the decisions of courts in Canada, Israel and the Netherlands. In Nulyarimma v. Thompson (the “Nulyarimma” case), which dealt with genocide, the court was referred to cases in Israel, England and the United States as well as extracts from textbooks and journal articles. If there is an International Court decision of relevance, it will generally be accepted as authoritative by a domestic court and reference will be made to it.

There is no practice in Australia whereby the executive, by certificate or suggestion, can directly influence the conclusion a court might make as to the existence or content of an international law rule. The government will, however, often be a party in proceedings where international law issues arise. If the government is not a party, it may seek to intervene in order to ensure that the court has relevant material drawn to its attention and can receive the views of the government as to the content of the relevant rule. However, it is for the court, on the basis of material before it or its own researches, to reach its own conclusion on the international law issue.

7 Id.
9 Nulyarimma v. Thompson, supra note 1 [hereinafter Nulyarimma case].
10 Id.