The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law

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Introduction

A function of international lawyers is to test the lawfulness of state conduct by assessing it against a given set of normative values. However appraised, the test of lawfulness presupposes an existing valid yardstick that reflects the common consensus of state actors. A problem that is all too frequently overlooked is that sometimes in international law the yardstick for assessing the degree of lawfulness is elusive. The scope of the problem has been demonstrated in a case concerning Australia.

In April 1997, in *A v Australia*, the United Nations Human Rights Committee (the Committee) found Australia to have breached its obligations under the International Covenant on Civil and Political Rights (ICCPR)[1] for having detained a Cambodian asylum seeker for four years after his arrival in Australia.[2] The applicant filed a complaint with the Committee and argued *inter alia* that the detention without recourse to any remedies in the Australian legal system was a breach of article 9(1) of the ICCPR, which provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The Committee found that there had been a violation of this right. One of the most important aspects of the decision was the finding by the Committee that Australia's detention of the applicant had not been 'lawful' in spite of specific Australian legislation that permitted such detention.[3]

While there may be little doubt that, in this instance, Australia's conduct is *lawful* and far from arbitrary in the Australian legal system, there is considerable doubt as to whether the conduct, and for that matter the Australian legislation in each case, is consistent with its international obligations under the ICCPR. This underscores the sometimes troubled, even fraught, relationship between international law and domestic law. Monists may perhaps view this as a storm in

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1 (19 December 1966), 999 UNTS 171; 6 ILM 368.

2 *A v Australia*, Comm no 560/1993, UN Doc CCPR/C/59/D/560/1993; (1998) 5 IHRR 78.

3 Ibid [10].

a tea-cup that lends itself to an obvious Kelsenian answer: the legitimacy and, for that matter, lawfulness of a given domestic norm must be tested ultimately not only by reference to the domestic legal order, but also by reference to a 'higher' external norm in the international legal sphere. For advocates of dualism the matter is far more complex. The lawfulness of a domestic norm may only be questioned by reference to its internal consistency. The international lawfulness of a domestic norm only becomes an issue where it is the subject of a direct international legal obligation. Thus where the substance of the international legal obligation provides only that the state actor must ensure that its domestic conduct is in accordance with law, in the absence of any specific international standard one must rely upon the internal consistency of a norm to assess its lawfulness. But the question arises, where international law imposes an obligation on a state to act lawfully in its domestic conduct, is the domestic legal order in itself appropriate for assessing the lawfulness of the conduct? In this paper, we intend to examine the notion of lawfulness in the context of the relationship between domestic law and international law on the basis of recent Australian experience.

Lawfulness and Normative Conduct under the International Covenant on Civil and Political Rights

In any legal system, to say that an act is lawful is to suggest that the act is consistent with the law. This in itself does not pose any difficulties so long as there is a clear rule that sets out parameters of expected normative behaviour. The issue of lawfulness of a given conduct in the international system may arise in three instances. First, there may be a specific directive to state actors to engage, or not to engage, in a particular act in pursuance of their obligations in law. In such cases, the particularisation of the act serves to clarify normative behaviour. Second, where the law does not prohibit the conduct of states, the conduct is categorised as lawful. The third instance arises where the specific obligation expressly or by inference provides no more than that the conduct of the state must be 'lawful' or 'in accordance with the law'. The ICCPR is replete with this category of 'lawfulness' and it is within the context of this instrument that we examine the tensions between Australian domestic law and international law.

A v Australia

A arrived by boat illegally in Australia in December 1989 and subsequently applied for refugee status. There followed a period of continued detention at a number of detention centres in Australia until his eventual release in January 1994. By the time of his release, A had been in detention for four years. This lengthy detention period pending the determination of his case became the substance of A's complaint against Australia before the Committee under the Optional Protocol to the ICCPR.[4]

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4 (16 December 1966), 999 UNTS 302.

The circumstances of A's prolonged detention are important in the assessment of Australia's conduct in international law. A's initial claim for refugee status was rejected by the Australian Department of Immigration, Local Government and Ethnic Affairs in June 1990. The Legal Aid Commission of New South Wales then took on his case, but his application was again rejected in May 1991, by which time A had been in detention for 18 months since his initial arrival in the country. Between May 1991 and April 1992, A made two further unsuccessful appeals against the decision to refuse him refugee status.

Proceedings seeking an order of review in respect of the decisions to reject the applications for refugee status were instituted in the Federal Court of Australia. In April 1992 the Federal Court made orders preventing the removal of A and other plaintiffs in his category from Australia. On 15 April 1992, pursuant to section 16(1)(a) and (b) of the Administrative Decisions (Judicial Review) Act 1977 (Cth), the Federal Court set aside each of the decisions rejecting the applications for refugee status and ordered that the matters to which those decisions related be referred back to the Department of Immigration, Local Government and Ethnic Affairs. The Federal Court also ordered that outstanding applications by A and others for orders that they be released from custody be adjourned for hearing commencing on 7 May 1992.

The action of A's solicitors set in motion a chain of events. On 5 May 1992, the Commonwealth Parliament passed several amendments to the Migration Act 1958 (Cth) to permit the detention of aliens in the position of A. Section 54J of the Act provided the rationale for the amendment:

> the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she:
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> (a) leaves Australia; or
>
> (b) is given an entry permit.

Under section 54K a 'designated person' is defined to mean a non-citizen who:

> (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
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> (b) has not presented a visa; and
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> (c) is in Australia; and
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> (d) has not been granted an entry permit; and
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> (e) is a person to whom the Department has given a designation by:
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> (i) determining and recording which boat he or she was on; and
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> (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat; and includes a non-citizen born in Australia whose mother is a designated person.

Under section 54N officers are empowered to detain without warrant designated persons not in custody immediately after commencement of the amendment and to take reasonable action to ensure that such persons are kept in custody for the purposes of the legislation. For present purposes, what was most significant about the amendment was section 54R, which provided in clear terms: 'A court is not to order the release from custody of a designated person.'

The effect of the amendments was to make A, and indeed all people in his position, 'designated persons' under the Act. A and others subsequently sought a declaration from the High Court of Australia that these provisions were not valid in law. The action before the High Court itself helped to highlight the possible tensions between Australia's domestic law and its international legal obligations. The issues presented to the High Court for determination were:

1. Are ss 54L, 54N or 54R of the Migration Act 1958 (Cth), as amended, invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia?
2. If yes, are the defendants under a legal duty to decide the plaintiffs' applications for release from custody:
   (a) having regard to the *Convention Relating to the Status of Refugees 1951* and the *Protocol Relating to the Status of Refugees 1967*;
   (b) having regard to *the International Covenant on Civil and Political Rights* set out in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act*?[5]

In a lengthy judgment, all seven members of the High Court held that sections 54L and 54N were valid.[6] With the exception of Mason CJ, the rest of the Court found section 54R invalid. In view of their responses to the first question, the Court did not find it necessary to answer the second question. However the plaintiff's arguments before the Court had included claims of inconsistencies between the amendments and Australia's international legal obligations under the ICCPR and the Refugee Convention.[7] First, it was argued that division 4B, incorporating the amendments, was invalid or inapplicable to the extent that its provisions purported to remove, limit or exclude rights of the designated persons under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), the ICCPR and the Refugee Convention and Protocol.[8] Second, the plaintiff contended that the provisions of division 4B were, to the extent of any such inconsistency, beyond the legislative power conferred upon the Commonwealth Parliament by section 51(xxix) of the Constitution with respect to external affairs and that, in any case, the amendments must be read in a manner as to avoid inconsistencies with Australia's international obligations. The Court rejected all these arguments on the basis that:

> s.54T, which expressly provides that the provisions of Div.4B prevail over any other law in force in Australia, unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent — if at all — that they are operative within the Commonwealth) those international treaties.[9]

On the issue of an interpretation approach that avoids any inconsistencies, the Court held:

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5 *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 14-15.
6 Ibid 1.
7 Convention Relating to the Status of Refugees (28 July 1951), 189 UNTS 150.
8 Protocol Relating to the Status of Refugees (31 January 1967), 606 UNTS 267
9 Above n 5, 38.

> We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty [(77). See, e.g., *Garland v. British Rail Engineering Ltd.* (1983) 2 AC 751, at p 771; *Attorney-General v. Guardian Newspapers Ltd.* (No.2) [1990] 1 AC 109, per Lord Goff of Chievely, at p 283; *Derbyshire CC v. Times Newspapers Ltd.* (1992) 3 All ER 65, at pp 77-78, 86-87, 92-93]. The provisions of Div.4B which require that, in the circumstances which presently exist, the plaintiffs be detained in custody are, however, quite unambiguous.[10]

Consistent with a line of well-established authorities, the Court's general position was that the Commonwealth Parliament is under no obligation to ensure that its enactments are necessarily consistent with Australia's treaty obligations. It held that where an inconsistency between a domestic enactment and an international obligation becomes apparent, it is within the sovereign authority of Australia to override the international obligation with the domestic enactment.

A was released from detention in January 1994, and filed his complaint with the United Nations Human Rights Committee. For the most part the Committee had to deal with the notion of 'lawfulness' in the context of the ICCPR. It is thus useful to provide a general overview of the scope of 'lawfulness' as it appears in the ICCPR.

The ICCPR and the Scope of Lawfulness

While the operation of international law ordinarily involves the application of international law rules, it is not uncommon for a rule of international law to directly involve the application of domestic law. This is, for instance, the case where international law incorporates a municipal law concept in the absence of any corresponding concept in international law. The issue of lawfulness does not arise in such cases. Another instance is where a treaty specifically calls for the adoption of national law to implement its terms. Article 2(2) of the ICCPR is a typical example:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, *in accordance with its constitutional processes* and with the provisions of the present Covenant, *to adopt such legislative or other measures as may be necessary to give effect to the rights* recognised in the present Covenant. (emphasis added)

In this example, the issue of lawfulness may arise where a state party fails to adopt the appropriate municipal law to reflect its treaty obligations. Another example is the article 6(1) provision on the right to life:

> Every human being has the inherent right to life. *This right shall be protected by law.* (emphasis added)

In this instance, the ICCPR relies on municipal law to implement the right. The issue of lawfulness may arise where rules in the municipal legal system fail to protect the right to life.

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10 Ibid.

In some other cases, a treaty may require that a particular (municipal) conduct by the state party be in accordance with (its municipal) law. However, international law may go a step further to set the parameters for assessing the 'lawfulness' of the municipal law upon which it seeks to rely. This occurs in article 6(2) of the ICCPR:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes *in accordance with the law in force at the time of the commission of the crime* and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. (emphasis added)

In such instances, the lawfulness of the conduct of the state in enforcing its laws on capital punishment is judged *inter alia* by assessing its consistency with specific international obligations. The standard for judging lawfulness would thus transcend mere internal consistency in the municipal legal system. In this example, the condition that the municipal law rule should be consistent with a given international law instrument helps to delimit the parameters of lawfulness. For the most part, however, the ICCPR does not provide such parameters. Where there are no specific parameters provided in international law, the general tenor of the Covenant leaves one to conclude that the principal standard for assessing lawfulness is no more than the domestic standard. This is borne out by other provisions of the ICCPR:

> Article 12(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.
>
> Article 13: An alien *lawfully* in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of *a decision reached in accordance with law*...(emphasis added)

There is no specific international law standard for assessing the lawfulness of the entry of an alien into the territory of a state. Each state adopts its own laws to regulate entry into its territory. The standard is simply premised on the consistency of the law with municipal law requirements.

Issues of due process pose more complex questions for the relationship between international law and domestic law under the ICCPR. For instance, article 9 provides:

> (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. *No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a *judge or other officer authorized by law to exercise judicial power.*
>
> (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that *court may decide without delay on the lawfulness of his detention* and order his release if the detention is not lawful.

(5) Anyone who has been the *victim of unlawful arrest* or detention shall have an enforceable right to compensation. (emphasis added)

The article 9(3) reference to a 'judge or other officer authorised by law to exercise judicial power' relates to the exercise of lawful authority as provided for in *municipal* law. The validity or lawfulness of such authority can only be assessed by the municipal law standards in the particular legal system in which the judicial power is exercised. It is also in pursuance of the judicial authority only as provided and assessed as valid or lawful within the municipal legal system that 'anyone who is deprived of his liberty by arrest or detention [can] be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'. But what does this mean for the implementation of human rights? To what extent is the municipal standard a sufficient basis for assessing lawfulness in international law? These were some of the principal issues in the case of *A v Australia.*

A's Complaint to the Human Rights Committee

A presented several complaints against Australia to the Human Rights Committee, two of which are relevant for our purposes. First, it was argued that the Migration Amendment Act 1992 (Cth) was aimed specifically at 'boat people' and that the legislation was a reflection of a policy that was inappropriate, unjustified and arbitrary, since its aim was to deter boat people from coming to Australia and to encourage those already in the country to discontinue their applications for asylum. A thus argued that the legislation was in breach of article 9(1) of the ICCPR.[11]

Second, A argued that the amendments denied any genuine judicial remedy for those in his position. According to A, the

> effect of division 4B of the Migration Amendment Act is that once a person is qualified as a 'designated person', there is no alternative to detention, and the detention may not be reviewed effectively by a court, as the courts have no discretion to order the person's release.[12]

Because the courts lacked the power to order the release of a designated person, there could actually be no real consideration of the case as required by article 9(4). The legislation was thus in breach of article 9(4). The Committee had to consider two principal issues among a number of claims made by A:

(i) whether prolonged detention of A, pending determination of his entitlement to refugee status, was 'arbitrary' within the meaning of Article 9(1);

(ii) whether the alleged impossibility of challenging the lawfulness of his detention violated Article 9(4).

Arbitrariness of detention

The difficulty for A was that the ICCPR does not define the term 'arbitrary'. Given the general tenor of the ICCPR as indicated earlier, the appropriate

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11 Ibid [3.1].
12 Ibid [3.5].

standard for assessing arbitrariness of state conduct within the context of the ICCPR would appear to be municipal law. The arrest and detention of A and other applicants were in pursuance of Australian legislation. In Australian municipal law, the validity or lawfulness of the detention of the applicant was thus not in dispute after the High Court's decision. From an Australian municipal law perspective, the detention was not arbitrary. In any case, since the ICCPR obligation is for parties to ensure that an applicant has access to the courts in pursuance of processes established in the municipal legal system, it is arguable that Australian law relating to designated persons met the ICCPR obligations to the extent that it was internally consistent and valid. In establishing his case against Australia for possible breaches of its obligations under the ICCPR, A sought to rely on an earlier decision of the Committee in which the issue of arbitrariness had been considered. There the Committee had defined arbitrariness as not being merely against the law but as including elements of 'inappropriateness, injustice and lack of predictability'.[13] A major issue that arose for the Committee was whether the Australian municipal legal system by itself provided the standard for assessing the lawfulness or arbitrariness of the detention of the applicant. Another was the issue of access to the courts, or whether the consistency, and for that matter the essential validity of Australian law regarding the detention of A, had to be assessed by an international measure of 'inappropriateness, injustice and lack of predictability'.

While not accepting all of A's submissions, the Committee nevertheless found that his detention had been arbitrary.[14] More importantly, the Committee seemed to stress that:

> the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.[15]

The Committee accepted Australia's view that mere detention of asylum seekers in accordance with Australian municipal law was not arbitrary, but insisted that detention still had to be justified. It observed that:

> every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. *Without such factors detention may be considered arbitrary*, even if entry was illegal.[16]

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13 Ibid [3.1], referring to *Van Alphen v The Netherlands*, Comm no 305/1988, adopted on 23 July 1990 [5.8].

14 Ibid [9.4].

15 Ibid [9.2].

16 Ibid [9.4] emphasis added.

In the view of the Committee, detention of those who entered the country illegally or unlawfully could still be arbitrary, unless there was some further justification. To avoid such a finding, a state would need to demonstrate the necessity for the prolonged detention of an illegal entrant in custody. Prolonged detention might be acceptable where circumstances indicated a need for further investigation of how the alien came to be within the jurisdiction. In A's case, the Committee found that, while there were grounds for holding him for a certain period, his detention for four years was an arbitrary act contrary to article 9(1), even although A had entered the country illegally.

In making its findings on proportionality and arbitrariness, the Committee made no reference to any legal authority to support its interpretation. The Rules of Procedure for the Committee do not oblige it to provide any specific authority to support its findings. But where the Committee purports to interpret legal instruments, as it often does, it would seem prudent to lend credence to its findings by appropriate references to relevant authorities either in the form of *travaux préparatoires*, or some other forms of aid in jurisprudence. In the case of *A v Australia*, the Committee's interpretation of the relevant provisions of the ICCPR, while understandable, is far from clear. Its insistence that the scope of arbitrariness be broadened to include notions of 'appropriateness' and 'injustice' without reference to any specific international standards underscores the essence of the tensions that can arise between international law and municipal law.

In the absence of an international standard, the measure of appropriateness and injustice must necessarily be construed in the context of the circumstances of each state. Not surprisingly, Australia submitted an argument on similar lines and rejected the contention that it had breached article 9(1) of the ICCPR.[17] Australia conceded that deprivation of liberty could be in breach of the Covenant if it were arbitrary but denied that its treatment of A was actually a breach.[18] It maintained that its actions were not only 'in accordance with such procedure as ... established by law' (the requirement in article 9(1)), but also that they were reasonable in the circumstances facing the country at the time. Australia's actions did not include the elements of inappropriateness, injustice and lack of predictability, the presence of which would have rendered the law in breach of article 9(1).[19]

Australia argued, in its formal response to the Committee's findings, that, in dealing with asylum seekers, a state has legitimate interests of its own to protect. It asserted that the rights of asylum seekers are not absolute and must be construed in such a manner that, as far as possible, a state can protect its own interests while respecting the rights it has undertaken to guarantee. Australia emphasised the right, and the need, to ensure that all non-citizens, including asylum seekers, entering the country are authorised to do so. It also insisted upon the importance of maintaining the integrity of its migration programs.[20] In

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17 Ibid [7.5]-[7.6].
18 Ibid [4.2].
19 Ibid [7.6].
20 Response of the Australian government to the views of the United Nations Human Rights Committee in *A v Australia*, 16 December 1997 (response) [5]. Australia

the case of A, an unauthorised arrival, it was quite proper that he be detained pending assessment of his claims: this ensured that the Australian government would have access to him, and be able to remove him if his claim was unsuccessful.

The problem with this argument is that it did not deal with the actual time taken to process a claim for asylum. A was not disputing Australia's right to control entry; rather, he was objecting to the duration of his detention and what he claimed was a denial of a reasonable chance to challenge it. In its formal response to the Committee's findings, Australia returned to its assertion, made in its earlier submissions, that it had little control over the length of time spent in detention, as this was effectively ruled by the time required to investigate and process a claim. Australia stressed that it had had to cope with a ten-fold increase in applications for refugee status at the time of A's application, which placed a substantial burden on its resources.[21] This statement, coupled with its admission that delays were experienced in dealing with this increase, acknowledged that the situation may have been handled better had circumstances permitted. This was a reasonable point: if indeed Australia was overwhelmed by a dramatic increase in asylum seekers so that it lacked sufficient trained personnel to process their applications, then consequent delays in dealing with individual cases were not, without other factors influencing the delays, arbitrary. The notion of arbitrariness denotes behaviour by the authorities which goes well beyond *bona fide* inability to adapt immediately to a significant change in circumstances, such as a major increase in the numbers of asylum seekers.

To substantiate this contention, Australia outlined the substantial reforms it had made to improve its procedures for assessing claims of asylum.[22] While these reforms do not affect the analysis of the way A was treated, they indicate a picture of a much changed, and faster, regime for processing asylum applications. Thus even though Australia denied any breach of article 9, it went to some trouble to show that its procedures had been improved since the time of A's arrival in Australia.

Australia made two other significant points: first, that its practice of detaining certain aliens was justified by 'compelling reasons of domestic policy';[23] second, that the Committee had failed to clarify when precisely A's detention became arbitrary.[24] The first argument reflects the right and need of all states to control entry to their territory. This is usually not problematic but, where the person seeking entry may wish to remain in the country indefinitely, it requires very careful consideration of a case. Of course, even in such cases detention may be arbitrary, which is why Australia went to such lengths to justify its detention of A. The second point — the failure to indicate when detention became arbitrary — was telling. Surely the Committee was not saying

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had made a similar point in its submission to the Committee [7.1].

21 Ibid [9].

22 Ibid [6].

23 Ibid [5].

24 Ibid [8].

that detention was arbitrary from the outset? To characterise detention as arbitrary entails assessing the circumstances in which it has taken place and the opportunities accorded to the detainee to oppose it. It is reasonable for a state that is considered responsible for such behaviour to be advised how precisely it has breached it obligations. Therefore, Australia argued, first, that its action was reasonable and would have been taken by any state in similar circumstances and second, that the Committee had failed to indicate precisely how and when detention became arbitrary.

By addressing the issues of appropriateness, proportionality and injustice in rejecting the Committee's findings, Australia impliedly admitted that compliance with article 9(1) required more than mere conformity with domestic law.[25] In particular, Australia seemed to accept that if the domestic law itself were 'arbitrary', it would be a breach of the Covenant. This is important for the next part of the discussion because it was in this context that Australia sought to rely on a considerably stricter construction of lawfulness.

The right to challenge detention

As noted earlier, A's case included the allegation that Australia, while *prima facie* adhering to its obligations, in fact breached article 9(4) of the ICCPR by denying any real chance for A to obtain release from detention through the courts. The Committee found that, after the Migration Amendment Act 1992 (Cth) came into effect, the power of the courts with regard to designated persons (of which A was one) was limited to ascertaining whether an individual did in fact come within the definition. A court could not order such persons to be released.

The Committee made two important findings on this. First, it stressed that the power of judicial review had to include the possibility of ordering release. Second, for detention to be lawful it was not necessarily sufficient that it comply with domestic law. That domestic law itself had to conform to the requirements of article 9(4):

> In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.[26]

The effect was that a court had to be able to order the release of such persons if it considered that appropriate because of non-compliance with article 9(1) (prohibition of unlawful arrest and deprivation of liberty) or indeed

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25 This interpretation is supported by case law under the European Convention on Human Rights. See below n 35.

26 Above n 2 [9.5].

any other provisions of the Covenant. The Committee found a breach because it considered article 9(4), the right to challenge detention, as necessarily including the right of a court to order release from detention. Since Australian courts had no such power with regard to designated persons, of whom A was one, the detention was not lawful. The Committee provided no clear authority or reasoning for this view. While it is the case in international law that a state cannot use its domestic law as a basis to avoid its international obligations,[27] the issue here is far more complex. The Committee again appeared to assume that international law necessarily provided a common standard for assessing lawfulness in a situation where the law appears to rely solely on the standard of the national legal system.

The finding that article 9(4) had been breached was rebutted strongly by Australia as a misinterpretation by the Committee of that provision. Australia insisted that 'lawfulness' referred only to the domestic law of the state concerned and not to international law.[28] Australian law permitted the detention of designated persons, while review of detention in such cases was limited to deciding whether an individual was in fact a designated person. Therefore a limited right of review was in conformity with article 9(4) so long as that was all that was provided for under Australian law. According to this interpretation, the detention could not have been unlawful simply on the ground that review would not have included the possibility of ordering release: review could be confined, as was the case here, merely to establishing that the individual fell within the relevant category so that his or her detention would automatically continue. This reasoning amounted to a very strong assertion of the right to detain, even if there appeared to be real injustice in the exercise of that power. Australia acknowledged as much in its response, stating that: 'There is nothing apparent in the terms of the Covenant that "lawful" was intended to mean "lawful at international law" or "not arbitrary".'[29]

This might suggest that such detention may well be contrary to international law where review does not include the possibility of ordering release although Australia did not concede this. The question remains: is the international obligation to ensure that all detention is lawful to be judged purely by a plethora of national standards of what is lawful (that is, the obligation is merely to detain in accordance with national law, as Australia asserts), or is there some other international standard to which national law must conform? Australia clearly supports the former view (that the international standard is variable according to the national standard) and referred to other provisions in the Covenant to claim this.[30] It also asserted that there was nothing in the *travaux préparatoires* of the

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27 I Brownlie, *Principles of Public International Law* (5th ed, 1998) 35. See also the Vienna Convention on the Law of Treaties 1969, art 27 of which provides, in part: 'A party may not invoke the provisions of its internal law for its failure to perform a treaty.', (23 May 1969), 1155 UNTS 331; 8 ILM 679. This reflects the primacy given in the international sphere to international obligations.

28 Response of the Australian government above n 20 [12].

29 Ibid.

30 Ibid. These included, according to Australia, arts 9(1), 17(2), 18(3) and 22(2).

Covenant or other relevant sources to substantiate the Committee's finding that lawfulness referred to some international standard.

This response rejected the findings of the Committee so vigorously as to be tantamount to challenging the latter's analytical competence. Of course, the fact that Australia maintains that the Committee's findings were based on a misinterpretation of the notion of lawfulness in the ICCPR, and of article 9(4) in particular, does not mean that this was necessarily so. But it does raise the question: why is lawfulness to be assessed in the context of the ICCPR when evaluating the conduct of a state?

Lawfulness: National or International?

What exactly is the standard to be applied in assessing the lawfulness of a state's conduct in the municipal sphere where international law does not provide a standard? Can a state seriously assert a right to pass any legislation it wishes and then maintain that it is lawful so long as it is in accordance with its municipal legal system? To respond to these questions, it is tempting to use the example of apartheid and to suggest that, even though the race laws of South Africa were obviously consistent with the state's legal system at the time and were thus lawful in domestic law, they were consistently found to be 'unlawful' in international law. However, apartheid provides a poor example. Apartheid in particular, and racial discrimination in general, were, and still are, the subject of several international instruments that specifically outlawed certain domestic laws so that where municipal legislation, however internally consistent, is adopted in direct breach of international instruments, such legislation is rendered unlawful in international law. In the case of apartheid and other racially discriminatory legislation, the point of reference for assessing their lawfulness is not the municipal legal system as such but rather the particular international instruments that outlaw the discriminatory practices. For instance, article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination[31] provides that:

> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any person or organizations;
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists...

The International Convention on the Suppression and Punishment of the Crime of Apartheid[32] reinforces these provisions by making apartheid a crime in international law. Under article IV, state parties undertake:

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31 (21 December 1965), 660 UNTS 195.
32 GA Res 3068 (1973).

> To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.

The undertakings and directives in the Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention for the Elimination of all Forms of Racial Discrimination are in sharp contrast to those under the ICCPR discussed earlier, which only require parties to ensure that their conduct is in accordance with (municipal) law. But does it mean that, in the context of the ICCPR, a state can adopt any legislation in municipal law regarding detention, for instance, and argue that its obligations are met if such legislation is in accordance with its legal system?

On the one hand, it seems difficult to accept without reservation that any detention would be lawful so long as it is in conformity with municipal law. The municipal law does not exist in a vacuum. At international law, a state is obliged to ensure that its domestic law does not conflict with its international obligations.[33] On the other hand, as we have noted earlier, it can be argued that, in some instances, the relevant international obligation is no more than to act in conformity with the state's domestic law. In such cases a state meets its international obligations by ensuring the consistency of its conduct with its domestic law requirements.

Where one accepts that the international standard requires no more than consistency with municipal law, it remains arguable that the municipal law standard itself can be a proper object of international scrutiny. Without such scrutiny, the international obligation loses its essence. The difficulty of course is that the Committee has not been able to articulate the international minimum standards that can be used as the basis for such scrutiny. Attempts have been made under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[34] to deal with the issue. In particular, the European Court of Human Rights has, in a consistent line of cases, lifted the national veil to examine the 'lawfulness' of the municipal laws of members states purporting to assess the extent to which they meet their obligations under the ECHR. For instance, in terms substantively similar to the ICCPR provisions, article 5(1) of the ECHR provides that:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure *prescribed by law*.[35]

Article 5(4) further provides that:

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33 Above n 27.

34 (4 November 1950), 213 UNTS 222.

35 Emphasis added. The lawfulness of the procedure must not only be in compliance with domestic law; there must also be no abuse of authority: *Winterwerp v The Netherlands* (1979) 2 EHRR 387; *Bozano v France* (1987) 9 EHRR 927; J Murdoch, 'Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence' (1993) 42 *International and Comparative Law Quarterly* 494, 500; D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995) 105-107.

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the *lawfulness* of his detention shall be decided speedily by a court and his release ordered if the detention is not *lawful.* (emphasis added)

In *Van Droogenbroeck v Belgium,* the Court examined the issue of lawfulness in the context of the Convention:

> for the purposes of Article 5 par.4, the 'lawfulness' of an 'arrest or detention' has to be determined in the light not only of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 par.1.[36]

In *Johnson v United Kingdom,*[37] the Court examined the lawfulness of the detention of the applicant under mental health legislation. In analysing the consistency of the Act with the ECHR, the Court conceded that the competence of United Kingdom tribunals to order the conditional, rather than absolute, discharge of a person no longer suffering from mental illness without specifying a time-limit for the finalisation of the appropriate arrangements, and a tribunal's power to defer a conditional discharge, are important discretionary powers, as affirmed by the House of Lords.[38] But the Court then observed further:

> that the lawfulness of the applicant's continued detention under domestic law is not in itself decisive. It must also be established that his detention ... was in conformity with the purpose of Article 5(1) of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion ...[39]

In *Assenov and Others v Bulgaria* the Court made similar concessions regarding the relationship between municipal law of the member states and the ECHR obligations:

> The Court recalls that the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5(1) essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof; but that they require in addition that any deprivation of liberty should be in conformity with the purpose of Article 5, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.[40]

There are two significant elements in the approach of the European Court to the issue of lawfulness and the relationship between municipal and international obligations under the ECHR. First, the Court concedes the obvious point that 'lawful' and 'in accordance with a procedure prescribed by law' as expressed in article 5(1) of the ECHR and article 9 of the ICCPR essentially refer back to municipal law. Second, the Court relates the substance of the municipal law to the purposes of the relevant provision of the Convention.

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36 *Van Droogenbroeck v Belgium* (1982) 4 EHRR 433; see also *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666.

37 Judgment of 27 October 1997, Reports, 1997-VII 2391.

38 Ibid [59].

39 Ibid [60]. See also *Wassink v the Netherlands*, judgment of 27 September 1990, ECHR Ser A 185-A.

40 Judgment of 28 October 1998, Reports 1998-VIII, 3264 [139].

As noted earlier, without an appropriate reference to the purposes of a particular treaty and relevant international standards, national laws in pursuance of the treaty obligations could be meaningless. It is therefore the case that even where any international instrument refers the questions of lawfulness to national law, the ultimate criterion for assessing the lawfulness of the conduct of the state is compatibility with the object and purpose of the instrument in question. In this sense, the logic is clear and consistent with the general principle of international law that where a party to a treaty adopts a posture or conduct incompatible with the object and purpose of the treaty, it effectively repudiates its obligations thereunder.

The interpretation of 'arbitrariness' in the context of the ICCPR and the variety of instruments in which it appears is far more complex.[41] In its plain meaning, 'arbitrary' detention would seem to imply detention without authority of law. In this context, 'arbitrariness' relates closely to 'lawfulness'. However, would this mean that an arrest or detention is not arbitrary simply because it is authorised by law? Conduct that is 'lawful' in the sense that it is authorised by the municipal law could nonetheless be arbitrary and in breach of article 9(1) of the ICCPR if considered in the context of the purposes of the Covenant. What is 'unlawful' or 'arbitrary' relates to law enforcement as much as it does to the legislative process and, indeed, the operation of the legal system as a whole. Thus, whether the conduct of the state is consistent with article 9(1), must be judged not only in terms of the secondary element of conformity with the municipal law that permits the detention, but the primary element of whether the law itself is justifiable in permitting such detention.

Whether a particular piece of legislation is justified also by permitting detention must be judged in the context of the purposes of the ICCPR or the relevant instrument. Several human rights tribunals and commissions have considered the notion of arbitrariness. For instance, the Inter-American Commission on Human Rights identified three forms of arbitrary detention: extra-legal detention or detention which violates the law;[42] indefinite detention

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41 See, for instance, art 9 of the Universal Declaration of Human Rights, GA Res 217A (1948); art 6 of the African Charter on Human and People's Rights, reprinted in (1982) 21 ILM 58; art XXV of the American Declaration of the Rights and Duties of Man, OAS Res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82 doc 6 rev 1 at 17 (1992); arts 7(2) and 7(3) of the American Convention on Human Rights, OAS Treaty Series No 36, (22 November 1969), 1144 UNTS 123, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82 doc 6 rev 1, 25 (1992); art 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, above n 34; art 55(1)(d) of the Statute of the International Criminal Court, Rome, 1998, reprinted in (1998) 37 ILM 999.

42 This included detention ordered by the executive or detention by paramilitary groups with the consent or acquiescence of the security forces. *Inter-American Commission, Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/V/II.49, doc 19, 140 (1980).

ordered by the executive;[43] and detention which, although carried out in conformity with the law, constitutes an abuse of power.[44] Similarly, the African Commission has held that mass arrests and detentions of office workers in Malawi on suspicion that they had used office equipment such as fax machines and photocopiers for subversive ends, were arbitrary and in violation of article 6 of the African Charter on Human and People's Rights, which prohibits arbitrary detention.[45] In 1997, the Commission also held that the detention of a person beyond the expiry of the sentence constitutes a violation of article 6 of the African Charter.[46] The Human Rights Committee has also taken the view that the term 'arbitrary' in article 9(1) of the ICCPR not only means detention which is 'against the law', but also is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[47]

Even though several human rights instruments use the term 'arbitrary' in defining the limits of permissible state conduct within municipal law, the statements from human rights tribunals would suggest that there is no concise international articulation of the standard that the term requires. The problem arises because of the inherent difficulties in relying on undefined municipal law standards to fulfil international law obligations. Terms such as 'appropriateness', 'injustice', 'lack of predictability' or 'abuse of power' are variable, depend on the circumstances of each state and hardly provide any objective basis for assessing state conduct.

The 1993 United Nations Working Group on Arbitrary Detention provides a relatively better insight into the notion of arbitrariness.[48] Based on specific United Nations human rights instruments and declarations including the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1988, the Working Group considers three main types of cases:

- cases in which the deprivation of freedom is arbitrary, as it manifestly cannot be linked to any legal basis (such as continued detention beyond the execution of the sentence or despite an amnesty act); or

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43 Annual Report of the Inter-American Commission, 1980-1981, OEA/Ser.L/V/II.49, doc 9 rev 1, 117 (1981) and Annual Report of the Inter-American Commission, 1981-1982, OEA/Ser.L/V/II.57 (1982).

44 An army general was subjected to 16 preliminary inquiries and eight criminal actions over seven years. All the actions were closed or dismissed, in what the Commission described as 'an unreasonable succession of cases, which taken together constitute an "abuse of power"'. Inter-American Commission, Report No 13/96, Case 11.430, Mexico, 15 October 1996.

45 *Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v Malawi*, (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev I.

46 *Anette Pagnoule (on behalf of Abdoulaye Mazou) v Cameroon*, (39/90), 10th Annual Report of the African Commission, 1996-1997, ACHPR/RPT/10th.

47 *Van Alphen v The Netherlands*, above n 13.

48 Report: Working Group on Arbitrary Detention, UN Doc E/CN 4/1993/24, 12 January 1993.

- cases of deprivation of freedom when the facts giving rise to the prosecution or conviction concern the exercise of the rights and freedoms protected by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR; or
- cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.

Even though the Working Group's approach does not purport to define what constitutes 'arbitrary detention', it is preferable in that it delimits arbitrariness by reference to the legality of detention within the state; state conduct in relation to the specific provisions of human rights instruments; and the principles of fair trial.

While cases in category one relate to 'extra-legal detention', it is to be noted that category two and three cases identified for consideration by the Working Group relate more to state conduct consistent with the object and purposes of the instruments listed. In the absence of any international standards, the best measure for assessing state conduct would seem to be the object and purpose of the instrument in respect of which the state has assumed specific obligations. This brings us back to the case of *A v Australia* and the tensions between Australian municipal law and the ICCPR obligations. There clearly are difficulties with Australia's assertion of how to evaluate the lawfulness of detention of persons like A. Australia's assertion of an exclusively national standard (while understandable) does not fit with the arguments outlined above. Even where international law seems to rely on municipal law and, for that matter, national standards, to meet an international obligation, the standard for assessing whether the state has in fact met its obligations remains in the domain of international law. The standard for assessing the state's conduct is not to be calculated by reference only to what it does within its own jurisdiction; to do so would render the essence of its international obligations meaningless.

Conclusion

The discussion of what is lawful in the human rights context and the standard by which it must be assessed exposes some of the difficulties in the complex relationship between international and domestic law. The situation demonstrates that the two can never be entirely separated despite assertions to the contrary. By their very nature the international obligations of states under human rights instruments depend in large part on municipal law for implementation. The lack of uniformity in municipal legal systems and the relevant implementation processes necessarily lead to variations in the conduct of states with predictable stresses on the relationship between municipal law and international law.

The tension between the two is exacerbated where there are no clear standards for assessing the lawfulness of state conduct in instances where international law seeks to rely on municipal law to meet states' human rights obligations. The reality is that human rights are, and will remain, a legitimate

subject of international concern well-insulated from any pleas of domestic jurisdiction. In an era when matters of democratic governance and general issues of human rights have become very much a part of the global agenda, it is difficult to maintain the argument, as Australia did in *A v Australia*, that the municipal law is in itself sufficient to provide the standard to assess the lawfulness of state conduct where international law seeks to rely on municipal law. It may be possible to make compromises between strong international standards and oversight, on the one hand, and national sovereignty and responsibility, on the other hand. Nevertheless, the point still remains that international obligations, particularly in the domain of human rights, if they are to be implemented in municipal law, would have little meaning if the eventual standard for compliance is the municipal law regime alone.

In any case, in the modern era, the traditional paradigms of sovereignty and related notions of non-interference, which may well have promoted the persistent use of domestic jurisdiction as a possible justification for reliance on municipal law as a standard in itself, are waning. Some states may not like this but there is little that they can do about it because the dynamic has changed. States increasingly have to accept the independent validity of fundamental legal principles. Indeed, in some cases to try to do otherwise might seem, shall we say, unlawful?