# Australia's Human Rights Obligations and Australian Defence Force Operations

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It is now well accepted within the Defence community that Australia's obligations under the law of armed conflict affect the planning and execution of Australian Defence Force (ADF) operations. However, the effect which Australia's obligations under international human rights law may also have upon the conduct of operations, is not often acknowledged. The obligations, which Australia has voluntarily accepted,[1] under various human rights conventions, form part of what is termed within the military as 'operations law'. This term encompasses all law which affects the planning and execution of ADF operations.

The relationship between the law of armed conflict and international human rights law has been the subject of much debate amongst academics.[2] There is general agreement that these two streams of international law have developed independently. The regulation of warfare can be traced back to medieval times when, it has been argued, its basis was more in regulating the financial gains of war than in the idea of humanity.[3] The law of armed conflict as we know it, is usually traced back to the latter half of the nineteenth century.[4] The most significant development in the law of armed conflict was the conclu-

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1 There may also be human rights norms which are binding upon Australia as customary international law. This Article discusses only those rules which are indisputably binding upon Australia, that is, the Conventions which Australia has voluntarily ratified.

2 See, for example, G Draper, 'Humanitarian Law and Human Rights' in *Proceedings of the 1979 Cape Town Conference on Human Rights* p 193 and S McBride, 'The Inter-Relationship Between the Humanitarian Laws and the Law of Human Rights' in *Proceedings of the International Conference on Humanitarian Law, San Remo 1970* p 31.

3 See Draper, note 2 above, at p 199.

4 After witnessing the aftermath of the battle of Solferino in 1859, Henri Dunant founded the organisation which we now know as the International Committee of the Red Cross (ICRC). The ICRC has been the driving force behind the codification and development of the law of armed conflict during this century.

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sion in 1949 of the four Geneva Conventions. These Conventions are now so well accepted by states that they are considered to constitute customary international law.[5]

Whilst it has been argued that the concept of human rights can be traced back to the French Revolution, the development of an international law of human rights cannot be said to have truly begun until after World War II. The development of this area of the law was prompted by the atrocities which occurred during that conflict.[6] The first explicit recognition in international law that an individual had certain fundamental rights and freedoms was in the Charter of The United Nations. Article 1 of the Charter sets out as one of the purposes of the United Nations, co-operation 'in promoting respect for human rights and fundamental freedoms for all'. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights[7] which gave some content to the term 'human rights' contained in the Charter. While the Declaration was not drafted in terms of a convention to which states may become party, its adoption prompted the formulation of several conventions which *are* formally binding, in particular the International Covenant on Civil and Political Rights 1966 (ICCPR).[8]

Despite their separate development, some academics argue that the law of armed conflict and international human rights law have now become fused. Others argue that this is more a matter of them becoming confused.[9] The relevance of the debate to this discussion lies simply in the question of whether the law of armed conflict and international human rights law apply in mutually exclusive circumstances, ie whether in circumstances where the law of armed conflict applies, international human rights law no longer applies.

5 If a convention reflects customary international law it will bind all States as customary law, regardless of whether they become party to the actual convention.

6 See H Charlesworth, 'Human Rights' in H Reicher (ed), *Australian International Law Cases and Materials* (LBC, 1995) p 614.

7 G.A. Res. 217A(III), UNGAOR, 3rd Sess., Part 1, Resolutions, at 71.

8 Other conventions include The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), The Genocide Convention 1948 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

9 Draper argues, '[T]he two regimes are not only distinct but are diametrically opposed. The confusion between the two was a heresy of the UN, brought about by political forces which achieved their purpose by the inclusion of struggles for self-determination within the law applicable in armed conflicts'. Draper, note 2 above, at p 205.

The law of armed conflict does not apply until an armed conflict has commenced.[10] But does the law of armed conflict in that event replace international human rights law? There is a growing body of opinion which supports the contention that international human rights law continues to apply during armed conflict. The United Nations has, on a number of occasions, affirmed that international human rights law continues to apply in times of armed conflict. UN General Assembly Resolution 3675(XXV) of 9 December 1970 states that the first of the fundamental principles concerning the protection of the civilian population in a time of armed conflict was that '[F]undamental Human Rights as accepted in international law and established in international instruments remain manifestly applicable in an armed conflict'. Again, in Resolution 2852 (XXVI) of 20 December 1971 the General Assembly declared itself 'desirous of securing the effective application of all existing rules relative to human rights in time of armed conflict'.

The most explicit acknowledgment of the continued application of international human rights law can be found in the recent Advisory Opinion of the International Court of Justice on the legality of nuclear weapons. In this Opinion, the Court stated that 'the protection of the International Covenant of Civil and Political Rights does not cease in time of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency'.[11]

There is, therefore, a strong body of opinion to suggest that the existence of an armed conflict does *not* absolve States of their responsibilities under international human rights law.[12] In a situation of armed conflict, both the law of armed conflict and international human rights law may apply. It may seem absurd to suggest that the

10 There is much debate over the circumstances in which the law of armed conflict will apply. The majority of the Geneva Conventions (1949) apply only to an international armed conflict; only common Article 3 may apply in circumstances other than an international armed conflict. The Additional Protocols to the Geneva Conventions were intended to apply in some situations of non-international armed conflict. In the post-Charter world, where a declaration of war is uncommon, it is often difficult to determine when an armed conflict has commenced.

11 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) 35 ILM 809 at 25.

12 An argument could be made that under the principle of *rebus sic stantibus*, human rights treaties do not apply during an armed conflict. However, it would be difficult to sustain an argument that armed conflict is unforseeable and this also seems to go against the General Assembly Resolutions.

right not to be arbitrarily deprived of one's life still applies during an armed conflict, but the *Nuclear Weapons Opinion* states clearly that this is the case. The law applied to determine what is in fact an arbitrary deprivation of life may, however, alter during an armed conflict.[13]

Australia's human rights obligations cover such diverse topics as the right not to be subject to arbitrary arrest or detention,[14] the right of freedom of movement,[15] the right not to be expelled from a country,[16] the right to be free from arbitrary or unlawful interference[17] and the right to freedom of expression.[18] While it is not suggested that any ADF operations are, or have been, undertaken in breach of any of these provisions, they are certainly obligations of which military personnel must be mindful.

There are also many situations in which the ADF may deploy which would not constitute an international armed conflict such that the law of armed conflict applies to its full extent. These operations may include peace-keeping, martime interception (such as in the Persian Gulf), drought assistance etc. While the law of armed conflict does not apply to Australian forces in these operations, international human rights law certainly does. Australia's human rights obligations therefore need to be seriously considered when planning or undertaking any military operation.

## Australia's International Obligations with Regard to Human Rights

Australia has not been reluctant to formally bind itself to conventions concerning the law of armed conflict. Australia became a party to most of the Hague Conventions in 1909. The four Geneva Conventions were ratified by Australia in 1959 and the Additional Protocols were ratified in 1991.

Up until the late 1970s, however, Australia's attitude towards ratification of human rights instruments was more hesitant. This was due to a reluctance by the Federal Government to adopt international ob-

13 The Advisory Opinion, note 11 above, at 25 states that 'The test of what is an arbitrary deprivation of life however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.

14 International Covenent on Civil and Political Rights (ICCPR) Article 9.

15 ICCPR Article 12.

16 ICCPR Article 13.

17 ICCPR Article 17.

18 ICCPR Article 19.

ligations before it could bring Australian legislation into line. At that time the prevailing view was that the implementation of Australia's international obligations through domestic legislation was complicated by the traditional division of Commonwealth and State powers. De Stoop, writing in the early 1970s, states: 'While the executive is competent to negotiate international agreements and undertake international obligations on behalf of Australia on a wide variety of subjects, the federal or a State Parliament may prevent Australia from fulfilling its international obligations, insofar as action within Australia is required'.[19]

In 1972, the Whitlam Government adopted a radical change of policy in this regard. This Government indicated early in its term of office that it would not wait for the states to bring their laws into line before ratifying international treaties. The Human Rights Bill and Racial Discrimination Bill, aimed at implementing the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination respectively, were introduced in November 1973, with a view to passing legislation under s51(xxix) of the Constitution (the external affairs power).[20] Such legislation was eventually passed in the form of the *Human Rights Commission Act* 1981 (which was replaced by the *Human Rights and Equal Opportunity Act* 1986), the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984, the *Privacy Act* 1988 and the *Disability Discrimination Act* 1992. As a result of this change in attitude, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was ratified on 30 September 1975 and the International Covenant on Civil and Political Rights (ICCPR) was ratified by the Fraser government on 13 August 1980.[21]

In September 1991, Australia accepted the First Optional Protocol to the ICCPR. This allows an individual, who is under Australian juris-

[19] D de Stoop, 'Australia's Approach to International Treaties on Human Rights' in (1970-1973) 5 *Australian Yearbook of International Law* p 27. See also A C Castles, 'The International Protection of Human Rights' [1968-1969] *Australian Yearbook of International Law* p 198.

[20] In 1983 the majority judgement of the High Court in the *The Commonwealth v Tasmania* (1983) 158 CLR 1 (The Tasmanian Dams Case) supported this more expansive view of the external affairs power.

[21] Australia's ratification of the ICCPR was accompanied by a declaration which stated that implementation of the Covenant was dependent upon the Australian states. This declaration was somewhat controversial, see G Triggs, 'Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?' (1982) 31 *ICLQ* 278. In 1984 Australia's declaration was altered however a number of reservations and a declaration still remain in force (see Charlesworth, note 6 above, at p 885).

diction, to communicate directly with the Human Rights Committee with respect to any alleged breach of the ICCPR by the Australian Government.[22] In January 1993, Australia made a declaration under Article 41 of the ICCPR that it recognised the competence of the Committee to receive and consider communications from other States party claiming that Australia is not fulfilling its obligations under the Convention.[23] Once received, a communication is examined by the Committee, the Committee's views are forwarded to both the State and the individual involved, and are published in the Committee's annual report to the General Assembly. Whilst the Committee's views are not binding upon the State concerned, they can prove politically and diplomatically embarrassing.

Article 4 of the ICCPR allows derogations from certain of the Convention's provisions in a 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Such a derogation must not discriminate on the basis of race, colour, sex, language or social origin. Certain fundamental provisions of the Convention may not be derogated from in any circumstances; these are: the right to life (Article 6); the prohibition on torture (Article 7); the prohibition on slavery (Article 8); the prohibition on imprisonment for inability to meet a contractual obligation (Article 11); the prohibition on retrospective punishment (Article 15) and recognition before the law (Article 16).

A state wishing to avail itself of the right to derogate from its obligations under the Convention must communicate its intention to the UN Secretary-General. This communication must set out the circumstances which necessitate a derogation and the specific domestic laws which constitute the derogation. Twenty-two States have communicated their intent to derogate since the ICCPR entered into

[22] The first communication to the Human Rights Committee under the Optional Protocol argued that the Tasmanian Criminal Code, in criminalising homosexuality, was in breach of Articles 2(1), 17 and 26 of the ICCPR (Communication No 488/1992 UN Doc. CCPR/C/50/D/488/1992, 4 April 1994). The opinion of the Committee was that the Tasmanian law was in violation of Articles 17(1) and 2(1) of the ICCPR (Views of the Human Rights Committee under Article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights - 50th Session).

[23] Some other human rights instruments contain similar provisions. In 1993, Australia also made a declaration under Article 21 of the Convention against Torture, allowing individuals to communicate directly with the Committee Against Torture. The ICESCR however, relies only upon compulsory reporting mechanisms.

force in 1976.[24] Communication to the Secretary General does not, however, instigate a consideration of the validity of a derogation. It is not until a communication is received by the Human Rights Committee that the validity of the derogation will be considered.[25]

In considering the validity of a derogation, the first issue is the existence of a 'public emergency'. Article 4 of the ICCPR was modelled upon Article 15 of the European Convention on Human Rights[26] and both Articles refer to the requirement of a 'public emergency'. The European Commission of Human Rights has considered what type of circumstances would constitute a 'public emergency' on a number of occasions. In the case of *Lawless*, the Commission undertook a thorough analysis of the conditions prevailing in Ireland before concluding that a 'public emergency' did in fact exist.[27] In the *Greek* case however, the Commission considered that there was not such an emergency.[28] In the latter case, the Commission stated that the following elements were required: (i) an actual or imminent emergency; (ii) involving the whole nation; (iii) threatening the continuance of the organised life of the community, and (iv) that the normal measures or restrictions permitted by the Convention for the maintenance of public health and safety were inadequate.

The requirements for a 'public emergency' appear to be quite strict. While a serious domestic crisis may meet the requirements, it is unclear whether a crisis which is geographically distant from Australia would qualify. Many of the contingencies planned for by the ADF

24 For the full text of submitted derogations see UN Doc. ST/LEG/SER.E/8 p 147.

25 For a comprehensive discussion regarding the validity of derogations see R Higgins, 'Derogations under Human Rights Treaties' (1976-77) 48 *BYIL* 281.

26 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222.

27 *Lawless v Ireland* 1 Eur HR Rep 1 (1960). Lawless contended that Part II of the *Offences Against the State (Amendment) Act* 1940, violated the provisions of the European Convention with respect to detention and arrest. The Irish Government contended that the extraordinary measures introduced by the Act, allowing detention without trial in some circumstances, were necessary to deal with the terrorist threat which existed in Ireland at that time. The Court considered that the words 'public emergency' 'refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed' at 56.

28 *Denmark, Norway, Sweden, and Netherlands v Greece* (Report, Nov 5 1969). In 1967 the military government of Greece submitted a derogation from its obligations under the European Convention 'in view of internal dangers which threaten public order and the security of the State'. The Commission considered in detail the evidence put forward by Greece regarding the conditions in that country but ultimately decided that these did not constitute a 'public emergency'.

would not meet the criteria of a 'public emergency' established in the *Greek* case. The ADF cannot therefore afford to rely on any exemptions or qualifications of Australia's existing human rights obligations in planning operations.

## What impact will the obligations have upon ADF planning?

In two recent cases, Defence Forces have been required to defend their actions before international human rights bodies. In *McCann and Others v United Kingdom*, relatives of suspected IRA terrorists who were killed during a special forces operation, brought a complaint before the European Court of Human Rights.[29] The relatives alleged a breach of Article 2 of the European Convention (the right to life) on behalf of the UK. The Court found that in planning the operation to arrest the alleged terrorists, the military had relied upon assumptions and faulty information. The Court also found that in the training and briefing of military personnel there was insufficent attention given to a response less than a recourse to lethal force. The Court concluded that the United Kingdom was in violation of Article 2 of the European Convention in relation to that operation.

In 1997 the European Commission considered a case brought by relatives of indiduals killed as a result of actions taken by Turkish security forces against Kurdish groups. The Commission found a violation of Article 2 of the European Convention on behalf of Turkey because the security forces did not take sufficient steps in their operation to avoid civilian casualties.

As can be seen, human rights obligations with respect to the right to life must be considered by Defence Forces in planning an operation. Article 6 of the ICCPR is a non-derogable provision which states that 'no one shall be arbitrarily deprived of his life'. The ICJ, in its recent Opinion on the legality of nuclear weapons, had cause to consider whether the use of nuclear weapons in a conflict would necessarily breach this provision of the ICCPR. The Court stated that, while the provisions of the ICCPR continue to apply during armed conflict, the question of what constitutes an arbitrary deprivation of life must be judged according to the law of armed conflict.[30] ADF members, in

[29] *McCann and Others v United Kingdom* (European Court of Human Rights 17/1994/464/545).

[30] The Opinion goes on to state: 'the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance'. Note 11 above at 95.

taking action against legitimate combatants in an armed conflict would not necessarily be in breach of Article 6.

As discussed earlier however, many operations undertaken by the ADF do not fall within the traditional definition of international armed conflict such that the law of armed conflict applies to its full extent. It is these types of operations which have become the subject of complaints before European human rights bodies. The ADF therefore needs to be very concious of its human rights obligations and to take measures to protect rights guaranteed by international human rights law when planning and undertaking any operation.

While Article 6 is obviously of concern to the ADF, there are several other provisions of the ICCPR which may also impact upon ADF operations. Article 9 provides that 'No one shall be subject to arbitrary arrest or detention'. The Article goes on to provide: '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'. It is forseeable that it may be difficult to accord these guarantees with regard to detention during an ADF operation. If, for example a unit is deployed into an isolated area and a civilian attempts to steal military equipment, there may not be law enforcement officials or judicial officials in the vicinity (or in fact in existence, as in Somalia). It may be impossible to accord such an individual their rights 'without delay'.[31]

Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall have the right to liberty of movement. This provision precludes the internment of aliens or any restriction of movement placed on a population.[32] The Article does however contain what is commonly referred to as a 'claw-back provision' (Article 12(3)). This is an exception for laws necessary to protect national security and public order. The situations in which, and extent to which, the rights contained in the Article may be restricted is unclear. There are a variety of reasons why the military may wish to control the movements of civilians during an operation. These range from con-

31 The Human Rights Committee has indicated that 'promptly' (the term used in the equivalent provision in the European Convention) means that 'delays must not exceed a few days'. *HRC Report*, UNGAOR, 37th Sess., Supp. 40, at 95 (1982).

32 See Francois Hampson who discusses the possibility that the detention of aliens by the British Government during the Gulf War was in breach of the European Convention in 'The Geneva Conventions and the Detention of Civilians and Alleged Prisoners of War' [1991] *Public Law* 507.

trolling enemy aliens to prevent intelligence gathering and sabotage, to protecting people by preventing them moving into areas of hostilities. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949 deals in some detail (Articles 79-135) with the question of internment of civilians during an international armed conflict. Any internment which takes place during an international armed conflict would be judged according to these provisions. The question of whether limitations may be placed on movements in situations short of international armed conflict is left open.

Article 19 of the ICCPR provides 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers...'. The modern military has become increasingly reliant on the media to build and maintain support for its operations. Conversely, the media can also adversely affect a country's fighting capability by undermining public support. To some extent the media has become a weapon of warfare with all participants in a conflict attempting to use it for their own purposes. In the conflict in Yugoslavia there have been many accusations of participants broadcasting propaganda and misinformation. In these circumstances it may be desirable that some controls be exercised over what may be broadcast or published. Whether such controls would be considered to infringe Article 19 is unclear.

## Concluding Comments

Australia's obligations under international human rights conventions are applicable at all times, even during armed conflict. These obligations must therefore be considered when planning ADF operations. Article 4 of the ICCPR allows States to derogate from provisions (other than certain fundamental Articles) in times of 'public emergency'. In situations which can be classified as a 'public emergency', the provisions of the ICCPR may be derogated from to the extent necessary. Any such derogation must be communicated to the UN Secretary-General.

In situations which do not meet the requirements of a 'public emergency' (and this will be the majority of ADF operations) the ADF must be aware of its human rights obligations and work within these parameters. In undertaking ADF operations Australia seeks to uphold international law; at the same time the ADF must ensure that the manner in which those operations are undertaken complies with international law.