

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 18, 2015
CORRESPONDENTS' REPORTS

AUSTRALIA¹

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Military Operations – Participation in Armed Conflicts and Australian Defence Force Deployments

The Australian Defence Force ('ADF') was deployed in a number of situations around the world, most significantly in Iraq and Afghanistan.

The beginning of 2015 marked a new phase in Australia's deployment in Afghanistan. Operation HIGHROAD replaced Operation SLIPPER, which had been Australia's contribution to the ISAF mission in Afghanistan.² Operation HIGHROAD is ongoing, involves 400 Australian personnel, and is a train, advise and assist mission, including embed position with NATO, mentoring and advisory roles, force protection and logistical support.³

Australia has made a significant contribution to military intervention against ISIS in Iraq and Syria, codenamed Operation OKRA. The operation began on 31 August 2014, and as of May 2015, 600 ADF members were deployed in Iraq, including 400 personnel assigned to the Air Task Group and 200 assigned to the Special Operations Task Group.⁴ The Australian contribution to Operation OKRA was expanded to about 780 personnel in September 2015.⁵ Airstrikes were also extended to Syria.⁶ In an Article 51 letter to the Security Council, Australia explained that the aerial bombing campaign against ISIS targets in Syria was pursuant to the collective self-defence of Iraq.⁷ The letter stated that the campaign was legal, despite occurring without the consent of the Syrian Government, because Syria was 'unwilling or unable to prevent attacks originating from its territory' against Iraqi territory.⁸ The craft deployed include F/A-18A Hornets, an E-7A Wedgetail and a KC-30A air-to-air refuelling station.⁹ There are some media reports of missions being called off due to the risk

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² Defence News and Media, *Australia supports new mission in Afghanistan*, (31 December 2014) Department of Defence <<http://news.defence.gov.au/2014/12/31/australia-supports-new-mission-in-afghanistan/>>.

³ *Ibid.*

⁴ A Greene, 'Budget 2015: Defence to receive \$750 million boost to extend and expand overseas operations' *ABC News Online*, 12 May 2015.

⁵ 'Explainer: Who is bombing Islamic State militants in Syria?' *ABC News Online*, 7 December 2015; Alexandra Fisher, 'Airstrikes against Islamic State in Syria, Iraq aborted over fear of civilian deaths, RAAF pilot says' *ABC News Online*, 13 December 2015.

⁶ P Coorey, 'Australia to take 12,000 refugees, boost aid and bomb Syria', *Australian Financial Review*, 10 September 2015.

⁷ *Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council*, UN Doc S/2015/693 (9 September 2015).

⁸ *Ibid.*

⁹ 'Explainer: Who is bombing Islamic State militants in Syria?' *ABC News Online*, 7 December 2015.

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of civilian casualties, or the selection of warheads employed against a target being altered mid-mission to reduce the risk of civilian casualties.¹⁰

The third significant overseas deployment is Operation MANITOU, which is the Royal Australian Navy's contribution to multinational Combined Maritime Forces to promote maritime security in the Middle East. A Major Fleet Unit, the Adelaide-Class Guided Missile Frigate, is deployed on a six month rotation.¹¹ This is a long-range escort vessel that is capable of air defence, surface and undersea warfare, surveillance, reconnaissance and interdiction.¹² 241 personnel are deployed on the Operation.¹³

There were also smaller deployments contributing to international deployments, including 12 personnel with the UN Truce Supervision Organisation in Jerusalem,¹⁴ 24 personnel with the Multinational Force and Observers in the Sinai¹⁵ and 25 personnel with the United Nations' Mission in South Sudan.¹⁶

Treaties – Australia-United States Force Posture Agreement

- *The Force Posture Agreement between the Government of Australia and the Government of the United States of America, Australia-United States of America, signed 12 August 2014, [2014] ATNIF 24 (entered into force 31 March 2015).*

This agreement, which was signed in August 2014, came into force at the end of March 2015. It established the legal framework for the deployment of US Marines and Airmen stationed in Darwin and also allowed more generally for increased access for American military personnel onto Australian bases.¹⁷ Article II(4) of the Agreement provides that the activities the US Forces may conduct include security cooperation exercises, joint and combined training activities, humanitarian assistance, and any other activities that the parties mutually determine.¹⁸

It is expected that a full contingent of 2,500 Marines will be stationed in Darwin on a rotational basis by 2018, allowing for trilateral military exercises with Indonesia or China.¹⁹ Importantly, the agreement allows for new alliance defence initiatives, possibly including increasing Australia's involvement in ballistic missile defence.²⁰ The agreement also provides

¹⁰ A Fisher, 'Airstrikes against Islamic State in Syria, Iraq aborted over fear of civilian deaths, RAAF pilot says' *ABC News Online*, 13 December 2015.

¹¹ Global Operations, *Operation Manitou*, Department of Defence, <<http://defence.gov.au/Operations/OpManitou/>>.

¹² Navy Today: Operations, *Operation MANITOU*, Royal Australian Navy, <<http://www.navy.gov.au/operations-and-exercises/operation-manitou>>.

¹³ Global Operations, *Operational Numbers*, Department of Defence, <<http://defence.gov.au/Operations/>>.

¹⁴ Global Operations, Middle East, *Operation Paladin*, Department of Defence <<http://www.defence.gov.au/Operations/MiddleEast/>>.

¹⁵ Global Operations, Middle East, *Operation Mazurka*, Department of Defence <<http://www.defence.gov.au/Operations/MiddleEast/>>.

¹⁶ Global Operations, Middle East, *Operation Aslan*, Department of Defence <<http://www.defence.gov.au/Operations/MiddleEast/>>.

¹⁷ ABC News 'AUSMIN talks set to take steps towards even closer military alliance' *AM with Michael Brissenden*, 12 August 2014 (Lexi Metherell). Available at <<http://www.abc.net.au/am/content/2014/s4065338.htm>>.

¹⁸ *The Force Posture Agreement between the Government of Australia and the Government of the United States of America*, Australia-United States of America, signed 12 August 2014, [2014] ATNIF 24 (entered into force 31 March 2015).

¹⁹ J Brown, *Australia-US defence deal: What it means* (13 June 2014) *The Interpreter*, <<http://www.lowyinterpreter.org/post/2014/06/13/Australia-US-defence-deal-What-it-means.aspx>>.

²⁰ *Ibid.*

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for an increase in the number of US Air Force long-range bombers, transport aircraft, and air-to-air refuelers operating from Royal Australian Air Force bases in the north of Australia.²¹

Foreign Affairs and Security – Comprehensive Strategic Partnership with Singapore

On 29 June 2015, Australia and Singapore signed a comprehensive strategic partnership ('CSP') for increased defence and security cooperation.²² It was the first CSP that Singapore has agreed with another country, and it was reported that the new partnership will 'foster cooperation across the broad areas of foreign affairs, defence and security, as well as people-to-people links.'²³ Most significantly from a strategic perspective, it will strengthen what is arguably Australia's deepest defence link in South East Asia²⁴ by increasing defence engagement with a new cooperation agreement to be established by July 2016.²⁵ It also appears there will be increased Singapore Armed Forces army and air force training in Australia.²⁶ Other agreements were concluded at the same time, including a memorandum of understanding on counter-terrorism, as well as separate agreements on increased cooperation against money-laundering and transnational crime.²⁷

Cases – Criminalising participation in foreign conflicts

☛ *Alqudsi v Commonwealth of Australia* [2015] NSWCA 351

The Court of Appeal of the Supreme Court of New South Wales upheld the constitutional validity of parts of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ('the Act') that criminalised acts preparatory to entry into a foreign state with intent to engage in a hostile activity. The central legal question the Court had to resolve was whether the external affairs power in the Constitution supported the relevant sections of the Act. The external affairs power extends to legislation with respect to matters geographically external to Australia, and in respect to Australia's political relations with other countries.²⁸ For his appeal to be successful, Alqudsi would have had to show that the offences were not connected to either matters geographically external to Australia or affecting Australia's relations with foreign states.

Alqudsi had been charged with a number of offences under the Act connected to his alleged involvement in helping people enter Syria to engage in armed hostilities.²⁹ More specifically, it was alleged that he helped orchestrate the travel of a number of young men to Syria by arranging their movements in Turkey, and helping them decide where to stay and how they would transit into Syria.³⁰ Section 6 of the Act made it an offence for an Australian

²¹ Ibid.

²² 'Australia-Singapore CSP: Tony Abbott, Lee Hsien Loong sign agreement formalising defence, economic ties', *ABC News Online*, 29 June 2015.

²³ J Fang, 'Pact takes S'pore and Australia ties to new level' *Today* (30 June 2015), <<http://www.todayonline.com/singapore/singapore-signs-first-ever-comprehensive-strategic-partnership-australia>>.

²⁴ E Graham, 'Canberra's Singapore swing', *The Interpreter* (30 June 2015),

<<http://www.lowyinterpreter.org/post/2015/06/30/Canberras-Singapore-swing.aspx>>.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ *Alqudsi v Commonwealth of Australia* [2015] NSWCA 351, [89] (per Leeming JA).

²⁹ Ibid [1].

³⁰ R Olding, 'Intercepted calls of Hamdi Alqudsi show secret travel plans to Syria', *Sydney Morning Herald*, 29 June 2016.

citizen or resident to enter a foreign state with the intent to engage in hostile activity in that foreign state.³¹ The Act defined 'engaging in hostile activity' as doing an act with the intention of a series of objectives (whether or not the objective was actually achieved). These objectives included overthrowing by force or violence the foreign state; engaging in armed hostilities; causing 'by force of violence the public in the foreign state to be in fear of suffering death or personal injury'; or causing death or injury to a head of state or person who holds public office in the state. The section did not include any act done while serving in the armed forces of a government of a foreign state. Section 7 of the Act criminalised assisting someone commit an offence under s 6, including by giving money or goods, or performing services to support the commission of an offence.³² Alqudsi was charged under s 7 of the Act.

The Court of Appeal held that the external affairs power in the Constitution granted Commonwealth Parliament the power to criminalise these activities as they related to matters geographically external to Australia.³³ The offence under s 7, which did not require the accused to actually leave Australia, was nevertheless connected to a geographically external matter as it criminalised supporting a person to enter a foreign state with the intention of engaging in hostile activity.³⁴ The Court rejected Alqudsi's argument that the only external element was the offender's state of mind, finding instead that it also required supporting conduct happening *outside* Australia.³⁵ The combination of this external aspect of the offender's mental state, alongside the conduct supporting the offence against s 6 of the Act, was sufficiently connected to the constitutional head of power.³⁶ The case also considered some other aspects of the external affairs power, but they were not determinative of the outcome.³⁷

Alqudsi later applied for, and was refused, special leave to appeal to the High Court of Australia, meaning the decision of the Court of Appeal stands.³⁸ At the time of writing, his trial had commenced in Sydney, and was ongoing before a jury in the Supreme Court of New South Wales.³⁹

Cases – Extradition for war crimes

• *Snedden v Minister for Justice & Anor*

On 15 May 2015, Dragan Vasiljković (also known as Daniel Snedden) sought leave to appeal his extradition to Croatia to the High Court of Australia to stand trial for war crimes.⁴⁰ It was alleged he had committed the offences in the early 1990s when he was commander of a Serbian paramilitary unit.⁴¹ It was the final avenue of appeal for Vasiljković, and it related to the Minister's decision to surrender him to Croatian authorities under the *Extradition Act*.⁴²

³¹ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(2)(b).

³² *Ibid* s 7.

³³ Leeming JA wrote the leading judgment, with Basten JA and McCallum J of the Court of Appeal agreeing with his decision: *Alqudsi v Commonwealth of Australia* [2015] NSWCA 351, [3], [171]-[172].

³⁴ *Ibid* [106]-[114] (per Leeming JA).

³⁵ *Ibid* [113].

³⁶ *Ibid* [113]-[114].

³⁷ *Ibid* [117]-[167].

³⁸ *Alqudsi v The Queen* [2016] HCA Trans 13 (10 February 2016).

³⁹ Olding, above n 28; S Crawford, 'Send me photos of Aussie martyred': Alleged jihad recruiter', *The Daily Telegraph*, 30 June 2016.

⁴⁰ *Snedden v Minister for Justice for the Commonwealth of Australia & Anor* [2015] HCA Trans 120 (15 May 2015).

⁴¹ *Ibid*.

⁴² *Ibid*.

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He sought leave to appeal to the High Court on two bases: whether the decision had been made according to the principles of procedural fairness, and whether the Minister had to consider Australia's obligations under Article 129 of the Third Geneva Convention. The High Court refused leave to appeal on either ground. This left the decision of the Full Federal Court that Vasiljković could be surrendered to Croatia on domestic law grounds undisturbed. It should also be noted that the Full Federal Court did not offer a view as to the appropriate interpretation of Article 129 of the Third Geneva Convention, holding that it was unnecessary to do so.⁴³ Vasiljković was handed over to the Croatian authorities at the beginning of July 2015.⁴⁴

☛ Krunoslav Bonic

In January 2015, Bosnia dropped its pursuit of Krunoslav Bonic for war crimes allegedly committed when he was a Bosnian Coat soldier during the Bosnian conflict from 1992 to 1995.⁴⁵ Bonic had been held in prison for four months prior to the case being dropped.⁴⁶

Cases – Military Justice

☛ *Thompson v Chief of Navy* [2015] ADFDAT (22 May 2015)

This case, before the Australian Defence Discipline Appeals Tribunal, concerned whether pleading guilty on the basis of incorrect advice from counsel amounts to a miscarriage of justice. The appellant, Thompson, had been charged with a number of offences relating to an incident that occurred in August 2011 where it was alleged that he and three other sailors set upon another sailor in the course of some form of initiation ritual.⁴⁷ At the beginning of the trial all four accused pleaded not guilty to the charges, apart from one who pleaded guilty to one charge.⁴⁸ On the sixth day of the trial, Thompson changed his plea to guilty to all the charges pursuant to an arrangement with the prosecution and on the basis that he would be sentenced by a Defence Force Magistrate ('DFM'), not a General Court Martial ('GCM').⁴⁹ The latter carried a much greater risk of imprisonment.⁵⁰

His co-accused did not change their pleas and were subsequently found not guilty of all charges.⁵¹ It later transpired that Thompson had to be sentenced by a GCM, contrary to the advice he received directly from his Defence Counsel, and indirectly from the Prosecution.⁵² The Tribunal held that this amounted to a miscarriage of justice, as the difference between being sentenced by a DFM and a GCM was significant, and that he had been entitled to rely on the advice of the experienced legal professionals.⁵³ The Tribunal was satisfied that he would not have pleaded guilty if the advice had been accurate.⁵⁴ It was also important that he

⁴³ *Snedden v Minister for Justice & Anor* (2014) 230 FCR 82.

⁴⁴ 'Captain Dragan: Serbian war crimes suspect Dragan Vasiljkovic extradited from Australia', *ABC News Online*, 8 July 2015.

⁴⁵ C Knaus, 'Former war crimes suspect freed from Canberra prison, extradition collapses', *Canberra Times*, 22 January 2015.

⁴⁶ *Ibid.*

⁴⁷ *Thompson v Chief of Navy* [2015] ADFDAT (22 May 2015), [1].

⁴⁸ *Ibid* [3].

⁴⁹ *Ibid* [4].

⁵⁰ *Ibid* [39]-[40].

⁵¹ *Ibid* [5].

⁵² *Ibid* [41].

⁵³ *Ibid* [42].

⁵⁴ *Ibid* [44].

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had not been acting on the advice of his Defence Counsel alone, but that the deal had been negotiated with the Prosecution, and both had an incorrect view of the legal requirements for sentencing.⁵⁵ As such, the Tribunal quashed the convictions and ordered there be a new Trial.⁵⁶

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⁵⁵ Ibid [45].

⁵⁶ Ibid [48].