AUSTRALIA[1]

Contents

Military Operations — Australian Defence Force and Australian Federal Police Deployments

As reported in the 2008, 2009 and 2010 *Yearbook of International Humanitarian Law*,[2] the Australian Defence Force (ADF) and Australian Federal Police (AFP) are deployed in a number of situations around the world.

In 2011, ADF personnel were deployed in seventeen operations throughout the world. The largest of these deployments continued to be in Afghanistan where on average around 1,550 ADF personnel were deployed,[3] with efforts concentrated in the Uruzgan Province. The process of transition from Australian to Afghan command formally commenced in July 2011, with the objective that the Afghan National Army will assume security responsibility by the end of 2014. The year 2010–11 saw the deaths of 11 Australian soldiers in operations in Afghanistan.

In other operations, the ADF were deployed as part of the International Stabilisation Force (ISF) in East Timor and the Regional Assistance Mission to the Solomon Islands (RAMSI).[4]

The AFP reported there were 415 staff on overseas posts (International Network and International Deployment Group).[5] A large proportion of these overseas programmes focused on strengthening police forces in the Asia-Pacific region.

The AFP presence in Afghanistan remained constant at twenty-eight personnel, with the primary objective of the operation being to increase the capacities of the Afghan National Police in the Uruzgan Province. Additionally, an AFP member commenced a new role as adviser to the Deputy Minister of Security within the Afghan Ministry of Interior.[6]

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[1] This entry was prepared by Nika Dharmadasa, Krystyna Grinberg and James May on behalf of the Australian Red Cross International Humanitarian Law Committee (Victorian Division).
[2] See 11 *YIHL* (2008) pp. 409–410; 12 *YIHL* (2009) p. 455; 13 *YIHL* (2010) p. 451.
[3] Australian Government Department of Defence, *Defence Annual Report 2010–11* (2011) p. 4 <http://www.defence.gov.au/Budget/10-11/dar/index.htm>.
[4] Ibid., p. 5.
[5] Australian Federal Police, *Statistics of AFP Staff Overseas* (30 April 2011) <http://www.afp.gov.au/media-centre/facts-stats/afp-staff-statistics/staff-overseas.aspx>.
[6] Australian Federal Police, *Annual Report 2010–11* (2011) pp. 38–39 <http://www.afp.gov.au/media-centre/publications/annual-reports.aspx- accessed>.

Military Court Martial — Civilian Casualties in Armed Conflict

☛ Transcript of Proceedings, *Sergeant J and Lance Corporal D* (Australian Military Court, Pre-Trial Directions Hearing, Chief Judge Advocate Westwood, 20 May 2011)

As reported in the 2010 *Yearbook of International Humanitarian Law*,[7] in 2009, six Afghan civilians including five children were killed, and four more were wounded, during a residential compound clearance in an Australian Special Operations Task Group raid targeting a Taliban leader.

Brigadier Lyn McDade, the Director of Military Prosecutions, decided to charge three former members of the Special Operations Task Group with service offences, including manslaughter.

On 20 May 2011, Brigadier Ian Westwood, the Chief Judge Advocate, dismissed charges against two of the three soldiers, Sergeant J and Lance Corporal D, during the pre-trial directions hearing.[8] Each accused was originally separately charged with a principal count of manslaughter contrary to Section 61(3) of the *Defence Force Discipline Act 1982* (Cth) and Section 15 of the *Crimes Act 1900* (ACT). In the alternative, each accused was also charged with dangerous conduct with negligence as to the consequences, contrary to Section 36(3) of the *Defence Force Discipline Act 1982* (Cth).[9] The accused objected to the charges on the grounds that they 'did not disclose a service office or are otherwise wrong on law.'[10]

In relation to the manslaughter charges, as stated by the Chief Judge Advocate during the pre-trial hearing, '[i]f, as a matter of law, there is no duty of care, then the proposed manslaughter charges disclose no offence and there would be no requirement to consider combatant immunity from prosecution or a potential conflict with other criminal provisions.'[11] The Chief Judge Advocate considered the issue of whether a duty of care could be established to be of fundamental importance.[12] In the circumstances of the case, the question arose as to whether there was a duty of care to private individuals.[13]

The Chief Judge Advocate referred to the international obligations assumed by Australia as a signatory to Additional Protocol I to the Geneva Conventions of 12 August 1949, which were subsequently made the subject of the *Geneva Conventions Act 1957* (Cth). He referred in particular to Article 51 of Additional Protocol I, relating to the protection of the civilian population,[14] and the commentary which provides that '[t]hus, in relation to criminal law, the protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.'[15] The Chief Judge Advocate stated that 'in incorporating into Australian domestic law the obligations arising under Additional Protocol 1 by way of the provisions inserted into the Commonwealth Criminal Code ... fault elements of intention, knowledge or recklessness are required. Mere negligence will not suffice.'[16]

The Chief Judge Advocate did not consider that a duty of care is imposed by the applicable principles of international law.[17] Accordingly, it was held that each accused did not have a duty of care to the

[7] See 13 *YIHL* (2010) pp. 451–452.
[8] Transcript of Proceedings, *Sergeant J and Lance Corporal D* (Australian Military Court, Pre-Trial Directions Hearing, Chief Judge Advocate Westwood, 20 May 2011) ('Transcript').
[9] Ibid., p. 1 lns 24–28.
[10] Ibid., p. 3 lns 39–41.
[11] Ibid., p. 8 lns 42–45.
[12] Ibid., p. 13 lns 27–29.
[13] Ibid., p. 15 lns 14–16.
[14] Ibid., p. 22 lns 40–45.
[15] Ibid., p. 23 lns 21–23.
[16] Ibid., p. 23 lns 40–45.
[17] Ibid., p. 25 lns 31–42.

civilians allegedly impacted by their actions so as to give rise to the charges of manslaughter by criminal negligence, and that the charges did not disclose service offences under Australian law.[18]

In relation to the charges of dangerous conduct, the Chief Judge Advocate stated that one of the issues was whether the relevant section applies to the alleged conduct of the accused.[19] In the Chief Judge Advocate's view, the relevant section 'seeks to regulate the operation of such things or the giving of direction concerning their operation only where that conduct causes or is likely to cause the death of or grievous bodily harm to another person and the principle [sic] is negligent as to that result'.[20] In his view, 'there must be a duty of care before the fault element of negligence can operate for the purposes of that subsection'.[21] Without the duty of care, His Honour reasoned, the concept of negligence was therefore meaningless.[22]

Regarding the interpretation of the relevant provisions of the *Defence Force Discipline Act 1982* (Cth), the Chief Judge Advocate stated that 'having regard to the nature of armed conflict, it seems unlikely that parliament would have sought to impose by implication rather than specific provision a wide-ranging duty of care to enemy persons'. His Honour also explained that '[i]t is also unlikely that such a duty of care would be imposed by implication towards ... those non-combatants whose incidental or collateral death or injury would be otherwise permitted under accepted international principles of armed conflict.'[23] The Chief Judge Advocate found that 'duty of care does not exist in connection with actual engagement in the course of armed conflict.'[24] Consequently, the Court upheld the accused's objections on the basis that the charges did not disclose service offences.[25] The Chief Judge Advocate concluded that 'the ruling does not detract from the personal tragedy inherent in the prosecution allegations, or diminish the importance of the lives concerned.'[26]

On 20 August 2011, the Defence Minister Stephen Smith stated that the Director of Military Prosecutions had decided not to proceed with charges against the third soldier. Further, he acknowledged that no evidence would be presented against that officer at a directions hearing scheduled for 29 August 2011.[27]

On 29 August 2011, the Registrar of Military Justice convened a directions hearing on the charges against the third ADF member. The Director of Military Prosecutions applied formally to withdraw the charges before the Judge Advocate. The Judge Advocate ordered that the charge sheet be withdrawn. The courts martial proceedings therefore concluded.[28]

[18] Ibid., p. 28 lns 4–10.
[19] Ibid., p. 28 lns 24–25.
[20] Ibid., p. 29 lns 1–11.
[21] Ibid.
[22] Ibid., p. 30 lns 10–16.
[23] Ibid., p. 32 lns 13–25.
[24] Ibid., p. 36 lns 7–21.
[25] Ibid., p. 36 lns 22–23.
[26] Ibid., p. 36 lns 39 to 41.
[27] 'Charges against Special Forces officer in Afghanistan dropped', *The Australian* (Sydney, Australia), 20 August 2011 <http://www.theaustralian.com.au/national-affairs/defence/charges-against-special-forces-officer-in-afghanistan-dropped/story-e6frg8yo-1226118434826>.
[28] 'General Courts Martial relating to charges against Australian Defence Force members relating to the 12 February 2009 civilian casualty incident', Media Release, Commonwealth Department of Defence, 30 August 2011 <http://news.defence.gov.au/2011/08/30/general-courts-martial-relating-to-charges-against-australian-defence-force-members-relating-to-the-12-february-2009-civilian-casualty-incident>(9 April 2012).

Cases — Extradition

- *Minister for Home Affairs (Cth) v Zentai* [2011] FCAFC 102 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2011/102.html>
- *Minister for Home Affairs (Cth) v Zentai* [2011] HCATrans 339 <http://www.austlii.edu.au/au/other/HCATrans/2011/339.html>

As reported in the 2008, 2009 and 2010 *Yearbook of International Humanitarian Law*,[29] Mr Charles Zentai ('Zentai') was alleged by Hungary to have committed a war crime in Budapest on 8 November 1944, namely killing a Jewish man while Zentai was a member of the Hungarian Royal Army. In 2005, a provisional warrant for Zentai's arrest was issued under the *Extradition Act 1988* (Cth) based on an earlier warrant issued by a military judge of the Military Division of the Budapest Metropolitan Court. This request was made pursuant to an extradition treaty between Hungary and Australia ('the treaty').[30]

There were a series of proceedings and appeals in 2008–2010 previously reported in the *Yearbook of International Humanitarian Law*. Initially, the Minister had found there were grounds to extradite Zentai. In 2010, McKerracher J of the Federal Court of Australia overturned the Minister's decision, specifically on two grounds. First, His Honour held that there was no extradition offence because extradition was requested on the basis of a war crime of murder (as distinct from the domestic crime of murder) which is only a crime in Australia not Hungary.[31] Second, McKerracher J made a separate finding that Zentai had a valid objection to extradition based on humanitarian grounds.[32] McKerracher J subsequently ordered Zentai to be released from custody and prohibited the Australian government from extraditing Zentai to Hungary.

On 16 August 2011, the Full Court of the Federal Court of Australia overturned the decision of McKerracher J, upholding the appeal in part.[33] First, the court unanimously held McKerracher J erred by finding there was no extradition offence and that Zentai was not an extraditable person. Besanko and Jessup JJ separately explained it was open to the Minister to find Zentai was an accused person, and thus an extraditable person, because in civil law countries criminal proceedings are started where there is a well-founded suspicion of the person having committed an offence.[34] Second, the Court held McKerracher J erred by finding that the Minister did not give proper consideration to humanitarian grounds against extradition. The error occurred by joining this question with the separate question of whether the Minister gave proper consideration to prosecuting Zentai in Australia.[35]

The Full Federal Court however divided on the interpretation of Article 2.5 of the treaty. This provision provides that extradition can be sought irrespective of when the offence was committed as long as: (a) it was an offence in the Requesting State (Hungary) at the time; and (b) the conduct, if committed in the Requested State (Australia) at the time of the extradition request, would constitute an offence in that country.[36] This is known as the 'dual criminality requirement'.[37] The case was complicated by the fact that Zentai was alleged to have committed the war crime of murder in 1944 under a retrospective Hungarian law created in 1945. Jessup J held that it was a decision for the Minister, not the court, whether

[29] See 11 *YIHL* (2008) pp. 417–418; 12 *YIHL* (2009) pp. 457–458; 13 *YIHL* (2010) pp. 455–457.
[30] *Treaty on Extradition*, Australia–Hungary, signed 25 October 1995, 1985 UNTS 123 (entered into force 25 April 1997); *Extradition (Republic of Hungary) Regulations 1997* (Cth).
[31] *Zentai v Minister for Home Affairs (Cth) (No 4)* [2010] FCA 1385, paras. 209–214.
[32] Ibid., paras. 327, 344.
[33] *Minister for Home Affairs (Cth) v Zentai* [2011] FCAFC 102.
[34] Ibid., paras. 52–54, 140–144.
[35] Ibid.
[36] Ibid., para. 3.
[37] Ibid., para. 29.

the offence for which extradition was sought was an offence in Hungary in 1944.[38] However, he found the Minister erred by failing to consider dual criminality, namely whether the murder was a war crime, as distinct from the ordinary criminal offence of murder, in Hungary in 1944. Besanko J agreed but went further, finding that had the Minister undertaken the correct test he would have found Zentai should not have been surrendered because the war crime for which Zentai was sought was not an offence in Hungary in 1944.[39] By contrast, North J supported a different interpretation of the treaty, arguing that 'formal correspondence between the offences in both Contracting States is not required provided the conduct in question is criminalised in both countries'.[40] On this construction, it was sufficient that there existed a crime of murder in both Australian and Hungary, despite the war crime of murder existing in Australia in 1944 but not in Hungary.

In the end, the Court set aside McKerracher J's finding that there was no extradition offence and also set aside the order to release Zentai. In their place, the Full Federal Court ordered the Minister to determine whether Zentai should be surrendered to the Republic of Hungary for the alleged war crime.[41]

On 9 December 2011, special leave to appeal was granted by the High Court of Australia.[42] The appeal is expected to be heard and determined in 2012.

Cases — Extradition

☛ *Extradition of Australian National to Croatia — Daniel Snedden*

As reported in the 2007, 2008, 2009 and 2010 *Yearbook of International Humanitarian Law*,[43] Daniel Snedden was sought to be extradited by Croatia for three alleged war crimes under the *Croatian Basic Penal Code*, namely two crimes against prisoners of war and one crime against civilians, for acts allegedly committed during the war in Yugoslavia during the 1990s and early 2000s.[44] As reported in the 2010 *Yearbook of International Humanitarian Law*,[45] the High Court unanimously held there was no valid extradition objection on the ground that Snedden's trial may be prejudiced by reason of his political opinions. The High Court confirmed the Magistrate's original order that Snedden was eligible for surrender for extradition. On 12 May 2010, after absconding, Snedden was arrested in New South Wales by Australian Federal Police, and returned to prison.[46] At the end of 2011, the Minister for Home Affairs' decision whether to extradite Snedden to Croatia remained pending.

Cases – defamation proceedings –publication of alleged war crimes by Australian National – Daniel Snedden

Snedden v Nationwide News Pty Ltd [2011] NSWCA 262
<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2011/262.html>

[38] Ibid., paras. 162–163.
[39] Ibid., paras. 63, 69–71.
[40] Ibid., para. 29.
[41] Ibid., para. 217.
[42] See *Minister for Home Affairs (Cth) v Zentai* [2011] HCATrans 339.
[43] See 10 *YIHL* (2007) pp. 285–286; 11 *YIHL* (2008) p. 418; 12 *YIHL* (2009) pp. 459–460; 13 *YIHL* (2010) pp. 457–459.
[44] *Vasiljkovic v Commonwealth* [2006] HCA 40. Vasiljkovic is Snedden's Serbian name.
[45] See 13 *YIHL* (2010) pp. 457–459.
[46] See 'Daniel Snedden Taken into Custody' (Media Release, Minister for Home Affairs (Cth), 12 May 2010) <http://www.ag.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2010_SecondQuarter_12May2010-DanielSneddenTakenIntoCustody>.

Snedden v Nationwide News Pty Ltd [2012] HCATrans 61 <http://www.austlii.edu.au/au/other/HCATrans/2012/61.html>.

The same war crimes allegations in the extradition proceedings against Daniel Snedden discussed above also formed part of defamation proceedings in New South Wales (NSW). On 8 September 2005, The Australian newspaper published an article across Australia about Snedden with the headline "Serbian death commander alive and well and teaching golf in Perth". Snedden claimed he was defamed by the article.

The proceedings were brought under the *Defamation Act 1974 (NSW)* and proceeded by way of a trial by jury lasting 13 days. On 18 December 2009, Latham J found the allegations were not defamatory. Latham J held that the newspaper could rely on the defence that the allegations were substantially true.[47]

Snedden subsequently appealed to the NSW Court of Appeal. The hearing and determination of the appeal was delayed following the High Court of Australia's decision on 30 May 2010 regarding Snedden's extradition proceedings.[48] Snedden absconded for 43 days before being captured by the Australian Federal Police.[49]

On 2 September 2011, the Court of Appeal unanimously affirmed the decision of Latham J.[50] Snedden lodged forty-three grounds of appeal.[51] He sought a damages or a new trial on the issue of damages.[52] The leading judgment of McClellan CJ, with whom McColl and Macfarlan JJA agreed, confirmed the trial judge's findings. Several witnesses identified Snedden as 'Captain Dragan' who commanded a Serbian militia in Krajina.[53] Significant findings included that Snedden was a death squad commander who admitted committing a masscare in the Battle of Glina.[54] McClellan CJ also found that he condoned the rape of women and girls through torture, which included evidence from a witness that Snedden actually raped a woman.[55] Snedden's evidence was found to be "beset by inconsistencies".[56] The court upheld the finding at trial that Snedden "was in command at Knin fortress and enjoyed a legendary status among his men" and "exercised absolute authority and was kept very well informed".[57] The court held that imputations of torture were justified because Snedden was present during various assaults and hence condoned torture by failing to act to prevent it.[58]

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[47] *Snedden v Nationwide News* [2009] NSWSC 1446 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2009/1446.html> (9 April 2012).
[48] *Snedden v Nationwide News Pty Ltd* [2010] NSWCA 98 <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/98.html> (9 April 2012).
[49] 'Daniel Snedden Taken into Custody', Media Release Australian Minister for Home Affairs, 12 May 2010, available from < <http://www.ag.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2010_SecondQuarter_12May2010-DanielSneddenTakenIntoCustody> (20 March 2012).
[50] *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2011/262.html> (9 April 2012).
[51] Ibid. [27]-[28].
[52] Ibid. [29].
[53] Ibid. [90]-[96].
[54] Ibid.
[55] Ibid. [84]-[114] especially [88]-[97].
[56] Ibid. [90].
[57] Ibid. [107].
[58] Ibid. [106]-[114].

The Court of Appeal commented on the use of judgments from the International Criminal Tribunal for the former Yugoslavia, in particular the decision in *Martic*.[59] McClellan J held it was incorrect for the trial judge to rely on that judgment for the purpose of determining whether Snedden committed a massacre in the Battle of Glina in July 1991. However, this error did not invalidate the finding made by Latham J because Snedden admitted he committed a massacre.[60] In addition, the Court of Appeal found it was open to the trial judge to rely on *Martic* for other purposes in the defamation proceedings. For example, the Court of Appeal confirmed that Snedden's alleged war crimes occurred in a 'foreign state' because in May 1991 there was an *unsuccessful* attempt to create a Serbian Autonomous District of Krajina.[61]

Snedden failed on each ground of appeal. The appeal was dismissed with costs.

On 9 March 2012, the High Court of Australia refused an application by Snedden for special leave to appeal. [62]

Legislation — Australian Military Justice

- Military Court of Australia Bill 2010 (Cth)
  <http://www.austlii.edu.au/au/legis/cth/bill/mcoab2010314>

As reported in the 2009 and 2010 *Yearbook of International Humanitarian Law*,[63] the Australian government introduced the Military Court of Australia Bill 2010 (Cth). However, the legislation lapsed due to a federal election.[64]

On 12 May 2011, the Military Justice (Interim Measures) Amendment Bill 2011 (Cth) was introduced into the Australian parliament by the government. The purpose of the Bill was to extend the interim measures for a further two years. On 4 July 2011, the Bill was passed by parliament and on 25 July 2011, received Royal Assent by the Governor-General. The Act commenced the following day. Hence, the system of court martial continues until late 2013.

In June 2011, the Defence Minister stated that his Department and the Attorney-General 'are currently working to finalise the details of a Military Court of Australia bill and associated consequential and transitional provisions'.[65] It is expected this work will continue in 2012.

Legislation — Cluster Munitions

- Senate Inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

[59] *Prosecutor v Milan Martic* ICTY-95-11, Judgment International Criminal Tribunal for the former Yugoslavia, 8 October 2008 (Appeal Chamber) and 12 June 2007 (Trial Chamber).
[60] Ibid. [60]-[67].
[61] Ibid. [79]-[84], [115]-[121].
[62] *Snedden v Nationwide News Pty Ltd* [2012] HCATrans 61 <http://www.austlii.edu.au/au/other/HCATrans/2012/61.html> (9 April 2012).
[63] 12 *YIHL* (2009) pp. 460-461; 13 *YIHL* (2010) pp. 459-460.
[64] See Letter from Trish Crossin, Chair of the Senate Standing Committee for Legal and Constitutional Affairs to John Hogg, President of the Senate, *Inquiry into the Provisions of the Military Court of Australia Bill 2010* (23 July 2010) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/military_court/index.htm>.
[65] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2011, p. 6959 (Stephen Smith, Minister for Defence).

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/ccab_cmp_2010/report/index.htm>

As reported in the 2009 and 2010 *Yearbook of International Humanitarian Law*,[66] the Australian parliament has been considering proposed legislation aimed at implementing the *Convention on Cluster Munitions* ('the Convention'), which Australia ratified in 2010 and which entered into force in the same year. Following the introduction of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (Cth) ('the Bill') into the Australian parliament in 2010, in 2011 it was referred to and considered by the Senate Foreign Affairs, Defence and Trade Legislation Committee ('Committee').

The principal purpose of the Bill is to create criminal offences in the *Criminal Code Act 1995* (Cth) relating to cluster munitions and explosive bomblets. As a qualification to these offences, the Bill provides for certain defences. For example, specified members of the ADF or other specified Commonwealth public officials authorised by the Minister for Defence may acquire or retain specified cluster munitions for training in detection, clearance or destruction techniques.[67]

In March 2011, the Committee released a report evaluating the Bill.[68] The report considered a number of issues, with particular focus on 'interoperability'. Under the Convention, countries which do not possess or use cluster munitions (such as Australia) are permitted to conduct joint military operations with the military forces of countries which do so (such as the United States) but significant restrictions applied.[69] Article 21(3) of the Convention provides that a State Party 'may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party'. Article 21(4) however provides that nothing authorises the State Party to itself use cluster munitions or to expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

The Bill seeks to implement Article 21 of the Convention by inserting new Sections 72.41 and 72.42 into the *Criminal Code Act 1995* (Cth). According to these sections, Australian military personnel in joint military operations do not commit an offence if 'the act does not consist of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth's exclusive control.'[70]

Several submissions to the Committee raised concern about the interoperability provisions. The Australian Red Cross argued that the defences to the offences should be narrowed.[71] Another submission suggested that 'joint operations can be carried out without the personnel of a State Party being required to carry out *any* prohibited activities. This has been amply proven with the Mine Ban Treaty, so a clear and workable precedent has been set'.[72] Some submissions argued the Bill should adopt the approach of the

[66] 12 *YIHL* (2009) pp. 462–463; 13 *YIHL* (2010) pp. 460–462.
[67] Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (Cth) sch. 1 ('Cluster Munitions Bill').
[68] Senate Standing Committee on Foreign Affairs, Defence and Trade, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 [Provisions]* (25 March 2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/ccab_cmp_2010/report/index.htm> ('Senate Report').
[69] Cluster Munitions Bill, sch. 1 inserts ss. 72.41 and 72.42 into div. 72 of the *Criminal Code Act 1995* (Cth).
[70] Ibid., sch. 1 s. 72.41(c). Compare the Convention, art. 21(4).
[71] Australian Red Cross, Submission No. 21 to Senate Standing Committee on Foreign Affairs, Defence and Trade, *Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, 24 January 2010, pp. 2–3 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/ccab_cmp_2010/submissions.htm>.
[72] Australian Network to Ban Landmines and Cluster Munitions, Submission No. 3 to Senate Standing Committee on Foreign Affairs, Defence and Trade, *Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, p. 5 (emphasis added).

New Zealand legislation, which provides for a defence of 'merely engaging' by the State Party in activities with a non-State Party.[73] There was also concern expressed by other submissions, such as Human Rights Watch, that the *mens rea* for the offence was too high. The threshold mental element in the Bill is that the conduct was intentional or deliberate. It was argued the offence should include reckless behaviour.[74]

The Australian government stated that interoperability was central to the protection of international security as well as Australia's national security. The Vice Chief of the Defence Forces, Lieutenant General David Hurley said the ADF was 'deeply embedded with US forces or coalition forces on operations today'.[75] He argued that total exclusion would negate interoperability.[76] Moreover, the Australian government argued the Bill simply gave effect to the Convention. In the Explanatory Memorandum, the government asserted that Article 21(3) permitted acts in military operations that could 'ultimately assist the non-State Party to engage in conduct that is prohibited in Article 1 of the Convention'.[77] Nevertheless, under Article 21(4) it would be prohibited for the ADF expressly to request the use of cluster munitions in cases where the choice of munitions is in their exclusive control.[78] In practice, it means the ADF should not be the first or last in the chain of command when cluster munitions are used.[79] It was also considered that positive obligations under the Convention meant that Australia would make clear to non-States Parties of Australia's obligations under the Convention including when engaged in military operations with non-States Parties.[80] These positive obligations are constituted by administrative action (such as formal diplomatic or military communications) rather legislative action.[81]

The Committee concluded the Bill was compatible with the Convention. In respect of the *mens rea* required for the proposed offences, the Committee was satisfied that due to the seriousness of the offence being created, the requisite mental element was intention and not recklessness.[82] In respect of interoperability, it found the Bill struck the correct balance between the underlying purpose of the Convention, namely to regulate cluster munitions and Australia's need to protect national security through interoperability in joint military operations. The Committee stated it was satisfied that the concerns raised about the 'lack of balance or silence on positive obligations in the bill are resolved'.[83] A Committee member from the Australian Greens Party released a dissenting report disagreeing with this and other findings contained in the report.[84]

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[73] Evidence to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 3 March 2011, pp. 5–6.
[74] See Human Rights Watch and Harvard Law School's International Human Rights Clinic, Submission No. 7 to Senate Standing Committee on Foreign Affairs, Defence and Trade, *Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, 19 January 2011, p. 12. See also Evidence to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 3 March 2011, p. 18.
[75] Evidence to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 3 March 2011, p. 34.
[76] Ibid., p. 35.
[77] Ibid., p 36. Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (Cth) p, 12. See also Attorney-General's Department (Cth), *Additional Information to the Senate Foreign Affairs, Defence and Trade Legislation Committee* (28 February 2011) p. 4.
[78] Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (Cth) p. 36.
[79] Ibid., p. 37.
[80] Ibid., p. 41.
[81] Ibid., pp. 41–43.
[82] Ibid., pp. 18–19.
[83] Ibid. p. 43.
[84] Senate Standing Committee on Foreign Affairs, Defence and Trade, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 [Provisions]* (Scott Ludlam, Dissenting Report, 25 March 2011) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/ccab_cmp_2010/report/index.htm>.

At the end of 2011, the Bill remained before the Senate in the Australian parliament.

NIKA DHARMADASA, KRYSTYNA GRINBERG AND JAMES MAY