

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 19, 2016
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 several situations around the world. The largest contingents were in the Middle East, mainly in Afghanistan and Iraq. All of the deployments have been ongoing for a number of years.

In Afghanistan, around 270 ADF members from the Royal Australian Navy, the Australian Army, the Royal Australian Air Force and defence civilians are deployed as part of Operation HIGHROAD.² The deployment is a training mission that begun in early 2015 and is made up of people serving with ADF's Task Group Afghanistan. It is part of Australia's commitment to Resolute Support, the NATO-led mission to train, advice and assist the Afghanistan government develop and sustain effective security forces.³

Operation OKRA, Australia's contribution to the military intervention against ISIS in Iraq and Syria, also continued into 2016. About 780 ADF personnel have been deployed alongside troops from Australia's international partners, including the Iraqi Government and Gulf nations.⁴ The Australian contingent is made up of three groups: 300 personnel are assigned to both Air Task Group and Task Group Taji, with a further 80 personnel part of the Special Operations Task Group.⁵

Air Task Group is carrying out air combat and support operations in Iraq, operating within a US-led international coalition with the permission of the Iraqi government.⁶ It consists of six RAAF F/A-18F Super Hornets, an E-7A Wedgetail Airborne Early Warning and Control aircraft, and a KC-30A Multi Role Tanker Transport.⁷ The Department of Defence releases some statistics about the operations of the Air Task Group. In 2016 the F/A-18F Super Hornets carried out 900 sorties over Iraq and 12 over Syria. Over 125 sorties, the E-7A Wedgetail entered Syrian airspace 97 times; and out of 385 sorties, the KC-30A entered Syrian airspace 47 times.⁸

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² Global Operations, *Operation HIGHROAD*, Department of Defence, <<http://www.defence.gov.au/Operations/Afghanistan/>>.

³ Ibid; Resolute Support Afghanistan, *Mission*, NATO, <<http://www.rs.nato.int/about-us/mission.aspx>>.

⁴ Global Operations, *Operation OKRA*, Department of Defence, <<http://www.defence.gov.au/Operations/Okra/default.asp>>

⁵ Ibid.

⁶ Global Operations, *Operation OKRA: Air Task Group*, Department of Defence, <<http://www.defence.gov.au/Operations/Okra/ATG.asp>>.

⁷ For more detail about the operation role of each aircraft see *ibid*.

⁸ These and further statistics are available at Global Operations, *Operation OKRA: 2016 Statistics*, Department of Defence, <<http://www.defence.gov.au/Operations/Okra/2016Stats.asp>>.

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Task Group Taji is a training force made up of a combination of Australian and New Zealand Defence Force ('NZDF') troops, located northwest of Baghdad at the Taji Military Complex. It is part of a broader international effort to build the capacity of the regular Iraqi Security Forces (ISF) to combat ISIS. The ADF and NZDF troops are operating in non-combat roles, and the deployment is made up of trainers and force protection as well as support and command elements.⁹ It became fully operational in mid-2015 and was then expected to continue for two years, but its progress will be regularly reviewed.

The operations of the Special Operations Task Group are more opaque. It is described by the Department of Defence as 'providing military advice and assistance' to the ISF, as well as 'taking the fight to the Daesh [ISIS] terrorists.' It is careful to point out that the 'legal protections required for deployment' of the Task Group have been negotiated and agreed with the Iraqi Government, and the mission is in direct support to the ISF. Other than this, very little information is available about the activities of the Special Operations Task Group.

The third major Australian overseas deployment is Operation MANITOU, the name given to the contribution of the Royal Australian Navy (RAN) to an international operation composed of 32 nations to provide maritime security to the Middle East region.¹⁰ The international operation has three principle task forces, each focussing on a different security threat. Combined Task Force 150 conducts counter-terrorism and maritime security operations; Combined Task Force 151 conducts counter piracy operations; and Combined Task Force 152 conducts Arabian Gulf maritime security operations. The RAN routinely sends a long-range frigate (known as a Major Fleet Unit) that can carry out air defence, surface and undersea warfare, surveillance and reconnaissance, as well as interdiction,¹¹ to the Middle East to join the Combined Task Forces.

Closer to home, Operation RESOLUTE is the ADF contribution to managing Australia's offshore maritime interests, including preventing boats of asylum seekers making landfall on Australian territory. The ADF is operating along with a multi-agency taskforce which includes the customs and border protection services. Up to 800 ADF personnel are involved in Operation RESOLUTE, comprising of Air Force AP-3C Orion maritime patrol aircraft, Navy Armidale Class Patrol Boats, Australian Army Region Force Surveillance Unit to conduct land based security operations, and a Transit Security Element to assist in detaining people intercepted at sea.¹²

International agreements – Australia-Singapore Defence Pact

In May 2016 the Australia and Singapore announced a significant expansion of Singapore's military bases in Queensland. Singapore will spend AUD2.25 billion to double its training facilities in Queensland. This will allow it to increase the number of Singapore Armed Forces (SAF) personnel it has on rotation from 6,000 to 14,000,¹³ as well as increase the number of training vehicles and equipment in Australia from 500 to 2,400.¹⁴ Two training

⁹ Global Operations, *Operation OKRA: Task Group TAJI*, Department of Defence, <<http://www.defence.gov.au/Operations/Okra/TaskGroupTAJI.asp>>.

¹⁰ Global Operations, *Operation MANITOU*, Department of Defence, <<http://www.defence.gov.au/Operations/OpManitou/default.asp>>.

¹¹ Navy Today: Operations, *Operation MANITOU*, Royal Australian Navy, <<http://www.navy.gov.au/operations/manitou>>.

¹² Global Operations: Border Protection, *Operation Resolute*, Department of Defence, <<http://www.defence.gov.au/Operations/BorderProtection/default.asp>>.

¹³ E Borrello, 'Singaporean army to sink \$2 billion into expanding Queensland bases, 14,000 troops on rotation', *ABC News Online*, 6 May 2016.

¹⁴ J Koh, 'New training facilities in Australia to take in more SAF troops', *The Straits Times*, 15 October 2016.

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facilities will be jointly developed: an urban live-firing facility, and combined arms weapon ranges.¹⁵ The SAF will conduct unilateral training exercises for up to 18 weeks per year.¹⁶

This arrangement was formalised in a Memorandum of Understanding signed by the Australian and Singaporean Ministers for Defence in October 2016, which sets out the conditions for upgrading the training areas and the time frame for it to occur.¹⁷ This document is not publicly available.

International agreements – Nuclear Ban Treaty

Australia was one of 35 countries that did not support¹⁸ the successful United Nations General Assembly resolution to commence negotiations on a binding nuclear weapons ban.¹⁹ The rationale provided by the Australian Department of Foreign Affairs and Trade was that it would be counterproductive to have a treaty that did not include nations with nuclear weapons.²⁰

Foreign Affairs and Security – Defence White Paper

The Australian Government released a Defence White Paper in 2016, a document that sets out the defence policy and strategy for Australia for the next decade.²¹ It proposes increased defence spending of 2% of GDP in 2020-21 to improve the capabilities of the ADF, as well as a restructure of the armed forces.²² This will allow for Australia to maintain a more sustained presence in Australia's region, and could foreshadow an increased number of international Australian deployments.²³

Importantly, it identifies three 'Strategic Defence Interests' as the basis for future defence policy and force structure. They are, first, having the capacity to deter or defeat any attack, or attempt to coerce, Australia. Second, securing the immediate 'maritime Southeast Asia' and Pacific regions; and finally contributing to a stable Indo-Pacific region and a rules-based global order.²⁴ Given Australia does not have the capacity to respond unilaterally to meet this final objective, it will be addressed by working closely with the US and other international partners to respond to threats to the rules based global order.²⁵ The White Paper mentions the military contribution Australia has made to the US-led operations in the Middle East, and notes the potential for further operations protecting the maritime trading and communication routes in North Asia.²⁶

¹⁵ Ibid.

¹⁶ Australia-Singapore Military Training Initiative, *Overview*, Department of Defence, <<http://www.defence.gov.au/Initiatives/ASMTI/Overview.asp>>.

¹⁷ Minister of Defence, 'Minister Payne Signs Military Training Agreement', (Media Release, 12 October 2016) <<https://www.minister.defence.gov.au/minister/marise-payne/media-releases/minister-payne-signs-military-training-agreement-singapore>>.

¹⁸ UNGA Voting Records for A/Res/71/258 available at <<http://www.un.org/en/ga/documents/voting.asp>>.

¹⁹ GA Res 71/258, UN GOAR, 71st sess, Agenda item 98, UN Doc A/Res/71/258.

²⁰ 'Aust to vote against nuclear ban treaty' *AAP News Wire*, 20 October 2016. Also see S Dziedzic, 'Australia's stance on the nuclear weapons ban treaty – and why our diplomats were labelled 'weasels'', *ABC News Online*, 3 June 2017.

²¹ Department of Defence, *2016 Defence White Paper*, (Commonwealth of Australia, Canberra, 2016).

²² Ibid 24, 177.

²³ Peter Jennings, 'The 2016 Defence White Paper: good posture', *ASPI Strategist*, Australian Strategic Policy Institute, 25 February 2016.

²⁴ Department of Defence, *2016 Defence White Paper*, (Commonwealth of Australia, Canberra, 2016) 68-70.

²⁵ Ibid 75-6.

²⁶ Ibid 76.

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Presciently, the White Paper says that there will be 'greater uncertainty' in the foreseeable future and elaborates on the threats faced by Australia, including terrorism, cyberattacks, serious friction between China and the US, and a 'coercive and aggressive' Russia.²⁷

Domestic Criminal Law – Change to permit targeting of non-combatant members of an organised armed group

Following a request from the Australian Defence Force, Australian war crimes legislation²⁸ was amended to allow for an increased range of targets to be attacked in non-international armed conflict without the risk of prosecution under Australian law.²⁹ The Government claimed these amendments were consistent with existing international humanitarian law obligations and were necessary to provide:

[T]he legal certainty needed to target members of organised armed groups with lethal force, including in the context of current ADF operations against Daesh in Iraq and Syria. They also reflect the reality that such groups are akin to regular armed forces, and their members should therefore receive treatment equivalent to members of regular armed forces under Australian domestic law.³⁰

Most importantly, the operation of the relevant war crimes offences were adjusted to exclude criminal liability in relation to the targeting of members of 'organised armed groups'.³¹ This expanded the range of permissible targets from only those taking an active part in hostilities to also supporting elements such as logistics and support personnel.³² While it was reported that this would not make that much difference on the ground, Junior Defence Minister Dan Tehan explained that '[n]ow if you are paying the fighter, if you are there on your Twitter account sending the propaganda out, then you are a legitimate target.'³³ This may suggest that view of some international law experts that the proposed amendments may go further than what is authorised under IHL.³⁴

The other significant amendment that was made was an explicit recognition of the proportionality principle. An exception was inserted into the relevant provisions that makes it clear that injuries or death that are part of an attack on a military objective are not criminal when the 'perpetrator did not expect that the attack would result in the incidental death of, or injury to, civilians that would have been excessive in relation to the concrete and direct military advantage anticipated', and it was reasonable for the perpetrator to have that exception.³⁵

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²⁷ Ibid 39-65.

²⁸ *Criminal Code Act 1995* (Cth) s 268.70-2.

²⁹ 'Australia to target IS support personnel' *AAP News Wire*, 1 September 2016.

³⁰ P Dutton, 'Second reading speech, Criminal Code Amendment (War Crimes) Bill 2016', House of Representatives, Debates, 12 October 2016, 1668.

³¹ See C Raymond and J Tomaras, 'Criminal Code Amendment (War Crimes) Bill 2016' *Bills Digest* no. 43, Parliamentary Library

³² 'Australia to target IS support personnel', *AAP News Wire*, 1 September 2016.

³³ Ibid.

³⁴ See Raymond and Tomaras, above n 31.

³⁵ *Criminal Code Act 1995* (Cth) ss 268.70(1A), 268.71(1A), 268.72(1A).

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In addition to the Australians who were fighting for ISIS in Syria and Iraq,³⁶ there were also media reports of Australians fighting in the civil war in South Sudan for both the government and opposition forces.³⁷ Both sides of the conflict have been credibly accused of committing war crimes. There has been at least one allegation made against an Australian for ordering the execution of a person described as a “colleague”, although this execution was not successfully carried out and it is unclear whether they were colleagues when the order was given, or on opposite sides as the Australian had switched sides in the conflict.³⁸ As well as the potential for criminal prosecution on the basis of war crimes, it is also an offence under Australian law to fight in hostilities for non-government forces.³⁹ It is unclear whether any of those fighting in the conflict will be charged.⁴⁰

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³⁶ See for example ‘Fifty Australians killed supporting or fighting with IS: ASIO’ *SBS News*, 5 May 2016.

³⁷ Colin Cosier, ‘Aussies at war in South Sudan put law to the test’ *The Sydney Morning Herald*, 17 July 2016, 22.

³⁸ *Ibid* 27.

³⁹ *Criminal Code Act 1995* (Cth) Part 5.5.

⁴⁰ Cosier, above n 37, 22.