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This edition provides an update of recent and interesting international legal developments affecting Australia and distinctive contributions made by Australia to contemporary international legal issues during April 2009.

## Use of Force – Defence White Paper.

The Australian Department of Defence has released its long-awaited White Paper entitled 'Defending Australia in the Asia Pacific Century: Force 2030'. The White Paper outlines Australia's strategy for maintaining a credible defence capability within a 'rules-based global security order'. The Paper indicates the willingness of the Australian Defence Force to address intra-State conflict (predicted to be the most common form of conflict up until 2030) as well as dealing with non-State global actors (p.11). Australia's defence policy will be grounded upon the principle of self-reliance in the direct defence of Australia and in relation to its unique strategic interests, but with a capacity to do more when required within the limits of its resources (para 6.16). It will also focus on developing a national defence force that meets the primary obligation to deter and defeat attacks on Australia (para 8.6). This is perceived to require a fundamentally maritime strategy (para 8.7). For example, the Indian Ocean falls within Australia's primary operational environment in respect of transnational security risks such as piracy (para 6.43). International legal aspects of particular interest include the following details:

(i) the use of military force by Australia. Australia's essential strategic interest is to defend itself against direct armed attack (p.12). The White Paper acknowledges the prohibition on the use of force under the United Nations Charter. However, it also notes that force is permitted in certain circumstances such as self-defence and where authorised by the Security Council (para 2.5). The Paper indicates that 'States should always conform to their international obligations when making decisions about the use of force, in order to establish the legal basis for that use as well as the nature and method of force used' (para 2.6). Failure to do so could inevitably lead to a loss of legitimacy. Australia will continue to contribute to a post-World War II international order that restrains aggression (para 2.6). Seeking to avoid wherever possible having to employ force or threaten its use is a matter of Australian policy (para 2.7) because action other than resort to force may provide better responses.

(ii) the use of force through the United Nations. The UN Charter is considered central to a 'rules-based global security order' (para 5.18). Australia, where able and within its limits, will continue to support UN initiatives. The UN is perceived to be an important multilateral entity which shapes behaviour in the global security order. As demonstrated in East Timor, the UN can contribute credibility to Australia's peace and security efforts when Australia operates directly under its auspices or mandate (para 11.43).

(iii) international humanitarian law. The White Paper acknowledges that the manner in which military force is employed is subject to constraints under international law (para 2.5). Military force should always be employed with precision in a manner consistent with Australia's international obligations and with an appreciation for the long-term consequences (para 2.10).

(iv) intervention. Deployments into situations of armed conflict short of conventional war may be required in the nature of humanitarian, stabilisation, counter-insurgency, peacekeeping and reconstruction interventions (para 2.21). Possible contributions made by Australia also include disaster recovery and evacuating Australian nationals. Operations in the form of counter-terrorism, counter-piracy and protecting the resources of regional partners including access to critical Southeast Asian sea lanes are envisaged (para 7.14). The 'responsibility to protect' principle, considered to be at an important developmental stage, posits that States are responsible for protecting their own citizens from mass atrocities and that the international community should encourage the exercise of that authority (para 5.19). Australia supports that principle and

recognises that it may occasionally be necessary for other States to intervene under the auspices of a UN Security Council resolution where States cannot or will not protect their population.

(v) climate change impacts. It has been predicted that changing climate patterns, combined with population growth, will increase competition for scarce food, water and energy resources (para 4.7; see also para 4.60). However, the White Paper predicts that the large-scale strategic consequences of climate change are unlikely to be felt before 2030. Many States in the Pacific region will be especially vulnerable (para 4.62).

(vi) countering the proliferation of weapons of mass destruction. Australia will continue to participate in efforts to promote disarmament and counter-proliferation initiatives (para 11.45). For example, Australia and Japan established the International Commission on Nuclear Non-proliferation and Disarmament ahead of the 2010 Nuclear Non-Proliferation Treaty Review Conference.

(vii) cyberattacks. The White Paper identifies cyberattacks upon Australia's defence, government and civil infrastructure-related information networks as a national security threat (para 7.18). Operations in cyberspace have become more important over the past decade (para 9.85). It is also predicted that space assets, including communications, intelligence, surveillance, positioning, navigation and targeting systems such as satellites will play an increasingly important role (para 9.99).

(viii) coalitions. Australia's defence relationship with the United States will continue to be underpinned by the Australia-New Zealand-US (ANZUS) Security Treaty of 1951 pursuant to which the parties have agreed to 'act to meet the common danger' (para 11.6). The ANZUS Treaty was invoked for the first time following the 11 September 2001 attack. Although the instrument does not commit the parties to specific types of action, it does provide a clear expectation of support. Australia's defence relationship with Japan is supported by the 2008 Memorandum on Defence Cooperation (para 11.14). The Lombok Treaty on Security Cooperation, ratified in 2008, and the Joint Statement on Defence Cooperation of January 2009 are the relevant instruments for Australia's relationship with Indonesia (para 11.22). Australia's engagement with the North Atlantic Treaty Organization and the European Union turn on the means for responding effectively to the threats posed by international terrorism, contributing to international counter-proliferation efforts and addressing the destabilising effects of failed/failing States (para 11.41).

(ix) Military contractors. Commercial contractors have been used in some form in all recent deployments involving the Australia Defence Force (para 10.20). Contractors generally work best in secured environments and allow Australian forces to redeploy elsewhere.

#### International Conferences – Durban Review Conference, Geneva, 2009.

Australia, together with other States including the United States, Canada, Italy and Israel, decided not to attend the World Conference against Racism in Geneva. The Minister for Foreign Affairs was not convinced that the Conference would not be a 'platform for anti-Semitic sentiment' arising from Israeli occupation of Palestinian territory. The 2001 World Conference against Racism, held in Durban, had previously declared 'the inalienable right of the Palestinian people to self-determination' while recognizing 'the right to security for all States in the region, including Israel'. However, several States had walked out of that Conference in protest at criticism of Israeli policy. In the run-up to Geneva, Australia and other States had been unable to amend a draft document upholding certain features of the Durban Declaration. However, a delegation from the Australian Human Rights Commission decided to attend the Conference to observe proceedings in relation to the role of national human rights institutions, policing, diversity and the rights of indigenous persons. The Commission issued a statement that it was an independent body having a legislative mandate under the *Racial Discrimination Act* to combat racial discrimination and practices leading to racial discrimination.

(Sources include *The Sydney Morning Herald*, 20 April 2009, p.5).

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