



The road to international hell is paved with good conventions

The details continuing to emerge about the abhorrent maltreatment of some Iraqi detainees at Abu Ghraib prison last October have again focused attention on some anomalies in Australian policy concerning the application of the Geneva Conventions to the Iraq conflict.

Australia signed the Conventions on 14 October 1958 and our lodgement came into effect on 01 September 1959. Iraq signed the conventions on 14 August 1958 (not that it noticeably changed Iraq's subsequent international behaviour).

Many arguments that the Australia is, or is not, an occupying power in Iraq seem to be driven more by party-political considerations than by an objective study of international law. In summary, good legal arguments can be mounted for either proposition and only an eventual determination by the International Court of Justice is likely to resolve the issue – which chiefly depends on whether the UN Charter and UN Security Council Resolutions, supported by international case law, can over-ride traditional black letter interpretations of the 1949 Conventions and their 1977 Additional Protocols.

Regardless of which point of view applies there continues to be widespread unease, and even professional embarrassment, in the ADF about some official Australian positions. This especially applies to the claim that our forces have taken no prisoners of war (PW) in Iraq and that accompanying American personnel were responsible for all captures – in law if not always in fact. This is despite, for example, Australian forces capturing an entire airbase in western Iraq during the initial intervention. This discomfort is exacerbated by the 1958 Geneva Conventions Act enshrining collective and individual obligations in Australian domestic law.

The country capturing a PW may legally turn that prisoner over for detention to another signatory to the Conventions as long as it is satisfied that such prisoners will continue to be treated strictly in accordance with the conventions. For practical reasons Australia, Britain, Canada and New Zealand signed an agreement with the US to do so in Afghanistan as it was pointless running separate national PW camps. These agreements appear to have flowed on to the conflict in Iraq but not as smoothly as they perhaps should have. A capturing power, however, remains responsible for ensuring that PW so transferred continue to be treated in accordance with the Conventions. You can hand over the PW but not the responsibility. This why the question of who made the initial capture is so important.

Now it seems certain that none of the detainees maltreated in Abu Ghraib were Iraqi soldiers detained as PW during the initial combat phase of the war. Therefore they could not have been personnel captured through Australian involvement in that phase. Australia's role is therefore a general humanitarian one among allies rather than a specific responsibility for individuals detained in Abu Ghraib.

The situation is further complicated by some apparent US interpretations or possible reservations on the applicability of the Geneva Conventions to terrorist prisoners, both in Iraq and more broadly. Again the nature of international conflict has outpaced the development of international law and its safeguards.

During the Cold War, when signing the Geneva Conventions, the Soviet Union and 12 other communist signatories declared a reservation concerning Article 85, which protects PW prosecuted under the laws of the detaining power from losing their status as PW. They declared that they would not recognise such protection in cases where they deemed the PW were 'war criminals'. Much abuse of allied PW as supposed 'war criminals' subsequently occurred in the Korean and Vietnam Wars.

In 1959, both in federal parliament and when acceding to the Conventions, Australia officially noted that it did not recognise such declarations or reservations as valid and would '... therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates'. The UK, Canada and New Zealand made similar declarations. Given this in-principle precedent, some of our international lawyers should consult with some of our military historians to ensure Australia's current national stance remains consistent with our longstanding historical one.

The practical bottom line to this debate has two parts. First, Australia has always prided itself on its leading role in supporting international law and its spread to new situations and conditions. Second, Australian personnel who have become PW since 1942 have generally been treated very poorly, especially by Japan and North Korea. ADF personnel captured by trans-national Islamist terrorist groups are even more likely to be treated appallingly. In case of future inter-State conflicts, however, we must give no grounds whatsoever now that might allow a later adversary to somehow claim that the Geneva Conventions do not apply to Australian personnel.●

Parliamentary Oversight

Anyone with experience of New Zealand, for example, swiftly becomes a fan of the machinery-of-government oversight exercised in Australia by Senate and joint committees. While party politics will always rear its head in such deliberations the taxpayer and the citizen win out overall.

It is for this reason that a ministerial veto on witnesses testifying is generally to be regretted. Many myths about supposed ADF (and government) involvement in the Abu Ghraib abuses could have been nipped in the bud if the ADF officers concerned had been allowed to defend themselves, and defend the ADF's (and Australia's) reputation.●

Highlights:

- Australia's Geneva Conventions obligations
- Protecting Major George O'Kane
- Preserving the ADF from electioneering
- Radio Australia and our national security
- Deciding when a spouse is a spouse
- Irony Corner: HREOC misses the point

Counting them all out and back

Twelve months ago, in the Winter 2003 issue of *Defender*, the ADA noted that it was encouraging to see ADF contingents deployed overseas farewelled and welcomed home to Australia by parliamentarians of all parties. The Association observed that ‘such ceremonies are truly national occasions that are above partisan politics and inter-State or inter-Service rivalries. The time-honoured and tested traditions and protocols involved emphasise the importance of the ADF in Australian life as one of our oldest, most integrated and honoured national institutions’.

‘In constitutional and professional terms, such national ceremonies especially illustrate that the ADF is apolitical in function and history and that it serves all Australians equally. Such national occasions also emphasise that while the ADF quite properly always carries out the lawful orders of the government of the day, the defence force itself has a wider and longer-term reciprocal relationship with, and responsibilities to, the Australian people.’

In June 2003 the ADA warned, however, that it was more than a pity that the farewell and welcome home ceremonies for ADF elements deployed to Iraq had not had the traditional ‘above politics’ theme that would come with the presiding dignitary being the Governor General or the relevant State Governor.

The Association noted with regret, ‘whether in truth or just common perception, and on this matter it does not much matter which applies, it seems both of the main parties have at times sought to make party-political capital out of such ceremonies or the associated media coverage. It is hoped the appropriate sense of constitutional perspective and professional decorum prevails in future. After all, even Parliament is always opened by the Governor-General rather than a politician for similar reasons.’

There has recently been further public (and defence force) unease about the propriety of electioneering material unnecessarily featuring photographs of parliamentarians with ADF personnel. This again highlights the importance of observing longstanding commonsense conventions, institutional protocols and simple courtesies. All political parties need to draw breath and apply some restraint, especially in an election year – and when the ADF is committed to combat operations in a situation of some public controversy.

An old Westminster System adage also applies. If you want to keep the military out of politics you should keep the politics out of the military.●

Spousing Controversies

Recent controversy over who constitutes a spouse has highlighted the size of the Commonwealth bureaucracy and the marked discrepancies between the definitions of a spouse applying in the Taxation Act, various social security acts, the regulations covering defence force personnel, and the policies applying to federal parliamentarians.

Surely the solution is simple. With the possible exception of the Taxation Act, where very strict interpretations need to apply, a common definition of a spouse should apply to all other circumstances where Commonwealth revenue may need to be expended.

If the definition of a spouse applied by ADF personnel regulations is good enough for defence force personnel, its universal application would seem to leave no potential for traveling parliamentarians to become confused as to who should accompany them on overseas trips at public expense.●

Powering up Radio Australia

Recent and reputable opinion polling in several Muslim-majority countries has recorded that the most ridiculous conspiracy theories about 9/11 and other issues are widely held among Muslims world-wide. This unfortunate situation assists with the propagation of bigotry by Muslim extremists and, in turn, to recruiting for trans-national Islamist terrorist groups.

The best counter to such conspiracy theories and the resultant recruiting is truth. This is especially so as Al Qa’eda’s strategic centre of gravity is probably its ability to recruit. Facts and considered views need to be broadcast to those who, for a range of technical, cultural and political reasons, will otherwise never hear other than bigoted, or at best heavily biased, views.

Despite drastic cutbacks Radio Australia remains a respected objective voice internationally. Unfortunately it is heard much less throughout our region these days because its best transmitters were sold by the Government as an ‘efficiency measure’. The amount saved was roughly equal to that spent each year on the triple-J network – somewhat of an interesting view of national priorities. That Radio Australia’s strongest transmitters were sold to a well-meaning Christian missionary organisation has not necessarily helped to allay conspiracy theories among Muslim listeners in South East Asia.

Significant resources need to be pumped into Radio Australia on national security grounds so it can project the ‘soft power’ of truth into our region.●

Malaysia Sets up a Coastguard

The Malaysian government has announced the creation of a new maritime paramilitary agency to police its territorial waters, especially the Malacca Straits. The Malaysians declared the creation of the agency was intended to bring maritime law enforcement under the one roof, rather than dispersed among 11 departments and agencies as at present, in order to ensure a more effective and orderly control of territorial waters and to maximise available resources.

While commensurate Australian bureaucratic responsibilities are spread over only half a dozen departments and agencies the same principles apply. It is a great pity that the question of an Australian coastguard has become a party-political difference rather than being a concept considered on its merits.●

Irony Corner

IN mid June the Australian Human Rights and Equal Opportunities Commission published a report titled ‘Ismae’ (*listen* in Arabic) which claimed that Muslim Australians are being widely vilified. This comes at a time when many Australians increasingly hope that there would be more criticism by Muslim community leaders of the Islamist terrorists and their sympathisers, both in Australia and overseas, who are hell bent on murdering Australians in large numbers.

Surely one of the most basic human rights is to be free from murder by terrorists motivated by religious hatred? Another basic human right is to live within a society where religious bigotry is opposed, not ignored, by moderate co-religionists with the moral and theological responsibility to do so.●

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