

INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMANITARIAN LAW

I. INTRODUCTION

In the period under review, two long-standing items on the legislative agenda were completed: the legislative amendments to allow New Zealand's ratification of the Third Additional Protocol (the Red Crystal Emblem) and the legislation required for ratification of the First and Second Protocols to the Hague Convention on the Protection of Cultural Property in Armed Conflict. Both are discussed below. Also, encouraging progress was made with the Arms Trade Treaty (ATT). While there was a disappointing failure when treaty negotiations collapsed in July, by the end of the year, there was optimism that agreement would be reached in early 2013.

Disappointingly, despite continuing concerns regarding detention practices in Afghanistan, there have been no clarifications made by the Government on New Zealand's role in the transfer of detainees in Afghanistan.¹ There was a Briefing on Afghanistan on 16 August 2012 in the Foreign Affairs, Defence and Trade Committee, but as per Standing Orders, the content of that Briefing remains confidential.

There was no progress on any of the amendments to the Rome Statute agreed in the Kampala Review Conference in 2010.²

II. RED CRYSTAL EMBLEM

Having languished since its first introduction on 24 August 2010, the Geneva Conventions (Third Protocol – Red Crystal Emblem) Amendment Bill had its First Reading on 28 June 2012. It was referred to Foreign Affairs, Defence and Trade Committee, had its Second and Third Readings on 5 December and passed into law. The Bill had unanimous support so it is unclear why there had been such a time lapse in the passage of the Bill, although the Select Committee did note that the matter was not urgent.³

The Bill amends the Geneva Conventions Act 1958 and the Flags, Emblems, and Names Protection Act 1981. It introduces the new Red Crystal Emblem as a protected emblem in New Zealand, although it should be noted that Tony Ryall, Minister of Civil Defence, introducing the Bill confirmed that the New Zealand Defence Force would continue to use

1 Treasa Dunworth "Year in Review: International Humanitarian Law and International Criminal Law" (2011) 9 NZYIL 308 at 310-315.

2 Treasa Dunworth "Year in Review: International Humanitarian Law and International Criminal Law" (2010) 8 NZYIL 214 at 215-216.

3 Foreign Affairs, Defence and Trade Committee *International treaty examination of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem* (2012).

the Red Cross Emblem, rather than the new Red Crystal.⁴ The maximum penalty for a breach of the Act has been increased from \$1,000 to \$10,000.⁵ The legislation paves the way for ratification of the Third Protocol, which is expected in 2013.⁶

III. CULTURAL PROPERTY (PROTECTION IN ARMED CONFLICT) ACT

Legislation to allow New Zealand's ratification of the First and Second Protocols to the 1954 Hague Convention had been languishing since 2009.⁷ The proposed implementing legislation, the Cultural Property (Protection in Armed Conflict) Bill, was introduced to Parliament in 2008, referred to the Government Administration Committee for consideration, and reported back to the House on 29 May 2009.⁸ Finally, on 6 December 2012, it was passed at its Third Reading.⁹ As with the legislation for the Red Crystal, there is no apparent reason for the lengthy delay. The requisite treaty examination process had been completed in 2008, with unanimous support in Select Committee for ratification,¹⁰ and New Zealand had been a state party to the parent treaty, the Convention on the Protection of Cultural Property in the Event of Armed Conflict, since 2008. With the implementing legislation being enacted, the way has been paved for ratification of the First and Second Protocols. That is expected to happen in 2013.

An interesting issue regarding the jurisdictional scope of the criminal provisions in the legislation arose in the course of the Select Committee's consideration of the Bill. Article 15 of the Second Protocol requires states parties to criminalise serious violations of the Protocol in their domestic law. The Second Protocol creates a system of "enhanced protection" in respect of cultural property that has "greatest importance for humanity" and that is protected by domestic measures that recognise the property's cultural and historic value provided it is not being used for military purposes.¹¹ Each State Party must ensure that its legislation establishes jurisdiction over serious violations of the Protocol when the offence is committed in its territory or

4 (28 June 2012) 681 NZPD 3521.

5 Geneva Conventions Act 1958, s 8(2).

6 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) 2404 UNTS 261 (opened for signature 8 December 2005, entered into force 14 January 2007) [Protocol Additional].

7 First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 215 (opened for signature 14 May 1954, entered into force 7 August 1956) [First Protocol]; Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 2253 UNTS 172 (opened for signature 17 May 1999, entered into force 9 March 2004) [Second Protocol]. See Treasa Dunworth "Year in Review: International Humanitarian and International Criminal Law" (2009) 7 NZYIL 321.

8 Cultural Property (Protection in Armed Conflict) Bill 2009 (275-2).

9 Cultural Property (Protection in Armed Conflict) Act 2012.

10 Treasa Dunworth "Year in Review: International Humanitarian Law and International Criminal Law" (2008) 6 NZYIL 315 at 320-321.

11 Second Protocol, above n 7, art 10.

when the alleged offender is a national of the State Party.¹² However, for violations of the Protocol involving cultural property that is the subject of enhanced protection, the Protocol requires States Parties to assert criminal jurisdiction even when the offence is committed abroad by a non-national.¹³ That is, the Protocol requires a form of universal jurisdiction as regards attacks against cultural property under enhanced protection.

In the Bill as originally drafted, jurisdiction in respect of the enhanced protection regime only extended to New Zealanders and to nationals of those states that have ratified the treaty. This did not quite reach as far as the Protocol required. As amended by the Government Administration Select Committee, the Bill (now Act) allows for prosecution of persons in New Zealand charged with any one of the three enhanced protection offences. This fits with the tenor of the Protocol itself and the intention to assert a wide scope of accountability.

The care that has been taken as regards the jurisdictional reach of the legislation is interesting in light of the International Crimes and International Criminal Court Act 2000. That Act asserts criminal jurisdiction over “all persons” regardless of their nationality or where the alleged offence took place for intentional direct attacks against “buildings dedicated to religion, education, art, science or charitable purposes, historic monuments ... provided they are not military objectives”.¹⁴

IV. ARMS TRADE TREATY

The impetus towards achieving agreement on a treaty to regulate international trade in and transfer of small arms can be seen as a manifestation of the evolution of humanitarian arms control. Therefore, although not “international humanitarian law” as traditionally understood, the negotiations on the Arms Trade Treaty are included in this review as they form part of the broader efforts to control the conduct of hostilities by attempting to limit the weapons available in such situations.

Notwithstanding the attention paid to weapons of mass destruction and their impact on security, it is well understood that small arms constitute a serious destabilising influence in the world today and have a major humanitarian impact in conflicts. As early as 1947, there were attempts to regulate international transfers of small arms, but as with many such attempts in the early years of the United Nations, they fell foul of the politics of the Cold War and were abandoned at least at an official level. Interest was reignited in the 1990s and since then, there has been a growing momentum towards acknowledging the problem and seeking resolution.

12 At art 16(1)(a) and (b).

13 At art 16(1)(c).

14 International Crimes and International Criminal Court Act 2000, s 8(1)(c) and Rome Statute of the International Criminal Court 2187 UNTS 3 (signed 17 July 1998, entered into force 1 July 2002), arts 8(2)(b)(ix) and 8(2)(e)(iv).

Over the years, there have been a number of initiatives attempting to deal with the problem, but it was not until 2006 that there was a clear impetus towards a comprehensive, binding treaty dealing with the international transfer of small arms. In that year, the General Assembly called for a start of the process to examine the feasibility of an ATT.¹⁵ In 2009, a decision was taken by the General Assembly to convene a United Nations Conference on the Arms Trade Treaty in 2012 “to elaborate a legally-binding instrument on the highest possible common international standards for the transfer of conventional arms”.¹⁶ A series of preparatory committee meetings were held during 2010 and 2011, and the Conference itself convened from 2-27 July 2012.

New Zealand has been a strong advocate throughout these developments, including during the preparatory process. In 2006, it was a co-sponsor of the call by states within the General Assembly to establish the ATT process, and it joined the consensus in the General Assembly in starting that process.¹⁷ Throughout the preparatory process, New Zealand actively participated in the work of the Preparatory Committee and in the negotiations themselves. Reading through the statements at the various meetings, it is clear that New Zealand supported a treaty with a broad scope, covering not just the transfer of weapons platforms and systems, but also including ammunition, weapons components and related manufacturing technology.¹⁸ Further, New Zealand’s position was that the range of transfers caught by the treaty would cover not only the usual import and exports, but also trans-shipment and arms brokering.¹⁹ New Zealand was also concerned to see a rigorous and transparent system of enforcement and monitoring.²⁰ Throughout the process, New Zealand stressed that an essential component of any treaty would be systems for international co-operation and assistance measures, aimed at ensuring that there would not be an undue burden on small island developing states in particular.²¹ During the negotiations, New Zealand worked actively to encourage and foster consensus on the text. Back at home, just prior to the Conference opening, Parliament passed a Notice of Motion reaffirming New Zealand’s commitment to the negotiations and to achieving a strong robust treaty.²²

15 GA Res 61/89, A/Res/61/89 (2006).

16 *The arms trade treaty* A/C.1/64/L.38/Rev.1 (2009) at [4].

17 GA Res 61/89, above n 15.

18 Statement of New Zealand “First Session of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty”(13 July 2010). See as well HE Dell Higgie, Ambassador for Disarmament “Opening Statement to the United Nations Conference on the Arms Trade Treaty, 2 - 27 July 2012” (2012).

19 Statement of New Zealand, 13 July 2010, above n 18, at 1.

20 Statement of New Zealand, “Third Session of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty” (11 July 2011).

21 Statement of New Zealand, 13 July 2010, above n 18, at 1. See also Statement of New Zealand, “Second Session of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty” (2 March 2011).

22 (27 June 2012) 681 NZPD 3407.

Ultimately, however, the July Conference failed to reach consensus and the meeting ended without agreement on the text of a treaty. Speaking to the First Committee, Ambassador for Disarmament HE Dell Higgie expressed disappointment with the failure of the Conference to reach agreement, but stated that New Zealand remained wholly committed to a treaty that would meet its “humanitarian ambitions”.²³ As the year ended, however, indications were that a treaty was likely to be agreed in 2013.

V. NUCLEAR WEAPONS

Another recent humanitarian initiative in the context of the control of weapons was the launch by the International Committee of the Red Cross of the “Make Nuclear Weapons the Target” campaign. On 26 November 2011, the Council of Delegates of the International Red Cross and Red Crescent Movements passed a resolution on the elimination of nuclear weapons. The Council stated that it found “it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality”.²⁴ It called for National Societies to work towards a global treaty eliminating nuclear weapons.

The New Zealand Red Cross launched its own campaign, Make Nuclear Weapons the Target, on 30 August 2012. On 31 May, Parliament passed a Notice of Motion, moved by Maryan Street and passed unanimously, to support the initiative of examining nuclear weapons from a humanitarian perspective. On 22 October 2012, New Zealand joined a statement on the humanitarian dimension of nuclear disarmament to the First Committee.²⁵

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23 Statement of New Zealand delivered by HE Dell Higgie, Ambassador for Disarmament “67th Session of the United Nations General Assembly First Committee” (9 October 2012).

24 Council of Delegations Resolution 1 *Working Towards the Elimination of Nuclear Weapons* (26 November 2011).

25 Speech delivered by HE Ambassador Benno Laggner of Switzerland “Joint Statement on the humanitarian dimension of nuclear disarmament” 67th Session of the United Nations General Assembly First Committee (22 October 2012).