

Documents tabled on 13 May 2009:

National Interest Analysis [2008] ATNIA 13

with attachment on consultation

**Optional Protocol to the Convention on the
Safety of United Nations and Associated Personnel**

(New York, 8 December 2005)

[2006] ATNIF 21

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005) [2006] ATNIF 21

Nature and timing of proposed treaty action

1. Australia signed the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel ('the Optional Protocol'), subject to ratification, on 19 September 2006. It is proposed that Australia lodge its instrument of ratification as soon as practicable after the completion of the treaty making processes, including the enactment of amendments to Commonwealth legislation and the tabling of the text in both Houses of Parliament.

2. In accordance with Article VI, the Optional Protocol will enter into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations ('UN'). The Optional Protocol has not yet entered into force. Once the Optional Protocol has entered into force generally, it will enter into force for Australia on the thirtieth day after the deposit of Australia's instrument of ratification.

3. The Optional Protocol supplements and amends the Convention on the Safety of United Nations and Associated Personnel 1994 [2001] ATS 3 ('the Convention'). The Convention entered into force for Australia on 3 January 2001. Article I of the Optional Protocol provides that the Convention and the Optional Protocol shall be read and interpreted as a single instrument.

Overview and national interest summary

4. The Convention requires States Parties to criminalise attacks on UN and associated personnel, and either to prosecute or extradite persons suspected of committing such acts. However, the Convention applies only to peacekeeping operations or other UN operations specifically declared to be of 'exceptional risk' by the UN Security Council or General Assembly. Despite a marked escalation in the number and seriousness of attacks against UN personnel since the 1990's, a declaration of 'exceptional risk' has never been made.

5. The Optional Protocol expands the protection of the Convention to additional categories of UN operations including personnel involved in delivering humanitarian, political or development assistance in peacebuilding or delivering emergency humanitarian assistance. The Optional Protocol also removes the requirement for a declaration of 'exceptional risk' before the Convention can apply to anything other than a UN peacekeeping operation. The Optional Protocol clarifies a State's obligation to release an arrested member of a UN operation.

6. Ratification of the Optional Protocol will demonstrate Australia's continuing support for UN operations and strengthen international cooperation to ensure individuals are held accountable for crimes against persons involved in a broader range of UN activities. Ratification will also encourage other countries to become parties which will provide greater legal protection for Australians participating in UN operations abroad.

Reasons for Australia to take the Proposed Treaty Action

7. Australian military and civilians are involved in a variety of UN peacebuilding activities. Were it to enter into force, the Optional Protocol would provide protection to a larger number of UN and associated personnel than is currently protected by the Convention. Peacebuilding activities and the delivery of emergency assistance are at the forefront of UN operations and, along with peace keeping operations, expose personnel to serious risk.

8. Australia has been a strong supporter of the Optional Protocol during negotiations and signed it on 19 September 2006. Ratification of the Optional Protocol will demonstrate Australia's continuing support of UN operations and strengthen international cooperation to ensure individuals are held accountable for crimes against UN and associated personnel in a broader range of situations.

Obligations

9. The Optional Protocol amends the definition of 'UN operations' contained in Article 1(c) of the Convention to additionally include those operations conducted under UN authority and control for the purposes of delivering humanitarian, political or development assistance in peacebuilding or delivering emergency humanitarian assistance.

10. The effect of the Optional Protocol would be to oblige States Parties to apply the Convention to a broader range of UN activities. That is, attacks against UN operations delivering humanitarian, political or development assistance or delivering emergency humanitarian assistance would be required to be criminalised and suspects prosecuted or extradited. For example, attacks against personnel employed by the UN Development Programme (UNDP), UN Children's Fund (UNICEF), the World Food Programme (WFP), the UN High Commissioner for Refugees (UNHCR) and the UN Office for the Coordination of Humanitarian Affairs (OCHA), previously not addressed in the Convention, would be included within its scope for those States who ratify the Optional Protocol.

11. The Optional Protocol allows State Parties to 'opt out' of applying the Convention to a UN operation delivering emergency humanitarian assistance when that operation is conducted for the sole purpose of responding to a natural disaster.

Implementation

12. Implementation of the Optional Protocol requires Commonwealth legislative amendment to Division 71 of the *Criminal Code Act 1995* (Cth) ('Offences against United Nations and associated personnel'). Amendment would be required to section 71.1 which outlines the purpose of the Division, to note the implementation of the Optional Protocol. The definition of 'UN operation' in section 71.23 would also require amendment in order to mirror Article II of the Optional Protocol. This will ensure that the crimes in the Criminal Code apply where the victims are UN or associated personnel engaged in delivering humanitarian, political or developmental assistance in peacebuilding or delivering emergency humanitarian assistance.

Costs

13. Ratification of the Optional Protocol would have no financial implications at the Commonwealth or State/Territory levels.

Regulation Impact Statement

14. DFAT has assessed the implementation of the Optional Protocol against the criteria in *The Best Practice Regulation Handbook*. This regulatory action has no impact on business and individuals or on the economy and a Regulation Impact Statement or Business Cost Calculator report is not required.

Future treaty action

15. The Optional Protocol does not provide for a method of amendment. However, according to the Vienna Convention on the Law of Treaties, a treaty may be amended by agreement between the parties. Any such agreement to amend the Optional Protocol or any proposed amendment to the Convention would have to satisfy Australia's domestic treaty requirements including tabling in parliament, a National Interest Analysis and consideration by the Joint Standing Committee on Treaties (JSCOT).

Withdrawal or denunciation

16. Article VII of the Optional Protocol provides that a State Party may denounce the Protocol by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date on which notification is received by the Secretary-General. Denunciation is considered a formal treaty action and would require satisfaction of Australia's domestic treaty requirements including tabling in parliament with a National Interest Analysis and consideration by the JSCOT.

Contact Details

International Legal Branch
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ATTACHMENT ON CONSULTATION

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Consultation

17. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the Optional Protocol was provided to State and Territory representatives for consideration at its meeting in August 2005 and remained on the schedule of treaties since that time. No requests for further information or comments on the Optional Protocol have been received to date.