

International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013 [F2013L01916]

Portfolio: Foreign Affairs

*Authorising legislation: International Organisations (Privileges and Immunities)
Act 1963*

Last day to disallow: 4 March 2014 (Senate)

Purpose

1.601 This regulation confers privileges and immunities on the International Committee of the Red Cross (ICRC) to give effect to the Arrangement between the Government of Australia and the International Committee of the Red Cross on a Regional Headquarters in Australia, done at Canberra on 24 November 2005. It confers on the ICRC in Australia legal status and such legal capacities as are necessary for the exercise of its powers and the performance of its functions. The regulation is intended to support the work of the ICRC in Australia and the Pacific region.

Background

1.602 The committee reported on the instrument in its *First Report of the 44th Parliament*.

Committee view on compatibility

Right to a fair hearing

Immunity from suit and other legal process

1.603 The committee sought clarification as to whether the immunities granted to the ICRC under the regulation were compatible with the right to a fair hearing.

Minister's response

1. This paper has been prepared by the Department of Foreign Affairs and Trade in response to the request for further information from the Chair of the Parliamentary Joint Committee on Human Rights in his letter to the Minister for Foreign Affairs and Trade of 10 December 2013 regarding the International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013 (Cth) (Regulation).
2. The Committee, in its *First Report of the 44th Parliament*, questioned the compatibility of this Regulation with human rights, in particular the right to a fair hearing (and any possible right of access to court) in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). It noted its intention to write to the Minister to seek clarification on this point. The Committee also drew to the Minister's attention the comments of its predecessor committee on the possible

inconsistency of Australia's laws on privileges and immunities with Australia's obligations under the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). It requested the Minister to undertake a review of those laws in relation to this aspect of their operation. This paper will address each issue in turn.

Compatibility with human rights

3. There is no incompatibility between this Regulation and the human rights and freedoms recognised in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In particular, there is no legal basis on which to assert that the conferral of privileges and immunities on an international organisation would breach any rights conferred by Article 14 of the ICCPR, which provides for an accused's right to a fair trial before an impartial court or tribunal.
4. The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and tribunals". Article 14(1) goes on to outline specific provisions regarding a fair hearing, while Article 14(3) sets out the minimum guarantees of the accused in criminal proceedings. In his leading commentary on the ICCPR, Nowak elaborates further on the content of the rights conferred in Article 14(1), identifying that the principle of "equality of arms" between plaintiff and respondent (or between prosecutor and defendant) is an important component of a fair trial. This is the principle that each party to a proceeding should have an equal opportunity to present his case. Nonetheless, Nowak notes that the right to equality before courts and tribunals does not affect diplomatic privilege or parliamentary immunity.¹
5. The Regulation also provides some restrictions on the privileges and immunities conferred on the ICRC. The purpose of conferring privileges and immunities on an organisation such as the ICRC is to assist it to fulfil its mandate. Protecting the confidential nature of the ICRC's work, including through immunity from legal processes, helps it to maintain the access it needs to perform its functions and the security of its personnel. The Regulation makes clear that the privileges and immunities conferred are for the benefit of the ICRC, therefore, and not the personal benefit of individuals (subsection 15(1)).
6. The Regulation also provides that the privileges and immunities conferred on the ICRC and its Delegates in Division 1 of the Regulation (Privileges and Immunities of the ICRC) and Division 2 (Privileges and Immunities of delegates of ICRC) do not apply if, in the ICRC's view: their application would impede the course of justice, as long as the

1 Novak, M. *UN Covenant on Civil and Political Rights - CCPR Commentary* (2nd Ed.), Kehl, 2005, pp 308-309.

purposes for which the privileges or immunities were conferred are not prejudiced (subsections 15(3) and 15(4)). Given the ICRC's mandate to promote and ensure compliance with international humanitarian law, we expect that the ICRC would be favourably disposed to any requests from the Australian Government to waive immunity in appropriate circumstances.

Committee response

1.604 The committee thanks the Minister for Foreign Affairs for her response and has concluded its examination of this matter.

1.605 The committee accepts that the right to a fair hearing in article 14 of the ICCPR may be subject to reasonable limitations. The committee notes that immunities enjoyed under international law by heads of state, diplomats and consular representatives and officials of recognised international organisations may involve a restriction on the right to a fair hearing. However, these immunities have generally been held to be consistent with the right to a fair trial. The committee notes that international law in relation to immunities and exceptions to immunities is evolving.²

Obligation to extradite or prosecute person suspected of certain international crimes

Immunities from prosecution

1.606 The committee noted the apparent inconsistency of Australia's laws on granting privileges and immunities with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and requested the Minister to undertake a review of those laws in relation to this aspect of their operation.

Minister's response

Consistency of Australia's laws on privileges and immunities with Australia's obligations under CAT

7. The question of the application of immunities to serious international crimes, including torture, remains unsettled under international law. There has been limited jurisprudence on this point and such jurisprudence as there has been is not determinative. For this reason, it would be premature to propose further legislative amendments addressing this issue. As such, a review of the legislation is not warranted at this time.

2 See, for example, M C Bassiouni, *Introduction to international criminal law*, Martinus Nijhoff Publishers, 2012 pp76-77. See, also, for example, Rome Statute of the International Criminal Court, article 5(1), *Prosecutor v Kambanda*, ICTR T Ch1, (4 September 1998); *Prosecutor v Blaskic* (ICTY) IT-95-14 AR 108 (1997).

Committee response

1.607 The committee thanks the Minister for Foreign Affairs for her response.

1.608 However, the committee notes that the legal basis for the obligation to prosecute or extradite an individual suspected of torture is well settled under the express provisions of Article 6(1) and (2) of the CAT, as elucidated in the jurisprudence of the Committee against Torture.³ The committee refers to its earlier analysis of this issue.⁴

1.609 The committee therefore seeks further information in relation to the compatibility of Australia's laws on granting privileges and immunities with its obligations under the CAT to prosecute or extradite an individual suspected of torture.

3 See the Committee against Torture's views expressed in its discussions with the UK government (CAT/C/SR.354, paras 39-40, 46) and in its concluding observations on the United Kingdom's third periodic report (CAT/C/SR.360, para 11 and CAT A/54/44, para 77(f) (1999)). A similar view is reflected in the Committee against Torture's decision in the case of *Guengueng v Senegal*, Comm. No 181/2001, A/61/44, at 160 (2006) (failure by Senegal to prosecute the former head of state of Chad involved violation of the Torture Convention). See also, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No3)* [2000] 1 AC 147.

4 See, Parliamentary Joint Committee on Human Rights, *Fourth Report of 2013*, 20 March 2013, pp 42-47; *Sixth Report of 2013*, 15 May 2013, pp 228-232 and *First Report of 44th Parliament*, 10 December 2013, pp 97-99.