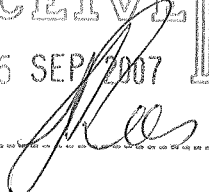


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Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House, Canberra ACT 2600

By email: jsct@aph.gov.au

5 September 2007

Dear Committee Secretary

Please accept this submission to your review of the **Agreement between Australia and the Philippines on the Status of Visiting Forces [2007] ATNIA 25**, tabled 7 August 2007.

We welcome a legal agreement to provide certainty in regulating the status and liabilities of visiting Australian and Philippine armed forces. We particularly welcome the various safeguards in the Agreement, including the exclusion of the death penalty and basic rights in criminal proceedings (article 11), environmental protection (article 12) and labour standards (article 19). We would like to highlight a number of issues in the Agreement.

1. Immigration Law and Refugee Status

While visiting forces are exempt from immigration law and do not acquire rights of permanent residence or domicile (article 4(2)), it would be desirable for the Agreement to explicitly declare that this provision is without prejudice to claims for refugee status under the Australian Migration Act 1957 (Cth), in accordance with international refugee law. It cannot be discounted that a member of Philippine visiting forces may fear persecution if returned to his or her home country, and the Agreement should not foreclose the availability of refugee status. There has been considerable political violence in the Philippines in recent years, which may entail persecution: see Amnesty International, *Report 2007*, pp 209-210.

2. Conditions of Detention

The Agreement provides that a member of visiting forces suspected of a crime will be detained in the custody of the Receiving State in various circumstances (article 11(7)) and will remain so detained on conviction. Here it should be noted that the conditions of detention in prison and the administration of justice in the Philippines has raised serious human rights concerns in recent years. Amnesty International observed in its *2006 Report* that:

Implementation of fair trial and custodial safeguards remained weak, and criminal suspects were at risk of ill-treatment or torture by the Philippine National Police (PNP) during extended periods of "investigative" detention.... Inhumane prison conditions also affected adult male and female prisoners and incidents of excessive use of force by the authorities were reported.

In March 2006, 26 prisoners were killed in prison (some after surrendering) when police responded to an escape attempt and prison riot in Bicutan, while in 1999 the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions similarly reported that the national police executed a number of wounded prisoners following a prison riot.

In these circumstances, it may be desirable for the Australian government to seek stronger practical safeguards and supervision in detention to ensure that Australian service men or women in Philippine custody are accorded the international minimum standards of protection in detention, rather than subjected to a possibly lesser national Philippine standard of treatment of detainees. Regular consular access will evidently play an important role here, although a subsidiary agreement particularising the treatment of prisoners may be desirable.

3. Prisoner Exchange

For those convicted and imprisoned in the Receiving State (article 11(7)(d)-(e)), it may be desirable to expressly acknowledge in the Agreement itself the possibility of prisoner exchange agreements enabling Australian personnel to serve out their sentences in Australia. This would also provide a further option for ensuring that prison conditions are adequate.

4. Non-Return to Torture, Ill-Treatment or Persecution

The Agreement requires the Parties to cooperate in the arrest of members of Visiting Forces in the territory of the receiving State and in handing them over to the party that is to exercise jurisdiction (article 11(5)). Such provision should not be understood to require Australia's cooperation in circumstances where handing over custody of Philippine personnel to the Philippine authorities would expose those personnel to a risk of torture, other serious ill-treatment, or persecution, as required by Australia's international law obligations.

The provision requires that the Parties so cooperate only '[w]ithin the scope of their legal competence', and this should be broadly interpreted to encompass domestic and international law competence. An expansive interpretation is necessary because Australian domestic law does not incorporate Australia's international obligation not to return a person to torture.

Similar considerations apply in relation to the obligation in the Agreement to cooperate in investigation and evidence gathering (article 11(8)). Mutual assistance should not occur where it might expose a person to torture or cruel, inhuman or degrading treatment.

5. Fair Trial Protections

We welcome the inclusion of fair criminal trial protections which substantially accord with article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). However, we note that there are some departures from the minimum international human rights standards in the Agreement. First, the right to an interpreter should be 'free' (ICCPR, art 14(3)(f)), which is not currently provided for in article 11(10)(f) of the Agreement. Given the considerable potential expense of interpreting, free assistance should be provided where necessary.

Secondly, while the Agreement provides for habeas corpus preceding and during the trial (article 11(1)(i)), there is no explicit inclusion of the international right of a convicted person to have their 'conviction and sentence reviewed by a higher tribunal' (ICCPR, art 14(5)). Thirdly, the Agreement does not provide for the ICCPR right to compensation where a conviction is reversed or a person is pardoned for miscarriage of justice (ICCPR, art 14(6)).

6. Jurisdiction over Security Offences

Consideration might be given to including terrorist offences within the scope of security offences over which the Sending State has the primary right to exercise jurisdiction under the Agreement (article 11(3)(a)-(b)). The definition of terrorism in Philippine law is much broader than in Australian law, and there is risk of Australian personnel being caught up in overly broad, politicised prosecutions, with a harsh prison term of 40 years – without parole.

The Human Security Act 2007 (Philippines) defines terrorism in article 3 as the commission of certain criminal acts (such as murder, piracy, kidnapping, arson, and the destruction of property) that ‘sow and create a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand.’ The Act permits terrorism suspects to be detained for three days before being brought before a court, aggravating the potential for abuse in police custody identified above. The Act also authorises preventive detention of terrorist suspects with no maximum detention period.

In these circumstances, so far as terrorist acts committed by Australian personnel are directed against Australia, primary jurisdiction should be exercised by Australian authorities.

Further consideration might also be given to permitting the Sending State to exercise primary jurisdiction over terrorism offences in all circumstances, including where members of Visiting Forces allegedly commit terrorist acts against the Receiving State. Australia has an interest in protecting its personnel from overly broad terrorism prosecutions under Philippine law, and the Australian legal system is sufficiently independent so as to properly deal with allegations of terrorism by Australian personnel against foreign governments.

In this context it should be noted that it is not clear whether acts of terrorism by Australian personnel would be regarded as falling within the scope of their official duties, such that the Agreement would confer primary jurisdiction on Australia under article 11(3)(a)(ii), as defined in article 1(i). Much would depend on the circumstances, including whether the conduct was authorised by a superior order.

7. Respect for Law

Consideration might be given to amending article 2 of the Agreement to impose a further duty on Visiting Forces and their Civilian Component to respect not only the law of the Receiving State, but also public international law (and in particular, those branches which directly concern the individual, including international humanitarian law, international human rights law and international criminal law). This is particularly relevant, for instance, to ensure that force protection security measures (article 10) respect the human right to life.

The provision might also reiterate the well accepted international law principle that no State is permitted to intervene militarily on either side in a civil war in a foreign State, even if requested to do so by the foreign government. This would not, however, prevent Australian assistance in counter-terrorism and counter-insurgency efforts in the southern Philippines.

Please be in touch if we can be of any further assistance.

Yours sincerely



Dr Ben Saul

Ms Lily Tsen