

KASHMIR AASM Submission.

1. Clarke Review Discussion:

The Veteran Entitlement Review Committee (VERC) aka Clarke, discusses the merit of eligibility provisions under the VEA for warlike service of the United Nations Military Observer Group India Pakistan (UNMOGIP) in Vol2, Chap 14, p.337 para 14.152 through to 14.155 of the VERC Report.

Submissions received by the VERC indicate that hostilities sporadically occurred between India and Pakistan, with most notable dates being 1965 and the end of 1971. The submissions argued that warlike service status should be awarded to service in UNMOGIP for the period August 1965 to January 1966, which covers the second India-Pakistan war over Kashmir.

Veterans explained that they were exposed to great danger and harm during these clashes, and experienced the full impact of the war, where they were subject to fire from small arms, mortars, field and medium artillery and, on occasions, air attack including the use of napalm.

The VERC again uses the un-referenced framework for defining warlike service and concluded that there is no justification for declaring service with UNMOGIP for the period August 1965 to January 1966 to have been warlike.

According to the VERC, service deemed to be warlike must have the application of authorised force in pursuit of a specific military objective. As UNMOGIP UNMO were unarmed and their mission was to monitor the cease-fire process, this was not pursuing a specific military objective with Rules of Engagement.

2. Contention:

2.1 The APPVA has viewed the submission for the reclassification of service for the UN Military Observer Group in India Pakistan (UNMOGIP) aka Kashmir, particularly during the India/Pakistan wars as potentially incurring danger. We are aware of periods of hostilities that Australian Army Observers may have been involved within combat operations between India and Pakistan during two periods.

2.2 In the same case presented by the APPVA in relation to UNTSO for reclassification of Warlike Service of the Arab/Israeli Wars since 1956, there holds a degree of merit to have the Kashmir Operation reviewed in some detail.

2.3 s7A (1) of the Veterans' Entitlement Act 1988 (VEA), determines "incurred danger" from hostile forces of the enemy, however in this case it would be pertinent to note that hostile forces within the context of this case would relate to Belligerents, or the

opposing forces conducting combat within the immediate space of the United Nations Military Observer (UNMO).

3. Incurred Danger.

3.1 The test for “danger” is objective, rather than subjective. On appeal to the *Repatriation Commission v Thompson* (1988), the Full Federal Court stated what has become the most cited test for “incurred danger”:

The words “incurred danger” therefore provide an objective, not a subjective, test. A serviceman (or woman) incurs danger when he encounters danger, is in danger, or is endangered. He incurs danger from hostile forces when he is at risk or in peril of harm from hostile forces. A serviceman does not incur danger by merely perceiving or fearing that he may be in danger (at 9 AAR 203).¹

3.2 The Actual or potential danger has been tested with the case of the *Repatriation Commission v Thompson* (1988); the Full Federal Court held that there must be actual danger. The Full Federal Court referred to the word “danger” and “substantial”. But the word “danger” stands for itself. If a serviceman incurs danger from hostile enemy forces, that circumstance is sufficient to satisfy the statutory requirement (at 355).²

3.3 Following from the definition of Incurred Danger, the Court commented:

Danger is not incurred unless the serviceman is exposed, at risk of or in peril of harm or injury. (at 356).

3.4 And further, the Court commented “[Danger] must arise as a direct result of the activities of hostile forces of the enemy..... There must be established an actual risk of physical or mental harm” (at 356-57)³

3.5 The **Length of time** danger is incurred has been interpreted in the case of *Crawford and Repatriation Commission* (1987), The Tribunal noted that the Act did not state, nor was it necessary to determine, whether danger needed to be measured in minutes, hours, days or even longer. That view would be preferable to the view *Re Howlett and Repatriation Commission* (1987) in which the Tribunal found that danger must be faced during a substantial (or, at the very least, a not insignificant) period of time.

¹ *Veterans’ Entitlement Law*, Creyke, Sutherland and Ridge, The Federation Press and Softlaw Community Projects, 2000, p124.

² *Veterans’ Entitlement Law*, Creyke, Sutherland and Ridge, The Federation Press and Softlaw Community Projects, 2000, p125.

³ *Ibid* p125.

4. The war of 1965 to 1966.

4.1 In 1965, Pakistan was despairing of the UN doing anything to alter the status quo in Kashmir. Early in that year fighting broke out well south of Kashmir. Internal unrest, ranging from non-violent opposition to Indian government to full-scale acts of terrorism, was on the increase in Indian-held Kashmir, being blamed by India on Pakistani infiltration.

4.2 The Indian government found itself under pressure to take a tougher line in Kashmir, and in August the government announced the abandonment of the 1949 ceasefire. Fighting broke out all along the ceasefire line and the Indian army seized key passes on the Pakistani side.

4.3 Pakistan retaliated with a major attack in the Jammu area. Within a few weeks, in September 1965, the fighting in Kashmir spread to become an all-out war between India and Pakistan. The UN Security Council demanded a ceasefire, implemented on 23 September, with Russian mediated discussions in Tashkent led to an end of hostilities and a resumption of normal relations. The Tashkent negotiations did not, however deal with Kashmir.

4.4 At the beginning of the war in 1965, Pakistan Army hatched a plan to wrest Jammu and Kashmir from India, by deploying hundreds of mercenary fighters across the Cease Fire Line (now known as the LoC - with some modifications) in civilian garb and cause an insurrection among the "suppressed" people of Kashmir. The plan code-named "Operation Gibraltar", was put into action in early August 1965. Unfortunately for the Pakistanis, the Kashmiri people refused to co-operate with the invaders, so the "Mujahids" went on to create arson, murder, rape and robbery in Kashmir and the Indian Army was called to save the people from the invaders. Desperate after the initial plan bust, the Pakistan Army then made a major armour-cum-infantry thrust into the Chhamb area and threatened the vital Akhnur bridge on the Jammu-Punch road, in turn causing the outbreak of the full-scale war.⁴

4.5 The second Indo-Pakistani conflict (1965) was also started without a formal declaration of war. It is widely accepted that the war began with the infiltration of Pakistani-controlled guerrillas into Indian Kashmir on about August 5, 1965. Skirmishes with Indian forces started as early as August 6 or 7, and the first major engagement between the regular armed forces of the two sides took place on August 14. The next day, Indian forces scored a major victory after a prolonged artillery barrage and captured three important mountain positions in the northern sector. Later in the month, the Pakistanis counter-attacked, moving concentrations near Tithwal, Uri, and Punch. Their move, in turn, provoked a powerful Indian thrust into Azad Kashmir. Other Indian forces captured a number of strategic mountain positions and eventually took the key Haji Pir Pass, eight kilometres inside Pakistani territory.

⁴ The Kashmir War, 1965: Raid on Badin By Aditya Gupta Oct 29, 2003 - http://www.acig.org/artman/publish/article_325.shtml

4.6 The Indian gains led to a major Pakistani counter-attack on September 1 in the southern sector, in Punjab, where Indian forces were caught unprepared and suffered heavy losses. The sheer strength of the Pakistani thrust, which was spearheaded by seventy tanks and two infantry brigades, led Indian commanders to call in air support. Pakistan retaliated on September 2 with its own air strikes in both Kashmir and Punjab. The war was at the point of stalemate when the UN Security Council unanimously passed a resolution on September 20 that called for a cease-fire. New Delhi accepted the cease-fire resolution on September 21 and Islamabad on September 22, and the war ended on September 23. The Indian side lost 3,000 while the Pakistani side suffered 3,800 battlefield deaths. The Soviet-brokered Tashkent Declaration was signed on January 10, 1966. It required that both sides withdraw by February 26, 1966, to positions held prior to August 5, 1965, and observe the cease-fire line agreed to on June 30, 1965.⁵

4.7 To meet the crisis, the UN immediate response was to increase the size of UNMOGIP. At the same time, the UN established a new mission, the UN India-Pakistan Observation Mission (UNIPOM), as a strictly temporary body to supervise the ceasefire along the border outside Kashmir. UNIPOM operated for six months from September 1965 to March 1966. By March 1966, the parties had withdrawn their forces as agreed at Tashkent to the lines held before the conflict.

5. The war of 1971 and after.

5.1 The **Indo-Pakistani War of 1971** was a major military conflict between India and Pakistan. The war is closely associated with the Bangladesh Liberation War (sometimes also referred to as the Pakistani Civil War). Although there is some disagreement about the exact dates of the war, hostilities between India and Pakistan commenced officially on the evening of December 3, 1971. The armed conflict on India's western front during the period between 3 December 1971 and 16 December 1971 is called the "Indo-Pakistani War" by both the Bangladeshi and Indian armies. The war ended in the surrender of the Pakistani military after armed hostilities on two fronts.⁶

5.2 At the end of 1971, as war flared between India and Pakistan over the future status of East Pakistan, soon to become the independent nation of Bangladesh, fighting broke out once again in Kashmir. A ceasefire was declared by India and agreed to by Pakistan on 17 December, after two weeks of intermittent fighting.

5.3 The Indians took the attitude that the Karachi Agreement of 1949 had ceased to have force, and that the ceasefire line agreed to in Karachi no longer existed. Moreover, India viewed the parties should now negotiate bilaterally with each other, and that the UN no longer had a role to play. After some months of disagreement, the parties met at Simla in northern India in July 1972 and agreed to treat the ceasefire line of December 1971, as the new 'Line of Control'.

⁵ Armed Conflicts Data - <http://www.onwar.com/aced/chrono/c1900s/yr65/fkashmir1965.htm>

⁶ Wikipedia, the Indo-Pakistani War of 1971 - http://en.wikipedia.org/wiki/Indo-Pakistani_War_of_1971

5.4 Since 1972 only Pakistan has lodged complaints about ceasefire violations with UNMOGIP. India also restricted the movements of UNMO, not allowing them close to the Line of Control on the Indian side, but nevertheless went on providing transport and accommodation facilities as before. After the crisis, Australia continued to contribute six observers to UNMOGIP.⁷

6. Contention Summary:

6.1 That the Australian Army Observers to UNMOGIP are provided an opportunity to present their case for reclassification of their service from Non-warlike Service to Warlike Service, in order for consideration, given the degree of incurred danger from the two Pakistan India wars in Kashmir.

6.2 There is no doubt that Australian UN Military Observers were intimately involved in the two Indo-Pakistani wars of **1965 (6 August 1965 to 23 September 1965); and 1971 (3-16 December 1971)**. Therefore, those Australian UNMO within the area of operations in the Kashmir region during both wars would have been exposed to the full effect of war, hence satisfying the Incurred Danger Test.

7. Recommendation:

That the Tribunal recommends retrospective awarding of the AASM (45-75) to the Australian Military Observers who served in Kashmir (UNMOGIP & UNIPOM) during the two Indo-Pakistani wars as dated above.

⁷ Londey, P, 'Other People's Wars', A History of Australian Peacekeeping, pp 49-52, 2004.