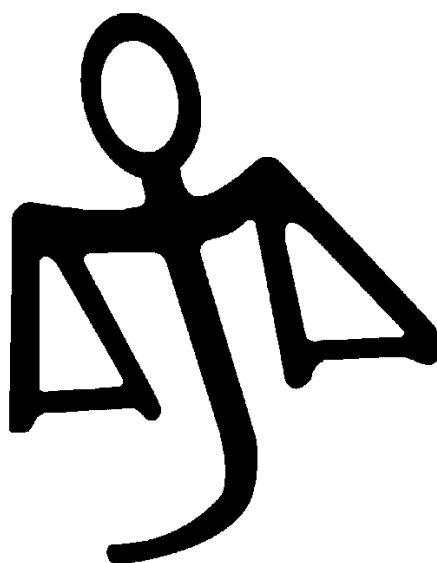


# *Pandora's Box*

*2017 War and Pieces*



## **Editors**

Eloise Gluer & Samantha Johnson

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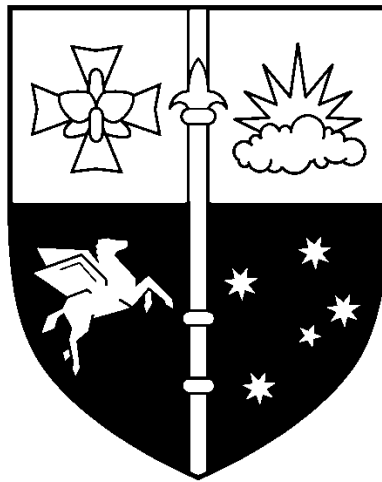
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*If no one fought but for their own convictions, there would be no war.*

Leo Tolstoy, *War and Peace*

## FOREWORD

*on*

### An Overview on the Law of Armed Conflict

The Hon Dean Mildren AM RFD QC

The Law of Armed Conflict has a history as old as war itself. The ancient Greeks, Romans, Chinese and Japanese all had their own laws. Modern laws have their origins in the customs of battle developed in medieval Europe, famously described by the Dutch scholar, Grotius, in his treatise *The Law of War and Peace* (1625). The changing nature of wars by the development of new weapons which began in the middle of the nineteenth century meant that the old rules were inadequate. Simultaneously, a spirit of humanitarianism swept across Europe which led to new rules designed to alleviate suffering, not only by those engaged in conflict, but by the rest of the population as well. Development of these new rules occurred mostly in the 20<sup>th</sup> century as a result of the two world wars, the war crimes trials which occurred in the late 1940s, and the establishment of international bodies such as The International Committee of the Red Cross, the League of Nations and the United Nations. These laws now find themselves in international conventions, to which Australia, as well as many other nations, have become parties. In recent times, the Commonwealth has also passed laws to give effect to these conventions as part of our domestic law.

Originally, the focus of these rules related to the participants in armed conflicts between sovereign states, but with the growth of new kinds of conflicts, the laws were extended to cover all sorts of conflicts, whether they be civil wars, wars of liberation, wars against racism or wars concerning the imposition of religious or political beliefs by force of arms. The rules governed not only what types of weapons were unlawful, but the circumstances under which lawful weapons may be used.

Humanitarian law, which is associated with the law of armed conflict, seeks to protect non-combatants, including the civilian population, as well as prisoners of war, internees, members of the Red Cross and other aid workers, hospitals, nurses, doctors and medics, and those who are *hors de combat*.

Breaches of these rules may be met with criminal proceedings either in a civil court, a military tribunal, or the International Criminal Court. The potential defendant is not limited to those in the regular armed services of a State, but may include virtually

anyone. Nor is it necessarily the case that the crime must be committed in Australia. In relation to crimes committed outside of Australia, it is usually necessary for the crime to have been committed either by an Australian, or by an Australian resident, or, if the perpetrator is a foreigner, against the person or property of an Australian, or the property of the Commonwealth or a state.

The starting point, when considering this topic, is the need for military discipline in our own armed forces. Without military discipline, there could be no control over the behaviour of those members, and nor could we expect the commanders of those forces to exercise control over their behaviour and to accept responsibility for atrocities committed by them against non-combatants.

What are these laws that I am talking about? Let us consider the position of a service member on active service. The *Defence Force Discipline Act 1982* (Cth) establishes a number of what are called 'service offences.' These include offences relating to operations against the enemy; mutiny, desertion and unauthorized absence; insubordination and assaults against other service personnel; offences relating to the inadequate performance of their duties; offences against military discipline and military property; looting; and custodial offences. These offences may be tried summarily, usually by a Commanding Officer, or by a service tribunal such as a Defence Force Magistrate or by a Court Martial in more serious cases. If the offence takes place in Australia, and is against a civilian or involves civilian property, the case will usually be dealt with by a civil court. In addition, servicemen are subject to the criminal laws of the Jervis Bay Territory regardless of where the offence was committed, whether in Australia or overseas.<sup>1</sup> Thus, a defence member was tried by a service tribunal in Australia for the offence of rape committed in a foreign country whilst on leave, even though he was not in uniform at the time and the victim was not a service member.<sup>2</sup> In recent times, charges have been brought against Australian servicemen on active service in Afghanistan for the alleged murder of Afghan civilians.<sup>3</sup> Convictions and punishment by service tribunals are subject to internal review by a legal officer and confirmation by the convening authority before they become effective. In addition, the defendant may appeal the conviction to the Defence Force Discipline Appeal Tribunal established by s 6 of the *Defence Force Discipline Appeals Act*

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<sup>1</sup> Section 4A(1) of the *Jervis Bay Acceptance Act 1915* (Cth) provides that the laws of the ACT from time to time apply in the Territory unless inconsistent with an Ordinance of the Jervis Bay Territory.

<sup>2</sup> *Re Colonel Aird; ex parte Alpert* (2004) 220 CLR 308; [2004] HCA 44.

<sup>3</sup> Similarly, in 1971 Lt. William Calley was tried by a United States Court Martial for atrocities committed against Vietnamese civilians during the Vietnamese War.



1955 (Cth), with a further right of appeal to the Full Court of the Federal Court, and from there, by special leave, to the High Court.

If the defendant is a member of a visiting force from another prescribed country, and has committed an offence within Australia relating to the person or property connected with the visiting force, it may be that the person will be tried by a service tribunal from his own country pursuant to the provisions of the *Defence (Visiting Forces) Act 1963* (Cth). Regulations made under the Act prescribe the countries to which the Act applies. This includes 16 Commonwealth countries and 34 non-Commonwealth countries. As a rule, similar arrangements exist in those countries to which the Act applies, so that Australian service personnel may be tried in those countries by an Australian service tribunal for offences committed abroad. In some circumstances, the serviceman might alternatively be dealt with by a foreign court, especially if the offence has no military connection.

As a general rule, only service personnel and defence civilians are liable to be tried and punished by military tribunals, but there are exceptions. Under the provisions of the *War Crimes Act 1945* (Cth) Australian Military Courts were able to try any person for a war crime committed against an Australian resident, wherever the crime took place. Under those provisions, following the end of World War II, military courts were conducted in Darwin, Hong Kong, Labuan, Manus Island, Moratai, Rabaul, Singapore and Wewak. There were some 300 trials involving more than 800 Japanese accused, resulting in more than 600 convictions and 200 acquittals. One hundred convictions resulted in the death penalty. War crimes trials were also conducted by military tribunals of the United Kingdom, the United States, and China, and also by civilian courts in other occupied nations such as France, Holland and Poland.<sup>4</sup>

In 1988, the Act was amended to redefine war crimes, by reference to certain 'serious crimes' such as murder and rape which in certain circumstances were deemed to be war crimes. It applied only to war crimes committed during World War Two. The victim no longer was required to be an Australian resident, but it was necessary for the perpetrator to be an Australian, or Australian resident at the time when the proceedings were commenced. Under these provisions, the crime concerned was an indictable offence triable by jury by an Australian civil court. The maximum penalty

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<sup>4</sup> Also, there were some prosecutions in English criminal courts. For example, William Joyce, (known as Lord Haw-Haw) who broadcast propaganda for the Nazis, was tried and convicted of treason even though he was born in the United States and was a naturalized German subject. The court's jurisdiction was based on the fact that he had entered Germany on an illegally obtained British passport: *Joyce v DPP* [1946] AC 347.

for killing a person was imprisonment for life and for other offences, imprisonment for 25 years. In 1990 and 1991, charges were brought against three alleged former Nazis living in South Australia. One of the defendants, Ivan Polyukovich, challenged the validity of the legislation, which purported to permit a prosecution against him for offences which were retrospective and committed in a foreign country against foreign nationals, but the High Court upheld the legislation under the external affairs power.<sup>5</sup> He was subsequently tried in the Supreme Court of South Australia but acquitted because of the difficulty in identifying him as the perpetrator. Charges against the other two men were dropped.

In addition, after World War II, special International Military Tribunals were established by the Allies to try war criminals in Nuremburg and Tokyo. These tribunals concerned mainly the high-ranking offenders who were charged with such crimes as conspiring to make war and to commit war crimes, planning, preparing and initiating wars of aggression, genocide, and crimes against humanity. In the result, at the Tokyo trials, seven Japanese leaders were sentenced to death. In Nuremburg, in which Australia was not involved, 12 prominent Nazis were also hanged. In addition, 15 German judges were tried for war crimes through the abuse of the judicial and penal processes, resulting in mass murder, torture, plunder of property, and crimes against humanity resulting in slavery. Most received lengthy prison sentences.

Since World War II, war crimes have been governed by the Geneva Conventions of 1949 and Protocols I and III thereto, which are now part of Australia's domestic law.<sup>6</sup> albeit that breaches of the Conventions are not by that Act specifically made offences, with some exceptions relating primarily to the Red Cross and prisoners of war.<sup>7</sup> However, acts which are war crimes under the Geneva Conventions are offences against the *Criminal Code* set out in the schedule to the *Criminal Code Act 1995* (Cth). These are set out in considerable detail in Division 268 of the Code, and include genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court. These crimes may be committed either within or without Australia: see ss.15.3, 15.4, and 268.117 of the Code.

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<sup>5</sup> *Polyukovich v The Commonwealth* (1991) 172 CLR 501; [1991] HCA 32.

<sup>6</sup> See the *Geneva Conventions Act 1957* (Cth).

<sup>7</sup> Protocol II was not adopted but its provisions have been enacted in certain sections of the *Criminal Code* (Cth). The Geneva Conventions of 1949 only had limited application to non-international conflicts. The first and second protocols adopted in 1977 extended the conventions to wars of liberation and against racist regimes in the exercise of rights of self-determination.

In addition, there are other Acts designed to ensure that war crimes and crimes against humanity do not go unpunished and to enforce other international conventions to which Australia is a party. These include the *Crimes (Biological Weapons) Act 1976* (Cth) which outlaws biological agents as well as biological weapons; the *Crimes (Hostages) Act 1989* (Cth) which outlaws hostage taking by an Australian citizen, by any person physically in Australia if the act was committed outside of Australia, by any person directed towards one of the arms of a federal or state government to do or refrain from doing an act, or by any person who commits the offence in Australia or in an Australian ship or aircraft wherever situated; the *Crimes (Aviation) Act 1991* (Cth) which deals with offences committed relating to aircraft and aircraft terminals, including hijacking as well as a raft of other offences; the *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) which deals with acts of piracy as well as other offences involving ships and fixed platforms wherever they may be situated; and the *Crimes At Sea Act 2000* (Cth), which deal with acts committed at sea which would be crimes against the laws of the Jervis Bay Territory if committed in that Territory, as well as providing for offences committed in the Joint Petroleum Development Area between Australia and East Timor; the *Anti-Personnel Mines Convention Act 1998* (Cth) which bans the use or possession of anti-personnel mines by an Australian citizen including a member of the Australian Defence Force anywhere in the world; and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) which deals with Australia's international obligations to combat money-laundering and the financing of terrorism. Additionally, the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) gives the Australian government authority to stop goods and services from being exported to a destination considered to be a WMD proliferation risk. Terrorist acts and acts designed to assist terrorism or terrorist organisations committed either in Australia or elsewhere by an Australian citizen or resident are offences against the Code, Division 101.

Australia has also passed legislation enabling it to assist in the enforcement of proceedings against war criminals conducted by the former International Criminal Tribunals for Yugoslavia and for Rwanda.<sup>8</sup>

Following the success of these tribunals, the *Rome Statute*<sup>9</sup> established the international Criminal Court on 1 July 2002, located at The Hague in the Netherlands, as a permanent court with jurisdiction to try crimes of genocide, war crimes and crimes against humanity, including crimes committed in both international and

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<sup>8</sup> See the *International War Crimes Tribunals Act 1995* (Cth).

<sup>9</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

non-international armed conflicts. The Court's jurisdiction is enlivened if the country in which the offences occurred is a party to the Convention and is unable or unwilling to deal with the matter itself, or if a matter is referred to the Court by the Security Council, irrespective of whether or not the country concerned is a party to the Convention. So far, there are 124 states which are parties to the Rome Statute, including Australia. Non-party states include the USA, China, Israel, Russia and India. In 2002, Australia passed the *International Criminal Court Act 2002* (Cth) in order to facilitate Australia's obligations under the Statute. Amongst the many provisions contained in the Act are provisions relating to the enforcement of warrants for the arrest and extradition of persons facing charges in the Court, and providing for the Court to sit in Australia.



## INTRODUCTION

*from the* QUEENSLAND LAW SOCIETY

Christine Smyth\*

The rights of every man are diminished when the rights of one man are threatened.

– John F Kennedy

A fundamental component of the rule of law is that access to justice is available to all. All men, all women, all children, in all nations across the globe. Justice should not be denied due to ethnicity, gender, socio-economic standing or personal situation. Denying any individual access to justice is against the fundamental tenets of a just society. Yet that is what we often see in war torn countries, or for those whose nation is in political conflict.

When the International Criminal Court's (**ICC**) founding statute was officially adopted in 1998, the first permanent international tribunal that had the power to prosecute perpetrators of crimes against humanity on an independent and impartial basis was established. Though in operation for 20 years, it is still seen as a novel development of our modern society. Prior to its creation, no such court existed, leaving *ad hoc* tribunals to address heinous crimes.

Prior to the ICC, the world's worst crimes often went unpunished, in situations where a national court could not or was unwilling to carry out a fair and impartial investigation or prosecution. The establishment of the ICC – which was a long time in the making – was a colossal leap forward toward justice for those most vulnerable. This included people living in countries that are unstable due to poverty, political unrest, military rule or dictatorship. Many of these people live in constant fear for their lives and the lives of their loved ones.

National courts often cannot deal with the extensive scope of inhumanity over which the ICC has purview. For example, crimes perpetrated by or authorised by a government are not generally able to be prosecuted impartially by a national court. This then leaves the victims and their families without not only justice, but also the

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\* President of the Queensland Law Society.

fear of further torment. This is where the ICC can step in as an independent and impartial body.

The decisions handed down from the ICC send a clear message to all nations that certain behaviour does not go unpunished. It empowers victims to know that they can receive justice for the atrocities committed against them, no matter how powerful the perpetrator may seem. International decisions can be relied upon by countries and can have a ripple effect on what the world considers acceptable or unacceptable.

In June 2016, a decision was delivered by the ICC, in which it was made clear, that sexual and gender-based crimes committed during a conflict would not go unpunished. The Bemba Case<sup>1</sup> saw a person, who was effectively acting as a military commander, found guilty of crimes against humanity and war crimes as the person with effective authority and control over the forces that committed the crimes.

This was the first conviction of its kind and the first to focus on the use of sexual violence as a weapon of war. The results of this case have seen widened recognition of such crimes and the commitment from an international standpoint that justice must be sought for every victim of these crimes.

Essentially, the ICC can hold the fate of millions in their hands when they take on a case. The legal profession is the protector of the people. Bulgarian judge and former ICC Judge Ekaterina Trendafilova put it well when she described the role of an ICC judge:

A lot of destinies are dependent on how we do our job. The destiny of those who are brought to justice, the destinies of victims and the destiny of a new institution. Law is really, I would not say complicated, but it is not easy. It is a sophisticated field of human knowledge activities.<sup>2</sup>

These skills make lawyers the orators for the oppressed. For society to remain just and equitable, an ethically administered legal system is essential for society to thrive. Lawyers are the conscience of the legal system. We bring the understanding that only if justice is even-handed and blind to bias will the community commit to its tenets. Absent that, chaos reigns.

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<sup>1</sup> *Prosecutor v Jean-Pierre Bemba Gombo* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-0108, 7 February 2011).

<sup>2</sup> S Maupas, *Testimony of an International Criminal Court Judge* (11 May 2015) Justice Info.Net. <<http://www.justiceinfo.net/en/justice-reconciliation/147-testimony-of-an-international-criminal-court-judge.html>>.

## A NOTE FROM THE EDITORS

In an ever-changing, incomprehensible, world the masses had reached the point where they would, at the same time, believe everything and nothing, think that everything is possible and that nothing was true.

– Hannah Arendt (1951)

A mere glance at any news source reveals instantly the profound impact of conflict – both on the international stage in terms of relations between States, and at a local level where the everyday lives of individual persons are affected. ‘War and Pieces’ is a reference to these diverse and ongoing impacts.

Recent events serve to demonstrate that emerging methods of warfare and changing global dynamics have the potential to alter our humanity. It is true that the law, whether domestic or international, must be robust enough to withstand and adequately respond to these continuing changes. A central theme in ‘War and Pieces’ is the interface between legal theory and its actual influence on people. We are fortunate this year in that many of our contributors have not only engaged with technical aspects of complex legal regimes, but also with the felt human experience of such regimes, whether that is from the perspective of a soldier, a refugee seeking protection, a victim of mass atrocities or a world leader.

The first edition of *Pandora's Box* was published 23 years ago, in September 1994, which coincidentally is also the year in which we were born. A lot has changed in the interim. Nelson Mandela has served as the President of South Africa; the United States has suffered the 9/11 terror attacks; civil wars in Syria, Yemen and Libya have begun; conflicts in Myanmar and Afghanistan are ongoing; and more than 65.6 million people are currently forcibly displaced worldwide.<sup>1</sup> Human beings have also made immense technological advances that change the very nature of world events.

However, some things haven't changed. This edition of Pandora's Box, like that first edition, seeks to foster an academic interest in, and promote awareness of, legal and social justice issues. While the above quote from Hannah Arendt was made in the context of the rise of totalitarianism, we think it highly applicable to the current state of the world, where we are both the beneficiaries of voluminous and instantaneous information, and the unhappy victims and perpetrators of ‘alternative facts’. In this context, we are proud to provide a forum for the exploration of considered and critical

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<sup>1</sup> UNHCR, *Figures at a Glance* (19 June 2017) Statistical Yearbooks <<http://www.unhcr.org/en-au/figures-at-a-glance.html>>.



ideas, and hope that it will inspire you not only to think, but as Arendt would have wanted, to think from the standpoint of somebody else.

Our sincere thanks go to our sponsor, the Queensland Law Society, for their ongoing and generous support of the journal, as well as to the members of the JATL executive for their tireless efforts throughout the year, which have given us the opportunity to edit this year's journal. We would also like to thank Dr Sarah Teitt for putting her time and talents towards judging the 2017 JATL Law and War Essay Competition. Finally, we are indebted to each of our distinguished contributors for their overwhelming generosity in providing such insightful and poignant contributions to the journal.

We hope that 'War and Pieces' will challenge you in developing your own convictions, as it has done us.

**Eloise Gluer & Samantha Johnson**

2017 Editors, *Pandora's Box*

## ABOUT PANDORA'S BOX

*Pandora's Box* is the annual academic journal published by the Justice and the Law Society of the University of Queensland. It been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

*Pandora's Box* is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind – as that is what the legal mind should be.

*Pandora's Box* is launched each year at the Justice and the Law Society's Annual Professional Breakfast.

*Pandora's Box* is registered with Ulrich's International Periodical Directory and can be accessed online through *Infomit* and EBSCO.

Additional copies of the journal, including previous editions, are available. Please contact [pandorasbox@jatl.org](mailto:pandorasbox@jatl.org) for more information or go online at <http://www.jatl.org/> to find the digitised versions.

## ABOUT THE CONTRIBUTORS

*Dr Peter Billings* is an Associate Professor at the TC Beirne School of Law, The University of Queensland, Brisbane, and a Fellow of the Centre for Public, International and Comparative Law. He teaches administrative law and immigration and refugee law, and his primary areas of research are: administrative law, immigration and refugee law, human rights law, social welfare law and legal pedagogy. He has published over thirty peer-reviewed papers as journal articles or book chapters in the United Kingdom, Australia and United States respectively. He serves on the Management Committee of the Refugee and Immigration Legal Service (RAILS), Brisbane.

*Kevin Boreham* is a lecturer at the Australian National University, where he teaches international and human rights law. He has provided a number of media interviews about international law, including commentary on the lawfulness of Australia's participation in the US-led campaign against Islamic State in Iraq and Syria. Kevin is currently researching whether non-State actors such as terrorist organisations are bound by international human rights law. He is admitted as a barrister and solicitor of the High Court of Australia and the Supreme Court of the ACT.

*Damian Copeland* is a legal officer in the Australian Army and holds the rank of Lieutenant Colonel. He has recently served in the Department of Defence, Operations and Security Law Branch where he participated in the legal review of a range of new weapons introduced into the Australian Defence Force. Damian is also a part-time PhD candidate at the Australian National University. His research considers the legal challenges raised in the legal review of autonomous weapons.

*Erin Germantis* is a Research and Policy Analyst at leading Australian bipartisan government relations firm GRACosway. She is completing a Master of Laws at Monash University, following a Juris Doctor at RMIT University and a Bachelor of Arts at the University of Melbourne, during which she majored in literature. She was admitted to the legal profession in 2014 after completing a Graduate Diploma of Legal Practice. Erin's interests include international law; women's rights; and animal welfare law. With a strong commitment to the pro bono sector, Erin volunteers with the Animal Law Institute, and has previously volunteered with Justice Connect (formerly PILCH); Lawyers for Animals; and the office of Australian Greens MP Adam Bandt.

*Fauve Kurnadi* is a Legal Adviser within the International Humanitarian Law (IHL) and Movement Relations Department at Australian Red Cross. With a view to promoting

respect and understanding for the laws of war, Fauve has primary responsibility for the department's engagement with academic circles and private sector stakeholders within Australia. Prior to this role, she worked as the Australian Red Cross IHL Coordinator for Queensland. Fauve holds a Master of Public and International Law from the University of Melbourne, a Bachelor of Laws and a Bachelor of Arts from the University of Queensland and is admitted as a Legal Practitioner to the Supreme Court of Queensland.

*Professor Penelope Mathew* is the Dean of the Griffith Law School. Before her appointment as the Griffith Law School Dean and Head of School, Professor Mathew undertook research at the Herbert & Valmae Freilich Foundation at the Australian National University. She was a visiting professor and interim Director of the Program Refugee and Asylum Law at the University of Michigan Law School, where she convened the 5<sup>th</sup> Michigan Colloquium on Challenges in International Refugee Law. From 2006 to 2008, she was a legal adviser to the ACT Human Rights Commission, where she conducted the Human Rights audit of the ACT's Correctional Facilities. Professor Mathew has also taught at the Australian National University College of Law and Melbourne Law School, and she is a past editor-in-chief of the Australian Yearbook of International Law. Her most recent book, co-authored with Tristan Harley, is *Refugees, Regionalism and Responsibility* (Elgar, 2016).

*The Hon Dean Mildren AM RFD QC* was a Judge of the Supreme Court of the Northern Territory from 1991 to 2013. From 1992 to 1996, he was a Colonel in the Australian Army Legal Corps, after being a Lieutenant Colonel from 1980 to 1992. He has served as the Chief Legal Officer of the 7<sup>th</sup> Military District (1975 – 1986), as a Judge Advocate (1986 – 1996) and as a Defence Force Magistrate (1986 – 1991). He has been a Member of the Defence Force Discipline Tribunal since 1996 and continues to be an Acting Judge of the Supreme Court of the Northern Territory.

*Mahdev Mohan* is an Assistant Professor of Law at the Singapore Management University, where he teaches public international law. A former Fulbright Scholar and Rockefeller Foundation Bellagio Center Academic Fellow, he is a founding member of the Singapore Branch of the International Law Association. He is an editorial board member of the Journal of East Asia and International Law, and the Business and Human Rights Journal. He researches, writes and advises on public international law, investment arbitration and regulation, and human rights in Asia. Mahdev's research and writing in the fields of international law have been awarded Stanford University's Carl Mason Franklin Jr. Prize for International Law and the Richard S. Goldsmith Research Grant for International Conflict and Negotiation. He has represented victim

civil parties at the UN-backed Khmer Rouge tribunal, and is an Associate Member of Temple Garden Chambers.

*Matthew Paterson* is a co-author of the winning essay in the 2017 JATL Law and War Essay Competition. He is in his 5<sup>th</sup> year of a Bachelors of Arts (majoring in Economics) and a Bachelor of Laws (Hons) at the University of Queensland. Matthew is also the President of the University of Queensland International Law Society.

*Dr Alison Pert* lectures in International Law and the Use of Armed Force at the University of Sydney. She holds an LL.B from the University of Manchester, and LL.M from the University of London and a PhD from the University Sydney. Her doctoral thesis on Australia's record as a good international citizen was published by Federation Press in 2014. She has practised as a barrister in London, Papua New Guinea and Australia, and has represented Australia in treaty negotiations and at international organisations. Dr Pert has also appeared in the media in relation to issues of public international law, including on ABC News 24, SBS Radio and The Project.

*Luke Reynoldson* is a legal officer in the Royal Australian Navy and holds the rank of Lieutenant. He currently serves in the Department of Defence, Operations and Security Law Branch, where he participates in the legal review of a range of new weapons for introduction into service with the Australian Defence Force. Luke is also currently undertaking studies in military law at the Australian National University, with a particular interest in military operations law.

*Christine Smyth* is the President of the Queensland Law Society. She is an Accredited Specialist – Succession Law and a Partner at Robbins Watson Solicitors. In 2013, LexisNexis recognised Christine as one of their Top 10 Influential Women. Christine's leadership has resulted in her being nominated for the Queensland Law Society President's Medal. In 2015 and 2016, Christine was awarded the prestigious Doyle's Guide of Queensland's Leading Wills and Estate Litigation Lawyer. In November 2016, Christine was one of only five people appointed to the Queensland State Government's Better Regulation Task Force.

*Dale Stephens* is a Professor of Law at the University of Adelaide Law School. He obtained his LL.B (Hons) from Adelaide University in 1988. In 1989, he was admitted as a legal practitioner to the Supreme Court of South Australia. That same year he also joined the Royal Australian Navy. His operational deployments include East Timor and Iraq. He has been awarded the Conspicuous Service Medal (CSM), the (US) Bronze Star and the (US) Meritorious Service Medal. He attained the rank of Captain in the Navy before transferring to the Reserve. In 2004 Professor Stephens completed

an LL.M from Harvard Law School (HLS) and taught at the U.S. Naval War College during the 2004/5 academic year. In 2014 he was awarded his SJD from HLS. In 2013, Professor Stephens was appointed to an academic position at the University of Adelaide. He is currently Director of the Adelaide Research Unit on Military Law and Ethics and Head of the SA/NT Navy Legal Panel.

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# Autonomous Weapon Systems, the Law of Armed Conflict and the Exercise of Responsible Judgment

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## I INTRODUCTION

Military technology continues to outpace the law. Recent developments in cyber warfare,<sup>1</sup> space warfare<sup>2</sup> and air and missile warfare<sup>3</sup> have generated creative initiatives by groups of lawyers, scientists, military professionals and NGO's to articulate legal frameworks that confine these technologies to existing legal regimes. These efforts have been underpinned by the enduring hope that such efforts to distill and apply relevant law will ultimately ameliorate the impacts of these new technologies of war and constrain their malevolent potential.

Appearing on the horizon is the development of autonomous weapons systems that offer a level of military precision and utility that transcends our capacity to even imagine how future war fighting might be conducted. Such weapons systems offer much to the contemporary war fighter. In an age where military losses on the battlefield translate directly to public support for an operation (especially within liberal democratic societies), there is much to be said for machines taking on the brunt of engaging in conflict. On the other hand, such technologies have met with resistance by a number of groups who seek to stop all development.<sup>4</sup> These groups cite real moral, ethical and legal concerns regarding such weaponry.

This article queries the capacity of autonomous weapon systems to comply with the existing Law of Armed Conflict (**LOAC**),<sup>5</sup> at least in circumstances where such machines are targeting humans. The debate regarding the legal and moral issues surrounding development of such systems reveals much about the assumptions and

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<sup>1</sup> M Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2<sup>nd</sup> ed, 2017).

<sup>2</sup> See McGill University, *Manual on International Law Applicable to Military Uses of Outer Space* <<https://www.mcgill.ca/milamos/home>>.

<sup>3</sup> Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press, 2013).

<sup>4</sup> See Campaign to Stop Killer Robots Global Coalition, *Who We Are*, Campaign to Stop Killer Robots <<https://www.stopkillerrobots.org/coalition/>>.

<sup>5</sup> Also known as International Humanitarian Law (**IHL**).

normative underpinnings of the Law of Armed Conflict. It is in this context that this article argues that while there are situations where autonomous weapons can likely comply with the law, such circumstances are severely constrained, thus rendering the general utility of such weapons questionable. Moreover, an argument will be advanced that warfare is an intensively human endeavour and strict legal compliance by such machines would have the counter-intuitive consequence of rendering bloodshed more clinical, more routinized and more likely.

## II AUTONOMOUS WEAPON SYSTEMS

At present we do not live in a world where truly autonomous weapons systems exist. Those weapons systems that might seem autonomous are in fact automatic. Hence the Navy Phalanx CIWS system<sup>6</sup> or Army equivalent C-Ram<sup>7</sup> system are defensive, counter battery type weapons that operate in accordance within a set of pre-determined criteria to respond to incoming threats. Such weapon systems do not make any kind of independent or autonomous targeting decision, but rather merely respond to a set of circumstances that fall squarely within a self-defence paradigm. Accordingly, these weapon systems do not pose any kind of moral or legal challenge to existing orthodoxy. A fast incoming missile travelling at Mach speed to a deployed warship always enlivens the right of the warship to respond in unit self-defence.<sup>8</sup> Hence weapon systems that can cut response time by responding automatically to the threat – though still subject to human veto – have not posed any kind of objection to date.

Rather, autonomous systems of the kind that this article is concerned with, are those that ‘once activated, can select and engage targets without further intervention by a human operator’.<sup>9</sup> Unlike the automatic systems detailed above, such autonomous

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<sup>6</sup> Phalanx Close-In Weapon System (**CIWS**): see Raytheon Australia, *Phalanx Close-In Weapons System* <<http://www.raytheon.com.au/capabilities/products/phalanx/>>.

<sup>7</sup> Centurion Weapon System: see Army Recognition, *Centurion C-RRAM Counter-Rocket, Artillery and Mortar Weapon System* <[http://www.armyrecognition.com/united\\_states\\_us\\_army\\_artillery\\_vehicles\\_system\\_uk/centurion\\_c-ram\\_land-based\\_weapon\\_system\\_phalanx\\_technical\\_data\\_sheet\\_specifications\\_pictures\\_video.html](http://www.armyrecognition.com/united_states_us_army_artillery_vehicles_system_uk/centurion_c-ram_land-based_weapon_system_phalanx_technical_data_sheet_specifications_pictures_video.html)>.

<sup>8</sup> See generally D Stephens, ‘Rules of Engagement and Concept of Unit Self Defence’ (1998) 45 *Naval Law Review* 126.

<sup>9</sup> For definition of ‘autonomous weapon system’, see Executive Services Directorate, *US DoD Directive 3000.09* (8 May 2017) DoD Directives Division, 13 <<http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf>>.



systems can independently 'learn or adapt their functioning in response to changing circumstances'.<sup>10</sup>

The current NATO designation for such weapon systems is a four-tiered one. Under this system, level one is remotely controlled systems that are dependent entirely on operators input (a Unmanned Aerial Vehicle for example); level two refers to automated systems with built in pre-programmed functionality (like the Phalanx system), level three relates to autonomous non-learning systems that are driven by a set of fixed rules that dictate goal driven reaction and behaviour and, finally, level four is autonomous self learning systems where behaviour is modified based on a set of governing rules for continuous self improvement.<sup>11</sup>

The type of weapons system that this article will focus upon is the level 4, human 'outside the loop' system.<sup>12</sup> These are systems that can self-select targets according to a set of algorithmic criteria and that are not subject to human control. While such systems do not exist yet, there are credible reports that such weapon systems are being tested and are within 20 years of being deployed.<sup>13</sup>

### III LEGAL ANALYSIS OF FULLY AUTONOMOUS WEAPONS SYSTEMS

The Law of Armed Conflict applies to restrain military action in a time of armed conflict and correlatively to promote humanitarian values in the conduct of that armed conflict. The law applies a delicate balance between attaining military outcomes and at the same time ensuring that civilian losses are kept to a minimum. In such circumstances, there are constant decisions, both empirical and evaluative, that the law demands be made by Commanders and soldiers alike.

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<sup>10</sup> A Backstrom and I Henderson, 'New Capabilities in Warfare: An Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons reviews' (2012) 94(886) *International Review of the Red Cross* 483, 490, quoting J Kellenberger, 'International Humanitarian law and New Weapons Technologies' (Keynote Address delivered at the 34<sup>th</sup> Round Table on Current Issues of International Humanitarian Law, San Remo, 8-10 September 2011) 5.

<sup>11</sup> NATO Industrial Advisory Group Sub-Group/75, 'NIAG SG/75: UAV Autonomy (Paper NATO Industrial Advisory Group, 2004) 43.

<sup>12</sup> Military planning in the face of technological development has envisaged a three tiered system of human engagement, namely: 'human in the loop' (humans select targets and deliver force on human command), 'human on the loop' (machines can select targets and deliver force with human oversight who can veto machine decisions) and 'human outside the loop' (machines can select targets and deliver force without human command or temporal oversight).

<sup>13</sup> Backstrom & Henderson, above n 10, 491.

Against this background, the role of truly autonomous weapons systems needs to be examined. There are some very respected commenters, such as Marco Sassoli, who see the benefits of an autonomous machine in realizing humanitarian goals, unaffected by extrinsic considerations. Hence Sassoli writes:

Autonomous weapons are able to decide whether, against whom, and how to apply deadly force based on a pre-established computer program. 'Intelligent weapons', in addition, may even be able to learn from past experience. These weapons do not base the use of force on ad hoc human decisions. I argue that autonomous weapons may bring advantages concerning the possibility of respecting international humanitarian law (IHL) ... a robot cannot hate, cannot fear, and has no survival instinct. While a human often kills to avoid being killed, a robot can wait with the use of force until the last moment when it is established that the target and the attack are legitimate.<sup>14</sup>

Such sentiments reflect a reading of the chaos of armed conflict and the tendency for decisions in such stress-induced and time-pressed circumstances to be less than optimal. It may also reflect a possible humanitarian suspicion that military decision-making affords too much emphasis upon military goals at the expense of humanitarian ones. The appeal to the ideal of a disassociated reasoning, immune from a sense of personal danger does, theoretically, allow for a greater sense of accuracy in the application of the law.

Such a perspective, however, seems to attribute great neutrality to the law, which itself is a highly contested proposition.<sup>15</sup> It also seems to de-emphasize the humanitarian assumptions that underpin LOAC, as well as the exercise of emotional intelligence and judgment that necessarily informs decision-making under the Law of Armed Conflict.

#### IV RULES, STANDARDS AND JUDGMENT

At the heart of the Law of Armed Conflict lie three central, defining principles. They are the principles of distinction, proportionality and precautions in attack. The principle of distinction relates to attacking only those military objects that are lawfully targetable in armed conflict, namely those objects that through their use, nature, location, purpose offer a definite military advantage if attacked.<sup>16</sup> This requires an

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<sup>14</sup> M Sassoli, *Autonomous Weapons: Potential Advantages for the Respect of International Humanitarian Law*, Professionals in Humanitarian Assistance and Protection <<https://phap.org/articles/autonomous-weapons-potential-advantages-respect-international-humanitarian-law>>.

<sup>15</sup> See generally D Stephens, 'Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity' (2014) 96(895/896) *International Review of the Red Cross* 751.

<sup>16</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force

objective empirical judgment to initially determine the military status of a potential target, but also a relative judgment, regarding the measure of ‘military advantage’ to be gained from such attack.

The principle of proportionality requires that a decision be made as to whether an attack on a military objective that may be expected to cause loss of civilian lives and property that is not ‘excessive in relation to the concrete and direct military advantage anticipated’.<sup>17</sup> Such a decision is necessarily an evaluative one, relying upon temporal and operational factors that are highly relativized.

Finally, the principle of precaution requires that a choice be made as to taking all ‘feasible’ precautions in the choice of means and methods of an attack to reduce civilian casualties to a minimum (even if otherwise proportionate).<sup>18</sup> This too, is a value judgment concerning means and methods available to the on scene Commander.

In addition to these central legal requirements, the conduct of modern operations imposes a wealth of other national and operational factors that condition targeting choices above and beyond what the law requires. Hence, questions concerning the collateral damage estimate methodology, ‘no strike lists’ and Higher Approvals lists, Commander’s Intent to Rules Of Engagement interpretation, strategic level direction, intelligence updates and ongoing coalition interoperability issues, all inform targeting choices, in addition to the law.<sup>19</sup>

Given the mix of legal and operational factors that exist in a symbiotic relationship, targeting within a time of armed conflict is a highly specialised, collective and informed process. Empowering autonomous weapons systems to integrate all these factors would appear to offer a great, if not insurmountable, challenge.

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7 December 1978) (API) art 48 states: ‘In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’.

<sup>17</sup> Ibid art 57(2)(b) which states: ‘An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’

<sup>18</sup> Ibid art 57(2)(a)(ii) which states: ‘with respect to attacks, the following precautions shall be taken... take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’.

<sup>19</sup> This comes from the author’s personal experience as former Navy Legal Officer involved in advising Operational Commanders.

More significantly however, is the felt experience of armed conflict and the capacity of that experience to inform choices made under the law. Studies on soldiers who have participated in armed conflict reveal that killing is not a natural or easy thing to do.<sup>20</sup> In fact, participation in armed conflict generates intense emotion and a range of ethical and moral commitments that are unavoidable. The purpose of military training is partly to de-sensitise such experiences and to allow for a more dispassionate application of lethality. As Chris Coker notes:

Killing does not seem to come naturally in all situations to all soldiers, even the most highly trained. Natural born soldiers are not made; they are born—and there are very few of them. That is why the military has preferred the discipline of collective units such as gun crews, which are more easily controlled and which, being often distant from the battlefield, are also less emotionally involved—in a word, they are more ‘mechanical’. The greatest cruelties in war have been the impersonal ones of remote decision, system and routine.<sup>21</sup>

Indeed, effective or optimal decision-making, especially by military commanders in times of armed conflict, involves the exercise of both logic and emotion.<sup>22</sup> The exercise of a level of emotional intelligence into targeting decisions allows for a highly nuanced application of force that accurately reflects broader strategic and/or operational goals. While logical reasoning would appear to be self-evidently reflected in machine logic, it is difficult to see how an autonomous machine would be able to incorporate the exercise of emotional judgment. This very point has been recognized in recent research developments that do seek to create algorithms that can emulate emotion for machines.<sup>23</sup>

In respect of the proportionality test under LOAC, it would appear that such a test represents a pro-humanitarian weighting in terms of cognitive bias. The proportionality requirements appears to map psychological testing that establishes that human cognition places a higher value on loss than potential gain.<sup>24</sup> Hence, in ordinary circumstances, most people would rather not lose \$5 in a gamble than win \$10 in that same bet, as loss is given greater cognitive ‘weighting’. In these circumstances, a legal

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<sup>20</sup> D Grossman, *On Killing* (Little, Brown and Company, 2009).

<sup>21</sup> C Coker, ‘Biotechnology and War’ (2004) 2(1) *Australian Army Journal* 125, 134.

<sup>22</sup> A Damasio, *Descartes’ Error: Emotion, Reason and the Human Brain*, (Vintage, 2006).

<sup>23</sup> SC Gadanho and J Hallam, *Emotion Triggered Learning for Autonomous Robots* (University of Edinburgh, 2001).

<sup>24</sup> J Levy, ‘Loss Aversion, Framing, and Bargaining: The Implications of Prospect Theory for International Conflict’, (1996) 17(2) *International Political Science Review* 179 who draws on Prospect Theory work of D Kahneman and A Tversky, (1979) ‘Prospect Theory: An Analysis of Decision under Risk’ 47(2) *Econometrica* 263.

test that demands that value be placed on anticipated civilian loss would necessarily be accorded greater weight than the future military advantage anticipated as a function of human reasoning. Such a test clearly serves to promote humanitarian priority in armed conflict by relying upon the exercise of a 'biased' human judgment.

Such reliance is necessarily absent where a proportionality determination is predicated upon algorithms that seek to quantify an evaluative exercise and turn it into an empirical one. Indeed, in respect of the general capacity for human decision-making concerning the application of lethal force, one prominent author in this field has observed:

One of the greatest restraints for the cruelty in war has always been the natural inhibition of humans not to kill or hurt fellow human beings. The natural inhibition is, in fact, so strong that most people would rather die than kill somebody...Taking away the inhibition to kill by using robots for the job could weaken the most powerful psychological and ethical restraint in war. War would be inhumanely efficient and would no longer be constrained by the natural urge of soldiers not to kill.<sup>25</sup>

## V MUTUALITY OF RISK AND NORMATIVITY OF THE LAW

The future of armed conflict and the rise of technology is already having a dissonant impact upon the felt experience of battle and associated issues of martial restraint. Such felt experience animates deeper qualities of shared humanity that necessarily tempers law's potential excess.

The increasing use of drones and capacity for 'remote control' warfare have already begun to generate a sense of cognitive dissonance with military personnel who manage such systems. A recent case<sup>26</sup> of a 19-year-old soldier, a drone operator of an Unmanned Combat Aerial Vehicle (UCAV) is telling. Sitting at his desk in the United States, his job was to operate a UCAV that tracked a small patrol of marines in Afghanistan. They came under fire by opposing fighters who were using a mounted .50-caliber machine gun on a pickup truck. The marines were unable to effectively respond. This was observed all through the computer monitor. Reacting to this scenario, the young soldier accessed his joystick and the UCAV was able to provide a perfect grid representation on the fighters attacking the US patrol. The resolution was

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<sup>25</sup> A Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons* (Routledge, 2013) 130.

<sup>26</sup> M Bowden, 'The Killing Machines – How to Think about Drones', *The Atlantic* (online), September 2013, 2 <<http://www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/>>.

fine, the targeting criteria well established and it was clear that four civilians were taking a direct part in hostilities and as such came within the correct legal formula for losing their civilian protection and could be targeted. Within such a perfect targeting envelope the young soldier acted and an AGM-114 Hellfire missile was released onto target. It destroyed the threat.

The patrol was saved and the law scrupulously observed. The young soldier was congratulated, yet the soldier felt uneasy about his role, one of the things that nagged at him, and that was still bugging him months later, was that he had delivered this deathblow without having been in any danger himself. The men he killed, and the marines on the ground, were at war. They were risking their hides. Whereas he was working his scheduled shift in a comfortable office building, on a sprawling base, in a peaceful country.<sup>27</sup> He noted, ‘...this was a weird feeling...You feel bad. You don’t feel worthy. I’m sitting there safe and sound, and those guys down there are in the thick of it, and I can have more impact than they can. It’s almost like I don’t feel like I deserve to be safe.’<sup>28</sup>

The disquiet felt by the soldier draws upon a deeper well of understanding the nature of war that is not incorporated into the law. The sense of personal honour and commitment that is activated by lethal combat, which derives from a sense of mutuality of risk, has underpinned conceptions warfare from Greek times.<sup>29</sup> The introduction of new weapon systems that increasingly remove the capacity for realized personal risk has always occasioned a sense of despair as to the respective virtues of the conflict. This has ranged from the crossbow through to modern intercontinental ballistic weapons. The issue here is not one of an uneven fight (which is not objectionable), but of a fair fight where personal risk is experienced.<sup>30</sup> Such a fight has the ability to animate emotions and commitments that the law cannot fully comprehend.

The relevance of this particular type of thinking is that the personal, felt experience of conflict, of a shared mutuality of risk,<sup>31</sup> allows for an optimized sense of meaning to sacrifice but also to the qualities of mercy, shared humanity and compassion. It also allows for a more accurate observation of surrender or capture when opposing soldiers

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<sup>27</sup> Ibid 3.

<sup>28</sup> Ibid.

<sup>29</sup> C. O’Driscoll, “A Fighting Chance” or Fighting Dirty? Irregular warfare, Michael Gross and the Spartans’, (2011) 11(2) *European Journal of Political Theory* 112.

<sup>30</sup> Ibid 124.

<sup>31</sup> Ibid 123.

do offer surrender or are otherwise injured and ‘out of the fight’. Capacity for accepting the full expression of felt experience permits a more nuanced view of the significance of the acts of warfare of killing and being killed that the law cannot easily comprehend. A soldier with Asperger’s syndrome for example, would still be able to conform to legal decision-making, but the absence of added qualities of empathy and of social connection would render him/her less than ideal in his/her reasoning capability. Naturally, autonomous machines systems cannot experience these same emotions that emerge from a shared experience of vulnerability and shared humanity. Qualities of mercy and compassion are not able to be ‘experienced’ by a machine. Rather, only an empirical legal assessment can be undertaken and a binary set of lawful or not lawful outcomes generated.

## VI NEUTRALITY OF THE LAW

The tentative endorsement of ‘robots’ made by Marco Sassoli as being trusted agents does assume much about the neutrality law. As I have argued elsewhere,<sup>32</sup> the Law of Armed Conflict, like all law, is necessarily under and over inclusive, indeterminate and highly contested.

While the idea of a dispassionate application of force by an autonomous system through the clinical and close application of the law is the ideal, it does place too much faith in the capacity of law to effectively provide the threshold limits and constraints.

HLA Hart’s soft positivism<sup>33</sup> continues to provide much desired re-assurance in our approach to legal interpretation. The idea of a settled core of meaning and a small penumbra of uncertainty allows a necessary confidence in approaching issues of legal interpretation. However, words like ‘anticipated military advantage’, ‘excessive’, ‘feasible’ and ‘military objective’ that provide the foundation of LOAC incorporate a myriad of nuance in their settled meaning. Even international criminal law resists a too prescriptive definition of key concepts like ‘proportionality’ instead, relying upon tests that invoke the ‘reasonable’<sup>34</sup> Commander or soldier to provide the touchstone of reference for assessing the lawfulness of actions under regimes of criminal sanction. Given the fluidity and highly contextual meaning of these terms, it is hard to envisage

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<sup>32</sup> Stephens, above n 15.

<sup>33</sup> HLA Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed, 1994).

<sup>34</sup> *Prosecutor v Galic* (International Criminal Tribunal for the former Yugoslavia, Case No IT-98-29-T, 5 December 2003) [58]: ‘[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack..’

circumstances where autonomous machines will arrive at meanings and interpretations of key words that can confidently reflect those of experienced Commanders and soldiers.

Modern war has become a robust and complex legal institution. It comprises bright line rules, elastic standards and dichotomous principles. It seeks to reflect sovereign will in the conduct of military operations and yet strives for a safe normative distance from the violence unleashed.

Law is invoked, justified and denied as part of a vocabulary of broader statecraft that invariably has its impact in constraining or broadening military discretion within LOAC. The law deals with violence in the most direct of manners. It necessarily implicates the most basic moral intuitions and at the same time violence 'defies the law to protect us from its cruellest consequences'.<sup>35</sup> The interpretation and application of LOAC is no ordinary process. It takes place on a bitterly contested legal, political and ethical terrain. As Kennedy notes, the language of the law is capricious enough to allow one to assume that 'all has been taken into account',<sup>36</sup> yet the law cannot fully dispense with the personal sense of moral conviction and reflection that accompanies choices made on the battlefield.

Despite the cool confidence found in many textbooks, military manuals and re-statements regarding LOAC, there exist mutually exclusive visions of interpretation that can lead to widely divergent outcomes. Luban, for example, defines these as 'LOAC' (military bias) and 'IHL' (humanitarian bias) visions<sup>37</sup> - both valid at exactly the same time. He thus observes the practical indeterminacy that comes from the law applicable to the battlefield, which cannot be easily reconciled. Imposed policy can apply to create context control and to channel discretion towards desired political preferences. This is rarely acknowledged, but clearly at play. It acts to transform the specific to the general and to reinforce the sense of normalcy in the enterprise of warfare.

In this context of dynamic interplay between policy, law and ethics, let alone a national sense of legitimacy, it is difficult to see how an autonomous machine would be able to balance the competing inputs that normatively contribute to the lawful application of force on the battlefield. This is not to say that such systems cannot have utility – plainly

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<sup>35</sup> A Sarat and T Kearns (eds), *Law's Violence* (University of Michigan Press, 1995) 212.

<sup>36</sup> D Kennedy, *Of War and Law* (Princeton University Press, 2006) 143.

<sup>37</sup> D Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 *Leiden Journal of International Law* 1, 23.



they can, if provided with a specific set of targeting criteria and a ready capacity for self-evaluation of such criteria. Such systems can engage undoubted military targets – enemy warships at sea or tanks in the desert – in circumstances where the lawfulness of such attacks is without question. However, the moment that broader legal and policy implications are incorporated into the decision-making calculus, then deeper resonances of effective decision-making are activated that inevitably draw upon years of training and command experience. Questions of timing, legitimacy and the particular military or humanitarian bias (equally valid) that goes into the decision are all present in such a moment. It is difficult to see how these factors may be included in a sense of responsible self-awareness by the autonomous system.

## VII MORAL AND ETHICAL FEATURES OF LOAC

It is hard to point to any express moral component of modern LOAC. The very transformation from just war concepts to the contemporary positivist foundation of modern LOAC necessarily marginalizes moral or ethical enquiry with respect to legal application. To this end, autonomous weapons systems would seem capable of managing such an application. However, while expressly marginalized, there are broader moral and ethical themes that permeate both the law itself and, in turn, the self-image of those applying the law.

The famous Martens clause which speaks to ‘dictates of public conscience’<sup>38</sup> to govern legal decisions in the absence of existing legal regulation, clearly does represent a specific invocation of moral and/or ethical considerations when deciding on the application of lethal force in a time of armed conflict. Despite this overture, it is necessarily marginalized given its reference to pre-existing legal regulation. The volume of law applicable to the battle space, along with the universal ratification of the four central treaties that underpin the law, namely the 1949 Geneva Conventions, characterize modern LOAC and hence don't allow for the Martens clause to be given much practical expression in the battle space. Accordingly, given its own self-limiting application, there seems to be little situational scope where the Martens clause might

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<sup>38</sup> Martens clause, Preamble to the *Hague Convention (IV) Respecting the Laws and Customs of War*, opened for signature 18 October 1907, 187 CTS 227 (entered into force 26 January 1910), as reproduced in A Roberts and R Guelff (eds), *Documents On The Laws Of War* (Oxford University Press, 3<sup>rd</sup> ed, 2000) 70, reflected in art 1(2) of Additional Protocol I to the Geneva Conventions and which provides: ‘In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’.

apply solely to govern legal decision making. Even so, one wonders how 'dictates of public conscience' could be interpreted by an autonomous weapons system in practice.

More fundamentally though, is the question of professional self-identity that emerges from internalization of the norms that underpin LOAC. The concept of constructivism that emerges from International Relations theory has useful application here.<sup>39</sup> The idea of constructivism is that national identity emerges from identification with legal and social norms that are internalized through a process of social agency. A resulting 'logic of appropriateness' applies in contrast to a 'logic of consequence'. Decisions are made in accordance with broader social and legal norms that cohere to a sense of national identity. This theory is advanced to have particular explanatory power in relation to decisions by States not to undertake wartime actions in circumstances where the law is silent or even ambiguous. The use of chemical weapons, for example, at a time when their use wasn't so broadly prohibited is an instance where concepts of self-identity inform weapon choice.

Such a sense of professional identity was particularly highlighted in the early years of military action following the 9/11 attacks. In the aftermath of those attacks, Bush Administration Officials were pressing for legal advantage in circumstances where they were met by resistance by uniformed members. Famously, during the Bush Administration debates about the *de jure* application of the Geneva Conventions to the war in Afghanistan, this correlation was evident when Chairman of the Joint Chiefs of Staff, General Myers, took issue with the notion that they would not apply stating that "The Geneva Conventions were a fundamental part of our military culture and every military member was trained on them ... Objectively applying the Conventions was important to our self-image".<sup>40</sup> The subsequent debate by military members as to who 'owned' the Geneva Conventions,<sup>41</sup> the civilian lawyers or the military, points to a strong sense of self-identity that constructivism seeks to account for.

If this theory holds true, then it would be a curious thing to know what sense of self-identity an autonomous weapon system may have. If such identity constrains and

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<sup>39</sup> JT Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50(2) *World Politics* 324, 326; J Goldsmith and D Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 (7) *Harvard Law Review* 1791, 1828.

<sup>40</sup> General R Myers, *Eyes On the Horizon* (Simon & Schuster, 2009) 203.

<sup>41</sup> M Osiel, *The End of Reciprocity* (Cambridge 2009) 335: 'In conversations among themselves, JAGs sometimes speak in candidly guild-like terms. "Who owns the law of war?" rhetorically asks former My Lai prosecutor William Eckhardt at one such gathering. "We do: the profession of arms: he immediately answers. "It's time to take it back," he adds, alluding to the Office of Legal Counsel's temporary, recent hijacking of the field.'

limits actions ‘off stage’ that are otherwise determined to be lawful under LOAC, then it is impossible to know how a machine might comply. In such circumstances the very stresses that Sassoli identifies as conditioning soldier behavior may, counter-intuitively, also offer a moment for restraint. Such moments are lost for machines that can neither choose not to apply lethal force where an attack is lawful nor feel guilt or remorse once they have done so – and that are oblivious as to whether a particular application of force offends against some sense of national identity.

## VIII CONCLUSION

Development of weapons systems for armed conflict on land, sea, air and space continues unabated. All such weapons systems are, however, required to comply with LOAC.<sup>42</sup> In many cases this is easily achieved by virtue of the role human agency that ultimately conditions their application in the battle space. However, the potential rise of autonomous systems represents a particular challenge for war fighting in accordance with the law. While such systems would offer great advantages when engaged against other machines unleashed by an opposing belligerent nations – or can otherwise operate in circumstances where targeting is straight forward – there are limits on their utility that need to be carefully navigated. The conduct of armed conflict is a highly calibrated and professional undertaking that involves a wide array of legal and policy issues. The Law of Armed Conflict assumes much in the exercise of restraint in applying lethal force. Intense emotions are animated in armed conflict and such emotions can lead to excess and can thus act negatively to compel violations of the law. However, they can also lead to more restraint and allow for very human qualities of mercy, forbearance and responsible judgment. The Law of Armed Conflict is seen as a professional code of behavior for many military professional forces around the globe. The law directly informs a sense of self-identity, in both individuals and also nations, that is infused with a logic of appropriateness. This self-identity necessarily draws on professional ethical and moral codes that certainly exist in the shadow of the law, if not resident within the law itself. Those who support the development of autonomous weapons systems see the possibility of a clean, removed and clinical application of the law to kill efficiently in armed conflict. Ironically, so do those who query this very same development.

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<sup>42</sup> API art 36.



## An Interview with Professor Penelope Mathew\*

*Professor Mathew, thank you so much for agreeing to be interviewed by Pandora's Box for our 2017 edition titled War and Pieces.' It has been more than 60 years since the Convention relating to the Status of Refugees<sup>1</sup> entered into force, and 50 years since the Protocol relating to the Status of Refugees<sup>2</sup> was signed and entered into force. Could you please explain what were the aims of these treaties?*

The aims are fairly simple: to protect refugees as defined in those two instruments. As you probably know regarding the 1951 Convention, it was a backward looking instrument, so it was really concerned with people who had fled as a result of World War II and its aftermath – the division into the Communist and Capitalist world. It was thought that it would be a temporary exercise to give protection to those people who had fled as a result of those events. So, the definition in the 1951 Convention actually has a deadline and you were only considered a refugee if you fled events before 1 January 1951. The States that became parties to the treaty also had the option of limiting their obligations to people who had fled events occurring in Europe. It was thought that this was a temporary problem, which is quite amazing when you think about the current refugee crisis from Syria.

In 1967, the aim of the Protocol was to lift the temporal and geographic restrictions on the definition of a 'refugee' with the result that refugees fleeing in whatever time period and from wherever around the globe will be able to get protection.

*As you say, it is quite remarkable looking back at the Convention and it being formulated as a solution to a temporary problem.*

It does seem extraordinary. Obviously, in 1967, it was recognised that there were ongoing problems. It isn't to say, of course, that the definition is perfect.

*On that note, we also wanted to ask whether you consider that these treaties have been successful?*

In many respects, yes. The Convention and the Protocol have provided full protection for people fleeing for their lives. In that sense, they are a great

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\* Professor Pene Mathew is the Dean of the Griffith Law School. This is a revised version of an interview conducted by Samantha Johnson on 23 August 2017.

<sup>1</sup> Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>2</sup> Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

success story. In another sense, as an international lawyer, you could say that they have been implemented as domestic law in many countries around the world; they are adjudicated frequently, and there are a lot of tribunal and judicial decisions on refugee status. You see the treaties applied in practice and often the refugees win their cases and secure protection. In that sense, they are, I think, a success story.

There are, of course, limitations. One of the limitations concerns the definition of the term 'refugee' itself. Even though the temporal and geographic limitations have been lifted since 1967, there is still quite a narrow definition. To be a refugee, you have to be outside of your country of nationality or citizenship, or in the case of stateless person, outside of your country of habitual residence. You must not be able to return or avail yourself of the protection of that country, owing to a well-founded fear of being persecuted for one of five reasons. Those reasons are race, religion, nationality, membership of a particular social group, or political opinion. That is still a very valid definition today, in that we see lots of people who have suffered serious harm or human rights violations (persecution) for those reasons.

But there are a lot of other people fleeing serious threats to their life or liberty that are not linked to those grounds. They may be caught up in armed conflict. Often armed conflicts do have those elements (persecution for one of the five reasons), but sometimes they don't. Sometimes people are in danger because they are in the wrong place at the wrong time when there is violence going on, but they still need protection which isn't being provided by their country of origin.

There are regional instruments and conventions that do broaden the definition to wider categories of people fleeing what we might call 'generalised violence'. There is a treaty that applies amongst the African States in the African Union;<sup>3</sup> there is a non-binding declaration called the *Cartagena Declaration*<sup>4</sup> that applies in Latin America; and within the European Union, too, there is the idea of 'complementary protection', which does not offer a new definition of a refugee, but protection that complements the Convention is bestowed on certain people who are fleeing violence. The latter contains a very complicated provision on

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<sup>3</sup> *OUA Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

<sup>4</sup> *The Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (22 November 1984).

complementary protection, which is narrower than the refugee definitions adopted in the African Union and in the Latin American context.

We also see other complementary protection provisions around the world. For example, Australia includes complementary protection in the *Migration Act 1958* (Cth), and there are other countries that have gone down that route.

In these ways, the Convention and the Protocol have been a success, but it is a limited success. You could, and perhaps should, offer protection to a broader category of people. In some ways, there are still problems with painting it as a success story.

*When you were talking about the definition of a 'refugee' I noticed that 'economic refugees' do not seem to be included. Do you think that is a category of people that would be best protected through those complementary measures?*

The first question is really what we mean by 'economic refugees'. There are a lot of terms around, such as 'economic refugee' and 'economic migrant'. There are normally two broad distinctions that are not necessarily legal, but they are distinctions that scholars and policy-makers often use. There is what is referred to as a 'forced migrant' (as opposed to a voluntary migrant), being someone who has to leave, whether because of persecution or generalised violence, or maybe because of an economic situation that is so dire that you cannot support yourself. It might be something like a famine, where people may be compelled to move but often are not able to move very far across borders. Forced migration can be a result of, for example, a natural disaster or a combination of things such as a war that has had an impact on food supplies, or the fact that there is a dictatorial government that doesn't ensure that everyone has access to food.

Forced migrants are not necessarily covered by the refugee definition, because you have to show somehow that what is happening to you has a link back to those five grounds [for fearing persecution]. In some cases, that will be true. It will be true if a particular group has been left out of the social compact very deliberately. Starvation may be used as a weapon of war or as a genocidal tool. But there will be other situations in which a person just cannot quite prove the causal link. Those people do need protection and if they have crossed an international border, the question is, *who provides the protection?* Some people say that the international community should support the national government when it really isn't the fault of the national government eg there has been a natural

disaster. Protection may be given in that country by way of overseas development assistance, for example. There can be a valid argument about the best way to provide protection.

Refugee status is really there to address situations of persecution for something about the person that they cannot, or should not have to change. It symbolises a breakdown in the relationship between the individual and the State, such that the international community must step in and provide protection. The fundamental obligation to a refugee is the obligation of *non-refoulement* – that is, not to return the person to a place where their life or liberty is threatened. If you returned a refugee, you could effectively be signing their death warrant, so you must provide protection outside of their country. Whereas in those other kinds of situations, there is an argument that sometimes you can, and should, provide protection or assistance in their country of origin.

*Thank you, that does provide some useful context for the idea of economic refugees, which is a term that is used quite often in the Australian political sphere.*

We probably tend to talk more about economic *migrants*, which is the idea that a person is a voluntary migrant and is really looking for work. As such, they are not a forced migrant and they are certainly not a refugee within the fairly narrow definition set out in the 1951 Convention as modified by the Protocol. Of course, the reality is often much more complex than that. It might be that the person really can't secure work in their country of origin and is in a way threatened, so they have taken matters into their own hands. They don't meet the refugee definition, but there is a serious issue about how to provide assistance for those people.

*Yes, and that really leads into another question we were hoping to ask you about the International Committee of the Red Cross reporting that at least 70 million people have been forced to leave their homes.<sup>5</sup> They predict that forced migration will be the defining social, economic and humanitarian challenge of the next century.<sup>6</sup> With that in mind, do you think the current state of international law is robust enough to guide States' responses to the crisis?*

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<sup>5</sup> Mark Tran, 'Forced migration in the 21<sup>st</sup> century: urbanized and unending', *The Guardian* (online), 16 October 2012 <<https://www.theguardian.com/global-development/2012/oct/16/forced-migration-21st-century-urbanised-unending>>.

<sup>6</sup> Ibid.



The general figure is around 65 to 70 million people at the moment, and that statistic, certainly when used by the United Nations High Commissioner for Refugees, refers to there being around 20 million ‘refugees’, being people who fall within the definition. Then maybe around 40 million of that number are internally displaced people, who might have moved for a variety of reasons (eg armed conflict, generalised violence, human rights violations or natural disasters) but relocate within their country of origin. So that statistic probably does not even capture those cases that we have just been talking about, where people are migrating maybe for largely economic reasons. There is an element of a push factor because those people really can’t get work where they are, so survival is very difficult. Some scholars, like Alexander Betts,<sup>7</sup> talk about ‘survival migrants’, trying to point out that things aren’t quite so simple as a person thinking things aren’t so great in their country, so they want to get a job in ours, which I think is the way the language of ‘economic migrant’ often gets used in Australia.

The international community has been trying to grapple with this issue. I do not think that the international community will ever widen the universally applicable definition of a refugee. I think that people worry that, if we open negotiations over the Convention and the Protocol, we may actually get less than we had originally and that refugees would be worse off.

You just have to look around the world at the States that are parties to the treaties, but that do not apply them. Australia’s state practice is a good example of avoiding obligations at the very least, if not actually violating them on occasion. And of course while the treaties are widely ratified, not every country is a party. In the Middle East and in Asia in particular, there are a lot of countries that aren’t parties to the Convention. Those countries are quite wary about signing up to the Convention. So I think it’s unlikely that we’re ever going to broaden the definition significantly.

The international community has been thinking about the global management of migration more broadly, though. Last year in the General Assembly, there was a General Assembly Resolution adopted, the *New York Declaration for Refugees and Migrants*,<sup>8</sup> and in it the UN member states start to talk about how to

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<sup>7</sup> See, eg, A Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell Press, 2013); A Betts, ‘Survival Migration: A New Protection Framework’ (2010) 16(3) *Global Governance: A Review of Multilateralism and International Organizations* 361.

<sup>8</sup> GA Res 71/1, 71<sup>st</sup> Session, UN Doc A/RES/71/1 (3 October 2016).

better manage migration. They hint at trying to acknowledge labour demand. The irony is that we talk about economic migrants who arrive without a visa as though they are bad people, but often they are responding to needs in the economies to which they are travelling. The international community is talking about acknowledging that labour demand and perhaps trying to provide more pathways for those people, so that they don't rely on people smugglers and traffickers.

That would then have benefits for people who are refugees who also use those unsafe routes. It is difficult to migrate to seek protection. Most countries have migration programs that revolve around labour migration, family migration, and they will give asylum seekers protection once they arrive, but they only have a very small number of places for resettlement of refugees. Less than one per cent of the global population of refugees are able to be resettled. It is hard to move if you are a refugee.

The international community is beginning to talk about that. The question is whether change will actually be implemented. Next year, as a follow up to the New York Declaration, the UN is trying to develop two global compacts: one for refugees and one for migrants. The question is, *what will be put in that global compact for migrants?* Will we see countries trying to open up more migration channels, or will they still try to control their borders very rigidly and ignore this problem?

*That also addresses in part the question of how you see international law developing to better protect those made vulnerable by forced migration. That duality of migrants and refugees does sounds like it is going to be a big part of that development.*

It is a big part of it. Trying to work out the connection is important. For a long time, refugee agencies, the UNHCR, refugee advocates and refugee lawyers, like myself, have been very wary of talking about the two categories together because you don't want to dilute the protections for refugees.

But there are connections in the way they travel and access safety. If we just keep operating on the model where every country controls their own borders and there is an emphasis on deterrence rather than providing safe migration and recognising that there are places in the economy for migrant workers, we are not going to get very far and we are going to continue to see deaths at sea.

The other important development for refugees is that the General Assembly has said in the New York Declaration that it wants to work towards more responsibility sharing amongst countries. Currently, responsibility for refugee protection generally falls on countries closest to conflicts and human rights violations, and not countries like Australia that are mercifully very far from most hotspots. I think the current statistic is about 84 per cent of refugees are sheltered in the developing world, in countries that have the least capacity to care for people.

*Is that something that is being seen in the context of the conflict in Syria?*

Absolutely. If you think about the Syrian conflict, it has now been going on for over six years and there are over five million refugees, most of whom are being sheltered in countries like Turkey, Lebanon and Jordan. Lebanon is so tiny that one in four people now in Lebanon is a Syrian refugee. It is actually putting enormous strain on that rather small country to provide for all of these people.

The General Assembly has said in the New York Declaration that they want to have responsibility sharing. You can share responsibility in a number of ways. You can share it financially. You can share it by taking people out of that context through resettlement and other migration pathways. And you can also share expertise where that is needed, such as if a country needs assistance determining refugee status.

I do think countries like Jordan and Lebanon are becoming quite impatient with the world because they have been shouldering a large share of the responsibility for the last six years and they really needed the assistance yesterday.

I really got a sense of that urgency when I went to Geneva not long ago. In the lead up to those global compacts, the UN is having a number of thematic meetings. The first one, which I participated in, was about regional arrangements and we were thinking about how some arrangements had shared responsibility and what lessons we could draw from those. I watched the representatives of these countries (Lebanon and Jordan) who have been doing more than their fair share and who had a palpable sense of frustration with the international community. We actually need to start giving assistance more quickly than we have been doing.

*What else do you think came out of the thematic meeting that you attended in Geneva?*

I thought it was a very positive and productive meeting, but as always with these high level forums, you wonder what is going to happen on the ground in practice. The New York Declaration may have some flaws, but it is basically a very positive document in my view. However, it is a General Assembly Resolution; it is not formally binding.

If we do get the global compacts in September 2018, especially in relation to refugees, it will be another General Assembly Resolution and, again, not formally binding. That doesn't mean that it is completely toothless. We will just wait to see how States actually implement it.

From an Australian perspective, I am very frustrated with our policies towards asylum seekers, particularly those arriving by boat, because we are really sending a message that other countries should also close their borders to desperate people in need. If everyone behaves in that way, no one will get protection. We are behind the eight ball and we are losing moral authority to speak on these issues, when in fact we are a very affluent, capable and much cleverer country than we are currently demonstrating. We could be having a real leadership role, because we are very good at resettlement when we do it. It will be interesting to see what kind of a role Australia has in these discussions when we have in the past sent people to places like Nauru and Manus Island.

*Like you, a lot of law students are concerned about our national policy when it comes to refugees and asylum seekers. Do you have any advice to students who may wish to work in refugee and migration law or become involved in advocacy?*

It is important that people keep trying. Sadly, one thing that you do have to get used to if you are working in this field is disappointment. Governments often don't listen. But I think it is still important that people get out there and do what they can to support refugees. This could be through volunteering with organisations that provide help with English language classes or demonstrating and advocating. It is great to have a younger generation who care about these issues and who are prepared to try to create change. We can't just give up.

As a lawyer, you can point out the violations of international law, and that can be important, but it is fairly limited. Sometimes people in Australia will say, 'Who cares what those people in the UN say?' They may not be swayed by those

legal arguments. That means we have to think about what is likely to change people's minds.

One technique that I think does a lot of good is talking about the human stories. Australians are in fact more compassionate than our government gives us credit for. When you explain the hardships that people have gone through, Australians often respond really well to that. So telling these human stories is an important advocacy strategy.

The other important piece of information to get out there is how countries actually benefit from refugees. If you are small country like Lebanon and the conflict goes on and on, protection of refugees can be very difficult for that country. But for a country like Australia, which is never going to have that size of an influx, simply because of where we are geographically, we have to focus on the fact that refugees have contributed enormously to the country. The UNHCR used to run a campaign that said, 'A bundle of belongings isn't the only thing a refugee brings to his new country. Einstein was a refugee'. We get people who make really significant contributions and there is plenty of evidence to show the ways in which refugees have contributed to their communities.

The other thing that we somehow have to counter, and it isn't just Australia – it happens elsewhere in the developed world, is the sense that because our economies are much stronger, people will want to come and work here, so that there are vulnerable citizens in our community who won't get access to jobs because there will be too much competition.

I think we have to remind ourselves that migration on the whole, including refugees and humanitarian migrants, has assisted the economy. Even so, we then see failures, such as a housing shortage like we see in Australia and in the UK affecting the debate about immigration. In the UK, this was a factor that drove Brexit, albeit the concern there wasn't just refugees but other EU citizens wanting to live and work in the UK. Political rhetoric linked immigration to the housing shortage and strains on social services. We really have to highlight for people that it isn't migrants who cause those problems. It is actually failure of government policy more broadly. Governments need to do things for their citizens and newcomers. We need to have good policies on things like housing and provision of health and education. Simply stopping a few boat arrivals at the border is not going to do anything to fix those problems. The public is being sold a lie and politicians get mileage out of whipping up a moral panic about

border control. It is a sideshow and a distraction from the things that they should be doing for their citizens, but that they are not doing for their citizens.

*Thank you, Professor Mathew. We definitely aspire to have your knowledge and energy on these issues. It has been wonderful to talk to you and to get your perspectives on some of these broader issues about conflict, immigration and the law. It was an absolute pleasure to speak with you.*

## Protecting Cultural Property in the Event of Armed Conflict: A Heritage View

Professor Peter Stone OBE

### I INTRODUCTION

The protection of cultural property (**CPP**) in the event of armed conflict has become a much debated topic since the failures, with respect to CPP, of the US/UK led Coalition that invaded Iraq in 2003. In reality, however, the failure of Coalition forces to stop the fully anticipated (at least by the heritage community) looting of archaeological sites, archives, art galleries, libraries, and museums was the very public culmination of a systemic failure to take CPP seriously by the military since the Second World War (**WWII**). At a superficial level, this failure is rather difficult to comprehend as, appalled by the destruction of cultural property during WWII, the international community had reacted by preparing the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>1</sup> and its Protocol (**1954 Convention**). Surely, with such a specific piece of international humanitarian law (**IHL** – also referred to, especially by the military, as the Law of Armed Conflict, [**LOAC**]) focussed entirely on this one issue we could assume all States Parties would abide by the 1954 Convention and do all in their power to protect cultural property. What went wrong, and why were the good intentions of 1954 apparently allowed to slip silently away, and fall completely off the political and military agenda?

There are two immediate answers to this question. First, in 2003, neither the US nor the UK had ratified the 1954 Convention and (despite at least the UK's protestations that its armed forces worked 'within the spirit of the Convention') their armed forces, therefore, had no legal obligation *under the Convention itself* (although see below). As any soldier will tell you, quite understandably, if an activity is not required, no-one will be given responsibility for it; and if no-one has responsibility – orders – to do it, it will not get done. Second, just as CPP appears to have slipped away from military consciousness, it had also slipped away from the consciousness of the heritage community. We expected the military to protect cultural property because it was 'obvious' that they should do so. We did not, however, think to assist the military in this task. Until the belated flurry of activity in 2002-3, very few in the heritage community had engaged with the military as to why, how, or what cultural property

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<sup>1</sup> Opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956).

should be protected. We had an international convention: but few in the heritage community appeared to know about, or have any intention of helping to implement, it.

## II SOME HISTORY

Interestingly, while cultural property is frequently a casualty of conflict, numerous military theorists and strategists, from Sun Tzu in 6<sup>th</sup> Century BC China, to von Clausewitz in 19<sup>th</sup> Century Europe, have argued that allowing the cultural property of your enemy to be destroyed (or worse, destroying it yourself) is bad military practice as it can lead to resentment, make subjugated populations difficult to govern, and become the first reason for the next conflict.<sup>2</sup>

Admittedly, it is only relatively recently that such advice has been acted upon. The restitution of cultural property removed as 'spoils of war', and for display and scientific study, was introduced in the Treaty of Vienna following the Napoleonic Wars.<sup>3</sup> Protection of cultural property during armed conflict was enshrined in law for the first time in the 1863 *Instructions for the Government of Armies of the United States in the Field* (the so-called 'Lieber Code'), which stated: 'Classical works of art, libraries, scientific collections... must be secured against all avoidable injury...'<sup>4</sup> A number of international treaties, for example the Hague Conventions of 1899<sup>5</sup> and 1907<sup>6</sup> and the 1935 Roerich Pact,<sup>7</sup> developed this approach. However, despite, and because of, the enormous damage to, especially European, heritage in the First World War (WWI), the international community was still debating how better to protect cultural property during war on the eve of WWII.

Setting aside the devastating destruction of cultural property, especially on the Western Front, WWI had also seen some positive action. The German army was the first to set-up a specialist team, the Kunstschutz, to protect cultural property.<sup>8</sup> Others took a

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<sup>2</sup> S Tzu, *The Art of War* (trans T Cleary, Shambhala); C von Clausewitz, *On War* (trans CJJ Graham, Wordsworth, 1997) [trans of *Vom Kriege* (first published 1832)].

<sup>3</sup> M Miles, 'Still in the aftermath of Waterloo: a Brief History of Decisions about Restitution' in PG Stone (ed) *Cultural Heritage, Ethics and the Military* (Boydell & Brewer, 2011) 29–42.

<sup>4</sup> *Instructions for the Government of Armies of the United States in the Field* (1863) (**Lieber Code**), art 35.

<sup>5</sup> *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, opened for signature 19 July 1899, 1 Bevans 230 (entered into force 4 September 1900).

<sup>6</sup> *Hague Convention (IV) Respecting the Laws and Customs of War*, opened for signature 18 October 1907, 187 CTS 227 (entered into force 26 January 1910).

<sup>7</sup> *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments 1935*, opened for signature 15 April 1935, 167 LNTS 289 (entered into force 26 August 1935).

<sup>8</sup> R O'Keefe et al, *Protection of Cultural Property Military Manual* (UNESCO, 2016) 21.



more individualistic – or haphazard – approach. Occupying/liberating Jerusalem in 1917, the British commander Allenby declared that ‘every sacred building, monument, holy spot, shrine, traditional site ... of the three religions will be maintained and protected’.<sup>9</sup> Fascinatingly, Allenby went further and, showing a nuanced understanding of cultural sensitivities, ensured that Muslim troops from the Indian Army were deployed to protect important Islamic sites. Whether it was Allenby himself or someone on his staff, *someone* was thinking about the value and implications of CPP from a military perspective.

Some positive action was also taken in WWII. Despite the appalling damage, the protection of cultural property was seen clearly as part of the responsibility of the combatants, and the Allies, and some elements of Axis forces (the Kunstschutz was still in operation), took this responsibility seriously – although history, of course, emphasises the Nazi destruction and theft of cultural property. The ‘Monuments, Fine Arts, and Archives’ unit was created in Allied forces and these ‘Monuments Men’ made enormous efforts to protect cultural property in all theatres of the war.<sup>10</sup> The unit had the full backing of Eisenhower, the Supreme Allied Commander, who wrote immediately before the Normandy landings reminding troops that ‘[i]nvariably, in the path of our advance will be found historical monuments and cultural centres which symbolise to the world all that we are fighting to preserve. It is the responsibility of every commander to protect and respect these symbols wherever possible...’ (Instruction from Supreme Allied Commander, 26 May 1944).<sup>11</sup> Many cultural sites, buildings, and collections were, of course, destroyed: but much was done to limit the destruction.

Unfortunately, apart from the 1954 Convention and some other developments in IHL, there was little effort to continue the work of these conscript-soldiers following WWII (although limited elements of their work were retained within US Civil Affairs units). The heritage community drifted away from any association with the military and by 2003, few military forces (with notable exceptions such as the Austrians – prompted by a potential Soviet invasion in 1968) retained anything other than a superficial

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<sup>9</sup> See M Duffy, *Sir Edmund Allenby's Official Proclamation Following the Fall of Jerusalem, 9 December 1917* (22 August 2009) First World War <[http://firstworldwar.com/source/jerusalem\\_allenbyprocl](http://firstworldwar.com/source/jerusalem_allenbyprocl)>.

<sup>10</sup> See, eg, RM Edsel, *Monuments Men: Allied Heroes, Nazi Thieves and the Greatest Treasure Hunt in History* (Preface Publishing, 2009); RM Edsel, *Saving Italy: The Race to Rescue a Nation's Treasures from the Nazis* (WW Norton & Co, 2013); L Nicholas, *The Rape of Europa: the Fate of Europe's Treasures in the Third Reich and the Second World War* (Vintage Books, 1995); L Woolley, *A Record of the Work Done by the Military Authorities for The Protection of the Treasures of Art and History in War Areas* (HMSO, 1947).

<sup>11</sup> See also R O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, 2006) 74-5.

expertise, or commitment to, CPP, as demonstrated depressingly by the debacle in Iraq.

### III WHERE IS THE LAW IN ALL OF THIS?

With the caveat that the author is not a lawyer, a few generalisations can be made. As of June 2017, there were 128 States Parties to the 1954 Convention.<sup>12</sup> There are 105 States Parties to the First (1954) Protocol (that deals mainly with reparation of cultural property) and 72 States Parties to the Second (1999) Protocol (which provides a far more robust mechanism for the criminal prosecution of those intentionally damaging cultural property). More worryingly, while no systematic survey has been completed, it is not unfair to suggest that of the 128 States Parties to the Convention only a handful can be argued to have implemented the Convention fully and perhaps especially art 7 which outlines the military measures to be taken in times of peace. Despite the 1954 Convention being accepted as part of international customary law (ICL) it is also probably fair to claim that those involved in most conflicts since 1945, culminating in the 2003 invasion of Iraq, systematically failed to uphold their responsibilities with respect to CPP under ICL. At the time of writing only one of the Permanent Five Members of the UN Security Council, France, has ratified the 1954 Convention and both its Protocols (although the UK has within the last few weeks submitted the necessary documentation to UNESCO to allow it to become the second). With such relatively low levels of international ratification (especially for the Protocols), that could be argued to mask a lower actual commitment, there is little room for complacency.

Even more significant is that, while the protection of cultural property has its own Convention, no-one has been prosecuted under it. In addition to the 1954 Convention, cultural property protection is an integral part of the 1977 Additional Protocol I to the 1949 Geneva Conventions (arts 53 and 85(4)(d)) and the 1998 Rome Statute of the International Criminal Court (arts 8(2)(b)(ix) and 8(2)(e)(iv)).<sup>13</sup> Prosecutions relating to intentional damage to or destruction of cultural property have, in fact, been brought effectively under international criminal law (ICrimL) and not IHL.<sup>14</sup> A number of

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<sup>12</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956).

<sup>13</sup> See, eg, HM Hensel, 'The protection of cultural objects during armed conflicts' in HM Hensel (ed) *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate, 2007) 39-104; J Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (UNESCO, 1996); P Gerstenblith, 'Archaeology in the context of war: legal frameworks for protecting cultural heritage during armed conflict' (2009) 5 *Archaeologies* 18, 18-31; O'Keefe, above n 11.

<sup>14</sup> O'Keefe, above n 8, 4-5.

those prosecuted in the Nuremberg Trials faced charges of damage to cultural property although their other charges were usually the main reasons for prosecution; and individuals were found guilty and imprisoned for crimes against cultural property under the remit of the International Tribunal for the Former Yugoslavia.<sup>15</sup> More recently in 2016, Mr Al Mahdi, a member of the extremist group Ansar Dine, was sentenced to nine years imprisonment by the International Criminal Court<sup>16</sup> under the Rome Statute, and has recently been given a, somewhat unrealistic, €2.7 million fine, for the destruction of nine mausolea and a mosque in Timbuktu. While some claim the sentence is too lenient there has been comment that the fine might backfire and lead to an incentive for similar attacks on cultural property in poor countries stimulated by the hope of receiving significant compensation.<sup>17</sup> This, sadly legitimate, concern opens the debate that CPP is an issue that only wealthy countries may have the ability to take seriously: a topic beyond the scope of this article. Regardless of this latter point, we have to take seriously the concern that, to date, CPP has been failed by IHL – or more precisely by the failure, unwillingness, or inability, to implement IHL – or even to focus political and military minds on their responsibilities under ICL.

While the success of IHL with respect to CPP may be questioned, interesting developments relating to CPP are taking place within international human rights law (IHRL). In 2015, the UN Special Rapporteur for Cultural Rights identified the intentional destruction of cultural heritage as a priority issue and indicated her intention to study the phenomenon in more depth. In her first Report she examined the impact of such destruction on a range of human rights, including the right to take part in cultural life; called for effective national and international strategies for preventing, and holding accountable those alleged to have taken part in, such destruction; and called for support for and protection of defenders of cultural heritage.<sup>18</sup>

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<sup>15</sup> See, eg, United Nations Criminal Tribunal for the Former Yugoslavia, *Case Information Sheet – Miodrag Jokic*, The Cases <[http://www.icty.org/x/cases/miodrag\\_jokic/cis/en/cis\\_jokic\\_en.pdf](http://www.icty.org/x/cases/miodrag_jokic/cis/en/cis_jokic_en.pdf)>; United Nations Criminal Tribunal for the Former Yugoslavia, *Completed Cases*, <<http://www.icty.org/cases/party/786/4>>.

<sup>16</sup> International Criminal Court, *Al Mahdi Case* (31 August 2017) Trying individuals for genocide, war crimes and crimes against humanity <<https://www.icc-cpi.int/mali/al-mahdi>>.

<sup>17</sup> 'War crimes court orders Mali radical to pay €2.7m for Timbuktu rampage', *The Guardian* (online) 17 August 2017 <<https://www.theguardian.com/world/2017/aug/17/war-crimes-court-icc-orders-mali-radical-pay-damages-timbuktu-rampage-ahmad-al-faqi-al-mahdi>>.

<sup>18</sup> See United Nations Office of the High Commissioner for Human Rights, *The intentional destruction of cultural heritage as a violation of human rights* (2017) Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/CulturalRights/Pages/IntentionalDestruction.aspx>>.

The Special Rapporteur's first report was welcomed in a cross-regional statement made to the Council in March 2016 by an unprecedented coalition of 145 States that stated:

As Members and Observers of the Human Rights Council, we condemn all acts of intentional destruction to cultural heritage occurring most commonly during, or in the aftermath of, armed conflicts around the World and we are alarmed by their increasing frequency and scale. We note that such acts and the violations and abuses of cultural rights they result in can constitute an aggravating factor in armed conflict and may also represent major obstacles to dialogue, peace and reconciliation, for instance when they interfere with the right to manifest one's religion by limiting access to places of worship. Parties to armed conflicts must refrain from any unlawful, military use or targeting of cultural property, in full respect of their obligations under international humanitarian law.<sup>19</sup>

A Second Report was presented to the UN General Assembly in October 2016 and, Resolution 33/20,<sup>20</sup> adopted by the Human Rights Council on 30 September 2016, called for 'all States to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage'; urged 'all parties to armed conflicts to refrain from any unlawful military use or targeting of cultural property, in full conformity with their obligations under international humanitarian law'; and encouraged 'States that have not yet become a party to all relevant treaties that provide for the protection of cultural property to consider doing so'.<sup>21</sup> Following an expert Seminar in July 2017<sup>22</sup> the issue has also been taken up by the Expert Mechanism on Rights of Indigenous Peoples.<sup>23</sup> Most recently, the Human Rights Council's Advisory Committee discussed the issue again.<sup>24</sup> Suffice to say that the Human Rights interest in CPP is strong, and getting stronger.

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<sup>19</sup> Permanent Representative of Cyprus in the General Debate under Item 8 of the Agenda, *Joint Statement on cultural rights and the protection of cultural heritage* (21 March 2016) United Nations Office of the High Commissioner for Human Rights <<http://www.ohchr.org/Documents/Issues/CulturalRights/JointStatementCyprus21Mar2016.pdf>>.

<sup>20</sup> *Cultural Rights and the Protection of Cultural Heritage*, Human Rights Council Resolution 33/20, 33<sup>rd</sup> sess, 40<sup>th</sup> mtg, UN Doc A/HRC/33/L.21 (30 September 2016).

<sup>21</sup> Ibid.

<sup>22</sup> See United Nations Office of the High Commissioner for Human Rights, *Cultural Rights and the Protection of Cultural Heritage* (6 October 2016) Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/ESCR/Pages/CulturalRightsProtectionCulturalHeritage.aspx>>.

<sup>23</sup> See United Nations, *Item 8: Intersessional activities – 7<sup>th</sup> Meeting, 10<sup>th</sup> Session Expert Mechanism on Rights of Indigenous Peoples* (13 July 2017) UN Web TV <<http://webtv.un.org/search/item-8-intersessional-activities-7th-meeting-10th-session-expert-mechanism-on-rights-of-indigenouseoples/5502629240001/?term=&lan=english&cat=Meetings%2FEvents&page=22>>.

<sup>24</sup> See K. Obata, *Report of the Advisory Committee on its eighteenth session*, UN Doc A/HRC/AC/18/2 (24 February 2017).

Finally, while reference was made to the 1954 Convention in para 7(a) of the UN's Status Agreement with the Government of Lebanon, with respect to the deployment of the UN's Interim Force in Lebanon, it was with respect to the UN deployment to Mali in 2013 that the UN specifically identified, for the first time, CPP as part of a mission's mandate.<sup>25</sup> Paragraph 16(f) of UN Security Resolution 2100 is titled 'Support for cultural preservation' and states:

To assist the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO.<sup>26</sup>

With such a mandate the armed forces of any participating country must surely begin to take CPP seriously.

In conclusion, with the combined attention and legal powers of IHL, ICL, and ICrimL, together with the emerging interest of IHRL, it could be argued that CPP is well catered for during armed conflict. Nevertheless, the reality appears to tell a different story. There appears to be a disjoint between law and the operational practice of the law. At one level this is unsurprising. Protecting old things during armed conflict may not be prioritised by force commanders' intent on mission success and the safeguarding of those under their command. At another it appears to identify a failure to identify, understand, and implement legal responsibilities: '... the bottom line remains that the wartime fate of cultural property rests on the effective acquittal by commanders of their operational and legal responsibilities.'<sup>27</sup> However, as intimated above, the acceptance and implementation of such responsibility on the part of the military requires the active participation of the heritage community. The rest of this article will concentrate on how parts of the heritage community are beginning to work in partnership with the military and in particular the activities of the international NGO, the Blue Shield. The delivery of legal responsibilities are focused on the 'what' and 'where'. However, when asking those in uniform to take on such an additional responsibility, it is justifiable to first answer the question 'why'.

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<sup>25</sup> See United Nations, *MINUSMA United Nations Multidimensional Integrated Stabilization Mission in Mali* (2017) United Nations Peacekeeping <<http://www.un.org/en/peacekeeping/missions/minusma/background.shtml>>.

<sup>26</sup> See SC Res 2100, UN SCOR, 6952<sup>nd</sup> mtg, UN Doc S/RES/2100 (25 April 2013).

<sup>27</sup> O'Keefe, above n 8, 12.

#### IV WHY IS CULTURAL PROPERTY PROTECTION IMPORTANT?

CPP is important for a variety of reasons. At a very basic level, cultural property is a finite resource. Once a manuscript or book, piece of art, old building, or archaeological site is destroyed, it is lost forever. There may be other copies of the manuscript or book – but frequently early written documents differ because they were written and copied by hand with numerous changes, intended or not, happening from one version to another. Each version, therefore, takes on a particular and specific importance. When an historic building is destroyed, we may be able to produce a very good ‘replica’, as for example happened in Warsaw following the wholesale destruction of the city in WWII, but it can never be the original. The tangible link to the past, these stones were placed here  $\times$  hundreds of years ago by real people, has been shattered and removed.

These physical manifestations – the tangible evidence – of the past, the objects and buildings, are critical to our understanding of what it means to be human. We study the past and contemporary culture to understand the present, to help create the future. Without the tangible evidence of that past, this process is significantly more difficult. The ability to interact with the past in this way is frequently seen as an attribute of a modern, stable society. Cultural property is also central to the cultural and social life of communities and at a national level, is frequently used as the ‘stage’ for the performance of intangible cultural heritage such as the pomp and ceremony surrounding State openings of Parliaments, or their equivalents, around the world. There can, of course, also be a ‘negative’ association, as in the recent use by Daesh of the Theatre at Palmyra for mass executions. Cultural property frequently helps preserve national, and local, traditions and culture, and can help build community pride in its heritage – although this too can also be controversial if two communities have a different understanding of the ‘same’ past, for example in Northern Ireland. An increasing body of research also testifies to the relationship between historic environments and individuals’ ‘wellbeing’.<sup>28</sup> People who live in historic environments appear to have higher ‘social capital’ – ‘a term which refers to benefits in terms of wellbeing, good health and civil engagement’.<sup>29</sup> This all goes back to Sun Tzu arguing that destruction of cultural property is poor military practice. For an occupying – or ‘stabilising’ – force, a community that can retain its pride and stability is an easier community to govern or support.

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<sup>28</sup> See, eg D Fujiwara, T Cornwall and P Dolan *Heritage and Wellbeing* (Historic England, 2014).

<sup>29</sup> See, eg, H Graham, R Mason and A Newman, *Historic Environment, Sense of Place, and Social Capital: A Literature Review*, (English Heritage, 2009) 4.

This last point brings us back to a fundamental issue. If we want politicians (never forget that it is politicians who send the military to war) and the military to take CPP seriously, we have to frame its importance in terms relevant to these groups. From a political and military perspective, at the very least a combination of academic, cultural/social, economic, medical, political, and specifically military arguments have been identified that need to be considered by those with the responsibility of waging war. For the military to take CPP seriously, the argument has to be made within the framework of successfully delivering the mission. This needs to be put into some context. The nature of war has changed dramatically since the early 20<sup>th</sup> Century and a military that has won a war now frequently finds itself being tasked to be responsible for helping to deliver an economically viable and stable post-conflict country before it can withdraw – in other words it needs also to win the peace.<sup>30</sup> It is suggested that if CPP can help in this then military planners would be negligent if they did not consider it as part of their responsibility. Issues relating to academic, cultural/social, and medical reasons for CPP have been touched on above. A few more points, perhaps more directly relevant to such military concerns, can, however, be flagged.

First, as discussed above the protection of cultural property is now accepted as an obligation codified as part of the LOAC. The LOAC stresses that occupying forces should not withdraw until there are competent and effective authorities to whom governance can be handed over. No-one implies that CPP in times of armed conflict is easy<sup>31</sup> but the responsibility of the military to include it in their planning and actions, under LOAC (or IHL), is unequivocal.

Second, the political use, manipulation, and abuse of heritage is now accepted as an ever-present issue. From a military perspective, political interest in and use of heritage may have a direct relationship with the reasons for the conflict and may, therefore, have a direct impact on the required military action. For example, in the civil war in the former Yugoslavia, heritage and religious sites were specifically targeted by troops on all sides as politicians, and some elements within the armed forces, strove to remove all evidence of other communities ever having lived in particular geographical areas.<sup>32</sup> No military planner should ignore the political agenda relating to heritage. Indeed, a more astute military might have questioned why the cultural implications of the

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<sup>30</sup> TX Hammes, *The Sling and The Stone: On War in the 21st Century* (Zenith Press, 2004).

<sup>31</sup> See, eg, R Bevan, *The Destruction of Memory: Architecture at War* (Reaktion, 2006); AH Yahya, 'Managing Heritage in a War Zone' (2008) 4 *Archaeologies* 495.

<sup>32</sup> See, eg, J Chapman, *Destruction of a Common Heritage: The Archaeology of War in Croatia, Bosnia and Herzegovina* (Cambridge University Press, 1994).

removal of Saddam Hussein played no part in the political planning of the 2003 invasion.<sup>33</sup>

Third, there is evidence that the looting of cultural property, especially during so-called 'asymmetric' armed conflict, may provide funding for some parties involved in conflicts. By restricting such looting, the military can therefore choke-off a strand of funding for the opposition and potentially save lives and shorten the conflict.

Fourth, according to the UN's World Tourism Organisation, in 2015 tourism accounted for nine per cent of global GNP and 1 in 11 jobs.<sup>34</sup> In 2007 some 40 per cent of tourists cited culture as the prime reason for travel.<sup>35</sup> Cultural heritage tourism benefits communities and countries by creating jobs and businesses, diversifying local economies, attracting visitors interested in history and preservation (who tend to have a higher daily spend than general tourists), and generating local investment in historic resources. From a military perspective, allowing cultural property to be destroyed therefore has the potential to undermine the economic recovery of a post-conflict country and may therefore lead to longer military deployments and, potentially, greater friction between the military and host community. With specific reference to the Middle East and North Africa (MENA) region, a 2001 World Bank report noted the 'highly valuable cultural endowments in all the region's countries' that opened up 'major opportunities for development, providing a major source of employment, and thereby contributing to the reduction of poverty and the decrease of chronic joblessness.'<sup>36</sup> In other words, cultural heritage, and its exploitation, are, or at least in 2001 were, perceived to be, at the heart of the economic development of the MENA region.

## V MILITARY ACCEPTANCE OF RESPONSIBILITY

The military are increasingly aware of their responsibilities and of the opportunities provided by CPP and are beginning to take steps to address previous failures. For example, some armed forces have re-introduced, or re-invigorated, contemporary versions of the Monuments Men. These, usually middle ranking officers, are usually part of what different armed forces call Civil Affairs or CIMIC – civilian/military

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<sup>33</sup> See also TE Ricks, *Fiasco: The American Military Adventure in Iraq* (Penguin, 2004).

<sup>34</sup> See United Nations World Tourism Organization, *Tourism Highlights 2015 Edition* (UNWTO, 2015) 2.

<sup>35</sup> Organisation for Economic Cooperation and Development, *The Impact of Culture on Tourism* (OECD, 2004).

<sup>36</sup> World Bank, *Cultural Heritage and Development: A Framework for Action in the Middle East and North Africa* (World Bank, 2001).



liaison and it is here where the relationship between cultural property experts and the military can be nurtured. In Europe in 2010, the Leadership Centre (Zentrum Innere Führung) of the German Bundeswehr<sup>37</sup> organised the first of what has become an annual conference called ‘Coping with Culture’. Despite the somewhat negative connotation of the title, the annual meetings have brought together predominantly members of the armed forces of between 10 and 15 European countries, with a smattering of cultural experts, to discuss a wide range of cultural issues facing the military – including CPP. Also in Europe, the multinational sponsored, NATO accredited CIMIC Centre of Excellence based in the Netherlands,<sup>38</sup> with the support of The Blue Shield, published in 2015 *Cultural property protection Makes Sense: A Way to Improve Your Mission*.<sup>39</sup> In the UK, a symposium ‘Culture in Conflict’, primarily attracting military staff and associated experts, has been held annually for nine years and has begun to address CPP on a regular basis. In Lebanon, following discussions with local archaeologists, the Lebanese Armed forces took the initiative and set-up an internal CPP unit and an initial training workshop was carried out in June 2013 in association with UNESCO and the Blue Shield. Following from this the UNESCO organised a training programme with the support of the Blue Shield for the United Nations Interim Force in Lebanon (**UNIFIL**). In the USA cultural experts, in liaison with the USA national committee of the Blue Shield, have worked with the Department of Defence (**DoD**) to create the Combatant Command Cultural Heritage Action Group which supports troops and the military mission by developing reference, education and training tools for DoD uniformed and civilian personnel and contractors. In particular, its mission is to ‘enhance military capacity by promoting cultural property protection as a force multiplier and an effective use of soft power’.<sup>40</sup> The USA DoD has produced a number of cultural property training resources.<sup>41</sup>

Also in the USA, the ‘Cultural Heritage by AIA-Military Panel’ (**CHAMP**), a collaboration between the Archaeological Institute of America and the military, is dedicated ‘to improving awareness among deploying military personnel regarding the culture and history of local communities in host countries and war zones’. CHAMP

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<sup>37</sup> See Bundeswehr, *Innerefuehrung* (14 August 2017) <[www.innerefuehrung.bundeswehr.de](http://www.innerefuehrung.bundeswehr.de)>.

<sup>38</sup> See Civil-Military Cooperation Centre of Excellence, *Welcome to the NATO Civil-Military Cooperation Centre* <<http://www.cimic-coe.org/>>.

<sup>39</sup> See Civil-Military Cooperation Centre of Excellence, *The Protection of Cultural Heritage* <<http://www.cimic-coe.org/products/conceptual-design/cimic-innovation/advanced-cultural-competence-aac/the-protection-of-cultural-heritage/>>.

<sup>40</sup> At the time of writing the CCHAG website is being renewed. This quote was taken from a previous version in 2016.

<sup>41</sup> See Colorado State University, United States Department of Defense and US Central Command, *Cultural Property Training Resource* <<http://www.cemml.colostate.edu/cultural/cptraining.html>>.

regards the education and training of military personnel as a 'critical step in preserving and safeguarding historical sites and cultural artefacts'.<sup>42</sup> In 2016 CPP was discussed specifically during the Australian DoD conference on 'ISIL and Middle Eastern Regional Dynamics'. Also in 2016, the Australian Red Cross organised a two-day Conference on Protecting Cultural Property in Armed Conflict that included a discussion with a number of government departments, including DoD, over the better implementation of the 1954 Convention and in the same year a workshop on the 1954 Convention was held by Pacific countries including representatives of the military and police. Space precludes mention of many other similar initiatives from around the world.

Some of the latter initiatives and meetings were driven by those outside the military and the heritage community is beginning to build an understanding of its responsibilities towards supporting the military with respect to CPP. Both these military and heritage developments are set within a wider context of action taken by the United Nations (for example, Security Council Resolutions 2199<sup>43</sup> and 2347<sup>44</sup>) and UNESCO (for example, the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage<sup>45</sup> and its 2016 Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict<sup>46</sup>). One other organisation, The Blue Shield, has been leading the way in developing thinking associated with CPP.

## VI THE BLUE SHIELD

In anticipation of the 1999 Second Protocol to the 1954 Convention, four of the major international heritage organisations (the International Council of Archives, the International Council of Museums, the International Council on Monuments and Sites, and the International Federation of Library Associations and Institutions) combined in 1996 to create the International Committee of the Blue Shield as an advisory body to the intergovernmental committee for the Second Protocol. The Blue Shield is currently a network of willing volunteers – with some 30 national committees.

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<sup>42</sup> See CHAMP, *Cultural Heritage by Archaeology & Military Panel* <<http://aiamilitarypanel.org/>>.

<sup>43</sup> SC Res 2199, UN SCOR, 7379<sup>th</sup> mtg, UN Doc S/RES/2199 (12 February 2015).

<sup>44</sup> SC Res 2347, UN SCOR, 7907<sup>th</sup> mtg, UN DOC S/RES/2347 (24 March 2017).

<sup>45</sup> UNESCO *Declaration concerning the Intentional Destruction of Cultural Heritage*, 32 C/Res 33, Records of the 32<sup>nd</sup> General Conference of UNESCO, Vol 1, Agenda Item 33 (17 October 2003).

<sup>46</sup> UNESCO, *Strategy for the Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, UNESCO <<http://en.unesco.org/heritage-at-risk/strategy-culture-armed-conflict>>.

While the primary context of the Blue Shield is the 1954 Convention, which relates solely to the protection of tangible property during armed conflict, it also works in situations involving natural disasters. The Blue Shield also strives to protect intangible cultural heritage. This wider remit is encapsulated in art 2.1 of the 2016 Statutes which states:

[The Blue Shield] is committed to the protection of the world's cultural property, and is concerned with the protection of cultural and natural heritage, tangible and intangible, in the event of armed conflict, natural- or human-made disaster.

To be effective, the Blue Shield understands the need to work in close partnership with a wide range of organisations including international and national governmental organisations, Non-Governmental Organisations, heritage organisations, disaster risk reduction teams, as well as supra-national and national armed forces, fire services, police, and customs; it is slowly building these links. It carries out its work through six activities, which are not necessarily sequential and can often be concurrent:

- Co-ordination (of Blue Shield and with other relevant organisations)
- Policy Development
- Proactive protection and risk preparedness
- Education, training, and capacity building
- Emergency response
- Post-disaster recovery and long-term support.

## VII POLICY DEVELOPMENT

To be effective, and a useful partner to those in uniform, the Blue Shield needs to understand what it is trying to achieve and how best to go about its work. Until recently it was effectively assumed that CPP was a 'good thing' and that relations with the military would simply begin to happen without conscious effort. While much progress has been made, for example in the USA, this has not always proved to be the case, resulting not infrequently in misunderstanding, missed opportunities, and lack of progress. By clearly defining the framework within which it works and clarifying what it can, and cannot, do, the Blue Shield is trying to build trust and cement developing relations.

### A *The Four-Tier Approach*

In conjunction with colleagues in the UK MoD, the USA DoD, and NATO, efforts have been made to develop what has become known as the 'Four-Tier Approach'.<sup>47</sup> This provides a policy outline and practical framework for the inclusion of CPP into military doctrine and long-term planning, supported by the heritage community, that should ensure the military comply with their legal responsibilities and that cultural property will be protected as effectively as possibly during conflict. Tier 1 requires the integration of CPP training within basic training for all military personnel at an appropriate rank and responsibility level and can be introduced for junior ranks, for example, through posters, packs of playing cards, and short films. Tier 2 is introduced as soon as deployment becomes a possibility and the military needs an understanding of the cultural property they will encounter in a particular location; this is the time to provide or review specific information about cultural property to be protected in a particular theatre of operations. A number of countries have developed specific materials for this Tier including the packs of country focused playing cards produced by the US, Dutch, and Norwegian armed forces, the latter with the support of the Norwegian Blue Shield. Tier 3 is activity during conflict and Tier 4 post-conflict activity during what the military refers to as 'stabilization'. The approach provides a framework for future collaboration with the intention that CPP will be integrated as a core element of military training and planning into the future. We cannot sit back and wait for the next catastrophe, but rather must proactively plan to mitigate the impact of the next war. It was as a direct consequence of the re-publication of the 'Four Tier Approach' in the *British Army Review* that the British Army set up a Cultural Property Protection Working Group that we anticipate will soon lead to the establishment of a formal Joint Service CPP capability across UK armed forces.<sup>48</sup> The USA is actively considering re-establishing a similar unit.

### B *The Seven Risks to Cultural Property During Conflict*

If the military are to take CPP seriously they need to understand not only why they need to do so but why and how cultural property is damaged and destroyed during conflict. Seven reasons for such damage and destruction have been identified by the Blue Shield: (i) protection of cultural property is not regarded as important enough to

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<sup>47</sup> PG Stone, 'A four-tier approach to the protection of cultural property in the event of armed conflict' (2013) 87(335) *Antiquity* 166, 166-177; PG Stone, 'A 4 Tier Approach in the Protection of Cultural Property', (2013-4) 159 *British Army Review* 40.

<sup>48</sup> T Purbrick, *Monuments Men: Part One*, British Army Blog (2016) <<https://britisharmyblog.wordpress.com/2016/10/21/monuments-men-part-one/>>.

include in pre-conflict planning; (ii) cultural property is regarded as legitimate ‘spoils of war’; (iii) it becomes collateral damage; (iv) through lack of military awareness; (v) through looting; (vi) through ‘enforced neglect’; and (vii) as the result of specific targeting.<sup>49</sup> The Blue Shield is beginning to address these, within the overall framework of the Four-Tier Approach, in the hope that military understanding and resulting action relating to as many risks as possible will lead to an overall reduction in damage.

## VIII PROACTIVE PROTECTION

The most fundamental preconditions to protecting cultural property during hostilities are to identify what and where the cultural property to be protected is and to communicate this information effectively to those engaged in the planning and execution of military operations.<sup>50</sup>

The Blue Shield has been involved in the production of lists of cultural property not to be damaged if at all possible for areas affected by conflict. Mainly led by the US committee of the Blue Shield, such lists have been compiled for Libya, Mali, Syria, Yemen, and Iraq. While such lists are an obvious and necessary requirement for military planners, they are not without contention.<sup>51</sup> Six major issues need addressing. First, the process of compilation of the lists is contentious: who produces the list and to what standard? Second, the scope of such lists continues to be an issue. Third, the size of different lists has prompted a variety of responses from different militaries, with some seeking as much information as possible and others requesting more ‘manageable’ lists. Fourth, while the 1954 Convention stipulates that all types of cultural property should be protected, it has proved to be extremely difficult to produce reliable lists of sufficient detail for libraries, archives, art museums, and galleries. Fifth, the nature of the detailed geo-spatial information in the lists needs standardising with what the military need. Finally, there needs to be clarity over who owns the lists and who has access to them: one man’s list of sites to be protected can easily turn into another’s list of sites to be targeted. Much more work needs to be done before there is an effective, efficient, and acceptable process for the development of such lists. We have, however, good evidence that at least some of these lists have been used by NATO to minimise damage to cultural property and action taken in Libya led

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<sup>49</sup> For further details see PG Stone, ‘The challenge of protecting heritage in times of armed conflict’, (2016) *Museum International* 1.

<sup>50</sup> O’Keefe, above n 8, 23.

<sup>51</sup> PG Stone, *War and Heritage: Using Inventories to Protect Cultural Property*, Conservation Perspectives <[http://www.getty.edu/conservation/publications\\_resources/newsletters/28\\_2/war\\_heritage.html](http://www.getty.edu/conservation/publications_resources/newsletters/28_2/war_heritage.html)>.

directly to the establishment of an internal NATO review regarding cultural property protection that recommended NATO should create its own CPP doctrine.<sup>52</sup>

We are a long way from position where we can feel comfortable that all sides in armed conflict will take the protection of cultural property seriously. We may never get to such a position. However, it is surely an aspiration worth striving for.

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<sup>52</sup> North Atlantic Treaty Organisation, *Cultural Property Protection in the Operations Planning Process*, Unclassified Report by NATO's Joint Analysis and Lessons Learned Centre (NATO, 2012).

## Interpolative Statements of Suffering: Victim-led Justice at the ECCC

Mahdev Mohan\*

Judge: Mr. Civil Party, Mr. Khieu Samphan declines to respond to your question, as he reserves his right to remain silent. So, your questions will not be answered by him.

### ABSTRACT

Often deemed perfunctory, victims' Statements of Suffering can become an important aspect of internationalised criminal trials. At the Extraordinary Chambers in the Courts of Cambodia (**ECCC**), Statements of Suffering have evolved through the Trial Chamber's jurisprudence, and at times through the questions posed by Civil Parties to senior leaders of the Khmer Rouge. Comparing Statements of Suffering at the ECCC to the 'views and concerns' that victims may express at the International Criminal Court (**ICC**), this article outlines the power of interpolative statements in vindicating victims' desires for transitional justice. It concludes that linguistic theory may hold the key to formulating a new inter-disciplinary model of victimology at these trials; one which recognises that for victims of mass crime, the opportunity to ask questions of defendants could ultimately be as important as having the opportunity to recount the horrors victims have experienced.

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## I INTRODUCTION

Transitional justice scholars have argued that internationalised<sup>1</sup> courts deter future crime,<sup>2</sup> establish an official historiographic record,<sup>3</sup> foster the rule of law,<sup>4</sup> promote reconciliation within post-conflict societies,<sup>5</sup> and achieve restorative justice by helping victims regain their autonomy and dignity.<sup>6</sup> Nonetheless, tribunals such as the ICTY and ICTR have been criticized for not giving due regard to the voices of the victims in the trial process.<sup>7</sup> In the past decade since the adoption of *The United Nations Basic Principles on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* by the United Nations General Assembly in December 2005,<sup>8</sup> there has been a growing recognition

<sup>1</sup> The phrase internationalised to refer to both purely international *ad hoc* courts such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the International Criminal Court (ICC) as well as hybrid tribunals, such as the Special Panels of the Dili District Court (SPDC), the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon and the ECCC.

<sup>2</sup> See, eg, R Posner, 'Retribution and Related Concepts of Punishment' (1980) 9 *Journal of Legal Studies* 71-78; M Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of Comparative & International Law* 375, 398.

<sup>3</sup> See, eg, SK Ivković, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' [2001] 37 *Stanford Journal of International Law* 255, 256; DF Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2546, quoting Justice Robert Jackson, chief US prosecutor for the Nuremberg trials of Nazi war criminals, on the purpose of those proceedings.

<sup>4</sup> See, eg, N Roht-Arriaza, *Impunity and human rights in international law and practice* (Oxford University Press, 1995) 3-4; see generally JD van der Vyver, 'Book Review' (2004) 18 *Emory International Law Review* 133, reviewing B Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003).

<sup>5</sup> See, eg, E Stover and H Weinstein, 'Introduction' in E Stover and H Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004) 1, 3-4, citing A Cassese, LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573, 597-601.

<sup>6</sup> See, eg, J Méndez, 'Comments on Prosecution: Who and For What?' in Boraine et al (eds), *Dealing with the Past: Truth and Reconciliation in South Africa* (IDASA Publishers, 1994) 87, 90 (arguing that 'prosecution in itself will provide a measure of healing and show the victims that their plight has not been forgotten by the states and society'); Ivković, above n 3, 334 (the ICTY aims to provide 'justice to the victims and thereby advanc[e] the processes of healing and reconciliation'); D Kaminer et al, 'The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses' (2001) 178 *British Journal of Psychiatry* 373, 375 (speculating that '[i]f justice is done, and seen to be done, psychological healing may be facilitated'); NJ Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law and Contemporary Problems* 127, 129: '[T]otal impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is immoral, injurious to victims, and in violation of international legal norms.'

<sup>7</sup> M Pena and G Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *International Journal of Transitional Justice* 518, 521; B Nowrojee, *Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?* (United Nations Research Institute for Social Development, 2005).

<sup>8</sup> GA Res 60/147, UN GAOR, 60th sess, 64th mtg, UN Doc A/RES/60/147 (21 March 2006).



of victims' rights to participate in the proceedings. The Basic Principles have provided some guidance on the the inclusion of victims, and have resulted in special mandates for victim participation at courts such as the ICC and the ECCC, including the right to legal representation, to provide and examine evidence, to apply for protective measures, and, importantly, to request reparations at the conclusion of the trial.

Some have observed that the official processes at these two tribunals, one permanent and the other hybrid, are a 'high-watermark' that place victims at the 'heart of international criminal justice',<sup>9</sup> and which expressly acknowledge the rights of victims and give them long awaited participatory status in the proceedings.<sup>10</sup> At the ICC, victims can (1) initiate proceedings under a request for reparations against the convicted person;<sup>11</sup> and (2) share their experience and other relevant information in relation to being a victim of the actions of the accused.<sup>12</sup> However, in relation to the latter, the drafters of the *Rome Statute of the International Criminal Court*<sup>13</sup> (**Rome Statute**) had been careful in drawing bright line between the victim and the prosecution, lest the victim becomes an auxiliary prosecutor or prosecutor *bis*, as has been recently suggested.<sup>14</sup> At the ECCC, in contrast, victims can be 'Civil Parties' in the proceedings against the accused persons. Civil Parties enjoy rights broadly similar to the Co-Prosecutors and the Defendants.<sup>15</sup> As 'parties' to the proceedings, rather than mere

<sup>9</sup> P Massidda and S Pellet, 'Role and Practice of the Office of Public Counsel for Victims', in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) 692.

<sup>10</sup> F McKay, 'Victim Participation in Proceedings before the International Criminal Court' (2008) 3 *Human Rights Brief* 152-5; GJ Mekjian et al, 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court' (2005) 17 *Pace International Law Review* 1, 15; CP Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29(4) *Michigan Journal of International Law* 777, 778.

<sup>11</sup> Pursuant to art 75 of the Rome Statute and r 94 of the Rules. The same was observed in *Situation in the Democratic Republic of Congo* (Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007) ICC-01/04 OA4 OA5 OA6, Appeals Ch (19 December 2008) [50].

<sup>12</sup> 'The roles of victims not just being limited to reparation roles was stated in *Prosecutor v Lubanga (Decision on Victims' Participation)* (International Criminal Court, Trial Chamber I, ICC-01/04-01/06-1432 11 July 2008) [108].

<sup>13</sup> Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>14</sup> *Prosecutor v Lubanga (Decision on the Application for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS 4, VPRS 5 and VPRS 6)* (International Criminal Court, Pre-Trial Chamber I, ICC-01/04-101, 17 January 2006) [51].

<sup>15</sup> Several sources suggest that Civil Parties have a fundamental role at the ECCC as separate players in their own right. ECCC Internal Rules, r 23(6), (7), (8) and (9); *Co-Prosecutors v Chea and Samphan (Decision on Civil Party Participation in Provisional Detention Appeals)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/01 20 March 2008) [36], [38]; S Mydans 'In the Khmer Rouge Trial, Victims will not stand idly by', *New York Times* (New York), 17 June 2008: G González Rivas, former deputy head of the ECCC's victims unit, said in an interview: 'For the first

'participants',<sup>16</sup> one observer suggests that Civil Parties are meant to 'have a fundamental role at the ECCC as separate players of their own right'.<sup>17</sup> This has led McGonigle to characterize the ECCC as combining both retributive and restorative justice principles, specifically as 'a criminal tribunal, with its formal rules of procedure and focus on retributive justice; and a quasi-truth and reconciliation commission, with its more flexible approach to participatory rights for victims and focus on reconciliation'.<sup>18</sup>

Despite purporting to have a victim centered procedural regime, even the ECCC and the ICC have often been viewed as external impositions that ride roughshod over victims' desires. The promise that victims have a meaningful place in the trials may, as this author has argued elsewhere, result in disillusionment for some victims when the court appears unreceptive to the victims' impressions, general reminiscences, emotions and renditions of truth.<sup>19</sup> Indeed, I have called for a 'new, inter-disciplinary model of victimology that recognizes that restorative justice can be meted *outside* the courtroom'.<sup>20</sup>

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time in history, the internal rules of an international tribunal will give victims of crimes the possibility to participate as parties'; HS Visoth speaking at the Reparations Conference, 26 November 2008, on file with author ('No other hybrid court has given victims equivalent rights as the prosecution and defence than those set out in Cambodia's ECCC ...'); Annex A is the ECCC, *Practice Direction on Victim Participation (Revision 1)*, 27 October 2008 (**Practice Direction**), which sets out the rights and responsibilities of victims under the ECCC's Internal Rules and explains how potential victim participants can apply to be a part of the process.

<sup>16</sup> I Stegmiller, 'Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia' (2014) 27(2) *Leiden Journal of International Law* 465.

<sup>17</sup> Internal Rules [Rev. 3] sub-rr 23(7), (8) and (9); *Co-Prosecutors v Chea and Samphan (Decision on Civil Party Participation in Provisional Detention Appeals)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber I, Case No 002/01 20 March 2008) [36], [38]; S Mydans, above n 15.

<sup>18</sup> BN McGonigle, 'Two for the price of one: Attempts by the Extraordinary Chambers in the Courts of Cambodia to combine retributive and restorative justice principles' (2009) 22 *Leiden Journal of International Law* 127, 129.

<sup>19</sup> See generally M Mohan, 'Re-constituting the Un-Person: the Khmer Krom & the Khmer Rouge Tribunal' (2009) 13 *Singapore Yearbook of International Law*. See also M Dembour and E Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) 15 *European Journal of International Law* 151, 156; 'Victims Voice their Hopes and Concerns about ECCC' (Press Release, 3 December 2009), on file with author: 'We hope participation in this process will provide us with some relief, a sense that justice has been done and an understanding of our history; but it also revives memories, bitterness, and misery. We began with hope that the ECCC would provide some satisfaction, but we are now concerned about the delays, the allegations of corruption, the sufficiency of available resources, and the lack of information on the progress made by the ECCC and prospects for our involvement. These problems prompt many of us to lose hope and faith in the ECCC.'

<sup>20</sup> M Mohan, 'The Paradox of Victim-Centrism – Victim Participation at the Khmer Rouge Tribunal' (2009) 5 *International Criminal Law Review* 733, 775.

This article highlights an unexpected device for victim-led justice – that is, the victim’s Statement of Suffering – which may open the door to such a model. Part II will briefly outline and compare the space for victims to express their views, concerns and suffering at both the ICC and the ECCC. Part III traces the modalities of victim participation at the ECCC. Part IV introduces the case-study of a seminal Statement of Suffering delivered at the ECCC Trial Chamber Courtroom in 2012 and 2013, and which tempers this author’s earlier opinion that victims ought to look only to non-court transitional justice mechanisms. In particular, it will consider questions the Civil Party asked Defendant Khieu Samphan that prompted the Trial Chamber’s 2 May 2013 decision on the parameters of permissible Statements of Suffering and ‘modalities of ‘Civil Parties’ questioning’. Part V concludes by suggesting how Statements of Suffering and Victim Impact Statements could constitute victim-led justice through victims’ interpolative ‘speech acts’, applying linguistic philosophical theory. It concludes somewhat controversially that transitional justice lawyers may inadvertently silence victims if they preclude such speech acts, and are unwilling to accede the archetypal mantle of cross-examiner to victim clients from time to time.

## II VICTIMS’ VIEWS, CONCERNS AND QUESTIONS

Largely, the role of victims’ counsel in both the ICC and ECCC has been to sketch their clients’ expressions of views, concerns and statements of suffering. However, as this section will go on to show, the two courts differ in their approach to allowing and accepting such contributions from victims.

Within the ICC, victims are understood to be individuals or organizations that have suffered harm as a result of crimes listed in art 5 of the Rome Statute.<sup>21</sup> Pursuant to Article 68(3) of the Statute, these victims have been permitted several avenues throughout the different stages of a case to raise their voices and concerns as long as they have a ‘personal interest’ in the case and if their participation does not prejudice the rights of the accused. This provision, when read together with r 89(1) of the *Rules of Procedure and Evidence* (**Rules**), empowers the court to take an active role in specifying the modalities of victim participation. Notwithstanding that the victims are not a party to the proceeding, as are the Prosecutor and Defence counsel,<sup>22</sup> their ‘personal interest’ in a case is not in relation to the culpability of a suspect/accused, but in relation to the

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<sup>21</sup> See also International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 85.

<sup>22</sup> *Prosecutor v Lubanga (Decision on Victims’ Participation)* (International Criminal Court, Trial Chamber I, ICC-01/04-01/06-1432 11 July 2008) [93].

determination of truth.<sup>23</sup> However, victims cannot participate in the investigation phase and only have substantive participation rights in the main proceeding; this does not preclude them from offering relevant information that they may be aware of to the prosecutor at the investigation phase.<sup>24</sup> Therefore, the procedural framework ensures that victims can get some opportunity to raise their voices, but leaves wide discretion to the judges in shaping the actual degree of participation of the victims in the proceedings.<sup>25</sup>

Victims have participated in the ICC case of *Prosecutor v Lubanga Dyilo*<sup>26</sup> (**Lubanga**), *Prosecutor v Katanga*<sup>27</sup> (**Katanga**), and the ongoing *Prosecutor v Ongwen* (**Ongwen**).<sup>28</sup> In a decision concerning r 140, the Court in *Katanga* had 'given detailed directions on how the trial must be organized and conducted.'<sup>29</sup> Included in these instructions were 'a number of rules stating the manner in which the victims [would] be able to participate in the trial'.<sup>30</sup> Indeed, r 91(3)(a) of the Rome Statute allows a legal representative to question a witness, expert or accused, but the legal representative must first make an application to the Chamber. The Chamber may then order that the questions be set down in writing and circulated to the Prosecutor and, if appropriate, the Defence, for their observations.<sup>31</sup> Asking questions has been recognized as 'one of the ways in which the legal representatives of the victims may present their "views and concerns" within the meaning of article 68.'<sup>32</sup> This, however, has to be balanced against the 'stage

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<sup>23</sup> *Prosecutor v Katanga and Chui (Decision on the Modalities of Victim Participation at Trial)* (International Criminal Court, Trial Chamber II, ICC-01/04-01/07, 22 January 2010) [59].

<sup>24</sup> Under art 15(2) of the Rome Statute, the Prosecutor is authorized to receive information from, *inter alia*, any 'reliable source' including victims. This was clarified in *Prosecutor v Lubanga (Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007)* (International Criminal Court, Appeals Chamber, ICC-01/04 OA4 OA5 OA6, 19 December 2008) [53].

<sup>25</sup> E Haslam 'Victim Participation in the International Criminal Court: A Triumph of Hope over Experience?' in D McGoldrick et al (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 315. See also E Baumgartner, 'Aspects of Victims Participation in the Proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 409, 411.

<sup>26</sup> *Prosecutor v Lubanga (Decision on Victims' Participation)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1119, 22 January 2008).

<sup>27</sup> *Prosecutor v Katanga (Decision on the Modalities of Victim Participation at Trial)* (International Criminal Court, Trial Chamber II, ICC-01/04-01/07-1788, 22 January 2010) (**Katanga**).

<sup>28</sup> *Prosecutor v Ongwen (Decision on contested victims' applications for participation, legal representations of victims and their procedural rights)* (International Criminal Court, Pre-Trial Chamber II, ICC-02/04-01/15-350, 27 November 2015).

<sup>29</sup> *Katanga*, [66]

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid* [72].

<sup>32</sup> *Ibid* [74].

of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial, and in order to give effect to article 68, paragraph 3.<sup>33</sup> For example, the Trial Chamber in *Katanga* made clear that the possibility of having a question answered is determined by the Court and not by the accused; and (ii) questions that could potentially relate to incriminating admission on part of the accused will not be permitted.<sup>34</sup> More specifically, in *Katanga*, the Trial Chamber held that even though victims would have the ‘opportunity to question witnesses... [a]ny application for this purpose must state how the intended question is relevant and must comply with the procedure defined by the Chamber.’

Civil Party participation at the ECCC faces similar strictures and has been described by some scholars as not always being beneficial nor therapeutic to victims, instead being potentially degrading.<sup>35</sup> Scholars note that victims feel disillusioned and frustrated as a result of the gap between the Courts' rhetoric and its reality.<sup>36</sup> After all, the schema of internationalised trials is, ironically, such that a Civil Party victim who wishes to participate in this legal process is required to provide an account that ‘is completed only on the occasion when it is effectively exported and expropriated from the domain of what is (the victim’s) own.’<sup>37</sup> There are limits to what sorts of truths Civil Parties are permitted to tell, and, more significantly, to ask the Defendants about. Regardless of its promises, victim participation at the ECCC, much like the ICC, clings to modes of accountability that set limits upon what parts of the victim’s story can be told, and who can tell it at any given time. The ECCC’s trial Chamber had in fact originally intended for only fifteen Civil Parties to speak about their suffering in the last two weeks of the trial hearings in Case 002/01 in a self-contained segment for this very reason – that is, to maintain unflinching judicial control of the process.<sup>38</sup>

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<sup>33</sup> Ibid [73].

<sup>34</sup> Ibid [59].

<sup>35</sup> E Stover, M Balthazard and K Koenig, ‘Confronting Duch: Civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia’ (2011) 93 *International Review of the Red Cross* 503.

<sup>36</sup> JP Bair, ‘From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia’ (2008-9) 31 *University of Hawaii Law Review* 507.

<sup>37</sup> J Butler, *Giving an Account of Oneself* (Fordham University Press, 2005) 36-37. See also M Minow, ‘Stories in Law’ in Solinger et al (eds), *Telling Stories to Change the World* (Routledge, 2008) 249, which drawing from Hannah Arendt, discusses the value of storytelling in court settings and the need for stories to off-set the predominance of rationalist social science techniques that treat genocides as capable of being explained. She also emphasizes, via Arendt again, the partial, incomplete nature of stories in the face of horror, something akin to my use of Butler’s analysis of subjection, power and narrative.

<sup>38</sup> L Olsen, *The Purpose of Hearing Victims’ Suffering* (7 June 2013) Extraordinary Chambers in the Courts of Cambodia <<http://www.eccc.gov.kh/blog/2013/06/07/purpose-hearing-victims-suffering>>.

In performing their role of 'supporting' the prosecution of the accused persons, as stated in r 23(1)<sup>39</sup> of the ECCC's Internal Rules,<sup>40</sup> Civil Parties may not augment the investigative and prosecutorial narratives at the pre-trial stage of the proceedings without the support or consent of the Co-Investigating Judges and Co-Prosecutors of the ECCC.

### III CIVIL PARTIES AND 'UNSPEAKABLE EVIDENCE'

Victim participation at the ECCC is further limited by the discretionary power of the Trial Chamber. Perhaps the most vivid example of this judicial orchestration of the victims' narrative is the decision by the Trial Chamber in September 2011 to sever the charges in Case 002's Closing Order into a series of mini-trials. The first trial in Case 002, referred to as Case 002/01, concerned the design and implementation of a series of reforms by CPK leaders, including the formulation of five policies concerning forced movement and the targeting of former officials of the Khmer Republic. The charges in Case 002/01 were thus narrowly focused on alleged crimes against humanity relating to the forced movement of the population from Phnom Penh in April 1975, and later from other regions (referred to as phases one and two).<sup>41</sup> Although close to 4000 Civil Parties were admitted to Case 002/01, only thirty-one Civil Parties from this consolidated group of Civil Parties had a chance to actually testify during the trial proceedings as a result of the Severance Orders.<sup>42</sup> These Civil Parties were selected by the Court on the basis of the evidence they could provide of their suffering, the relationship between this evidence and the crimes being tried in Case 002/01, and the

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<sup>39</sup> See Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Ver 9)* (adopted 16 January 2015) (**Internal Rules**) r 23.

<sup>40</sup> The Internal Rules contain legal procedural rules regulating the proceedings before the ECCC. The Internal Rules were first adopted at an ECCC Plenary Session, a decision-making conference of all judicial officials, on 12 June 2007. The ECCC Plenary has amended the Internal Rules during subsequent Plenary Sessions. For more information and editions of the internal rules from 2007 to date, see this website: ECCC, *Internal Rules* (16 January 2015) Extraordinary Chambers in the Courts of Cambodia < <http://www.eccc.gov.kh/en/document/legal/internal-rules>>.

<sup>41</sup> Annex 1 to *Co-Prosecutors v Chea and Samphan (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case 002/01, 7 August 2014) sets out the statistics in detail: 'Of the 3,867 Civil Parties comprising the consolidated group, the OCIJ admitted 746 Civil Parties for forced transfer 1, 350 for forced transfer 2, 210 for forced transfer 3, 238 for security centers and execution sites, 221 for worksites and cooperatives, 87 for Buddhist persecution, 67 for Vietnamese persecution, 46 for Cham persecution, 115 for purges and 663 for forced marriage. Subsequently, the PTC admitted an additional 34 for forced transfer 1, 12 forced transfer 2, 13 for forced transfer 3, 7 for deportation, 27 for enforced disappearance, 1721 for enslavement, 5 for extermination, 288 for murder, 116 for forced marriage, 34 for genocide, 121 for imprisonment, 105 for torture, 517 for inhuman act(s), 155 for persecution on political grounds, 98 for persecution on religious grounds against the Cham, and 15 for persecution on racial grounds against the Vietnamese.'

<sup>42</sup> Ibid.

diversity of suffering they represented on behalf of the consolidated group of Civil Parties. They have been able to speak only to crimes and crime sites in connection with forced evacuations from specific regions in Cambodia and time periods or phases when the Khmer Rouge regime first came to power; the regime's structure; and the defendants' roles during the period just prior to and during its reign. Even though its second Severance Order contemplates that the Khmer Rouge's policies raised in the 'entire Indictment' are within the scope of this mini-trial, the Trial Chamber has not given much latitude to Civil Party testimony that relates to policies beyond the narrow confines of the early phases of the abovementioned forced evacuations.

Civil parties are regularly told to show gumption, not to veer off-topic, not to introduce new evidence in the course of their Statements of Suffering and to show consistency in recollections, placing an immense burden on them to adhere to the rules governing courtroom procedure and the provision of testimony. In effect, this has meant that Civil Parties have often not been permitted to explain the full particulars of their evidence in relation to the entire Closing Order, regardless of how germane these particulars are to the case at hand, being Case 002 as a whole. Put differently, if a Civil Party testified about being evacuated from Phnom Penh in 1975, and in the course of his testimony refers to policies that came into effect later in 1977 or 1978 which he witnessed or has knowledge about that do not relate to these evacuations, the Trial Chamber has deemed this irrelevant on its own instance or upheld the Defence's objections.<sup>43</sup>

Unfortunately for the ethnic minority Khmer Krom Civil Parties, such as Civil Party Chau Ny, their evidence fell outside the scope of Case 002/01 and was therefore rendered 'unspeakable'. The ECCC's prosecutors and investigating judges did not include the specific crimes against the national minority Khmer Krom as part of its three-year pre-trial judicial investigation for Case 002.<sup>44</sup> A Khmer minority group in Cambodia with geographic and cultural ties to Vietnam, the Khmer Krom were targeted for elimination by the Khmer Rouge and, on the evidence that has been collected by the ECCC's own and independent investigators, slaughtered due to their perceived connections with Vietnam, when relations between the two countries became strained and Pol Pot turned against Vietnam. The Khmer Krom were labelled as having 'Khmer bodies but Vietnamese minds', an accusation that led to their widespread and systematic segregation, torture and eventual execution. Suffice it to

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<sup>43</sup> Transcript of Proceedings *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 002/01, 23 May 2013) 35-36.

<sup>44</sup> See generally M Mohan, 'Re-constituting the Un-Person: the Khmer Krom & the Khmer Rouge Tribunal', (2009) 13 *Singapore Yearbook of International Law*.

say that the Khmer Krom community's participation at the ECCC has been severely constrained by decisions of the prosecutors and investigators.

The Trial Judgment in Case 002/01 only refers to the Khmer Krom by their perceived association to the Vietnamese. The Trial Chamber noted 'that while a policy of targeting Cham, Buddhist and Vietnamese is alleged in the Closing Order, limited evidence has been heard to date on this policy. It will therefore be examined in detail in Case 002/02 and any subsequent trial'.<sup>45</sup> Indeed, the Trial Chamber further held 'that there will be no examination of the implementation of policies other than those pertaining to the forced movement of the population (phases one and two)'.<sup>46</sup> In light of this, one might say that this placed the Khmer Krom community in a juridical black-hole, as 'it is one thing for certain kinds of speech to be censored, and quite another for censorship to operate on a level prior to speech, namely, as the constituting norm by which the "speakable" is differentiated from the "unspeakable"'.<sup>47</sup>

However, victims are not always so easily silenced in the course of trial proceedings. Nor should they be. It is through their own speech acts and searching questions that inherent truths are revealed, and tensions unpacked. The 'Statements of Suffering' expressed by Civil Parties who testified have, as we shall see, become a critically important feature of their testimony, and underscore the importance of victim-led justice. Linguistics scholar Mary Louise Pratt observes that '[a]n account of linguistic interaction based on the idea of exchange glosses over the very basic facts that, to put it crudely, some people get to do more talking than others, some are supposed to do more listening, and not everybody's words are worth the same'.<sup>48</sup> For an interdisciplinary understanding of the nature and purpose of these questions – and to uncover the potential of the Statement of Suffering component of Civil Party testimony only during which these questions can be asked – it is suggested that the linguistic theoretical construct of 'speech acts' should be examined. To be effective or 'felicitous' question, Austin posited certain 'felicity conditions', imbuing the request with a sense of 'appropriateness'.<sup>49</sup> In speech-act theory, the term *felicity conditions* refers to the conditions that must be in place and the criteria that must be satisfied for a speech act to achieve its purpose. Three main felicity conditions have been identified, including: (1) an essential condition (whether a speaker intends that an utterance be

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<sup>45</sup> *Co-Prosecutors v Chea and Samphan (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case 002/01, 7 August 2014) 65.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid* 137-138.

<sup>48</sup> ML Pratt, 'Ideology and Speech-Act Theory' (1986) 7 *Poetics Today* 68.

<sup>49</sup> See generally J Austin, *How to Do Things with Words* (Oxford University Press, 2<sup>nd</sup> ed, 1975).



acted upon by the addressee); (2) a sincerity condition (whether the speech act is being performed seriously and sincerely); (3) a preparatory condition (whether the authority of the speaker and the circumstances of the speech act are appropriate to its being performed successfully).<sup>50</sup> This article proposes that victim statements and questions should not only have a preparatory quality, but to be victim-led they should be interpolative. It proposes that essential and sincere questions Civil Parties ask should be entertained.

Civil Parties' questions may not always be met with revelatory answers by the Defendants at the ECCC, or even answered at all. Notwithstanding this, essential and sincere requests for information are valuable to the development of the ECCC's process, and perhaps more generally to internationalised criminal trials as a whole. Victim questions in the context of their Statements of Suffering should be welcomed as they upend the orthodoxy that a victim should tell his story before a decision-maker within the framework of a formalized process in order to feel better.<sup>51</sup> Victims gain 'a sense of control, an ability to lessen their isolation and to be reintegrated into their community, and the possibility of finding meaning through participation in the process.'<sup>52</sup> Participation as a Civil Party is equated with 'truth-telling', which is seen as being fundamentally beneficial, validating the victims' experience and permitting them to heal.<sup>53</sup> However, there is merit to saying that victims' truth-asking can be equally, if not more, important. After all, more than testifying as a witness, playing a role in supporting the prosecution as a civil party is said to 'assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood.'<sup>54</sup>

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<sup>50</sup> See W Turnbull, *Language in Action: Psychological Models of Conversation* (Psychology Press, 2003).

<sup>51</sup> Roht-Arriaza, above n 4, 21: '...more formalized procedures, including the ability to have an advocate and to confront and question their victimizers, may be more satisfying for victims than less formal, less adjudicative models.'

<sup>52</sup> Roht-Arriaza, above n 4, 19; See also R Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly* 607, 675.

<sup>53</sup> JL Herman, *Trauma and Recovery* (Basic Books, 1992) 181: 'The fundamental premise of psychotherapeutic work [with survivors of severe trauma] is a belief in the restorative power of truth-telling.'

<sup>54</sup> Y Danieli, 'Victims: Essential Voices at the Court' [2004](1) *Victims Rts. Working Group Bulletin* 6.

#### IV 'STATEMENTS OF SUFFERING' AS INTERPOLATIVE SPEECH

Comparing the jurisprudence of victim participation at the ECCC with that of the ad hoc Chapter VII tribunals, Susana SaCouto makes the following conclusions, which are broadly instructive:<sup>55</sup>

In sum, it appears that victim participants at these tribunals have suffered some of the very same challenges victim-witnesses faced at the ad hoc tribunals. At the end of the day, these proceedings remain criminal trials with significant time and logistical constraints, making it difficult to accommodate the desire of victims to tell their stories or to talk about their experiences on their own terms. ... [I]t is not at all clear that victims will be able to communicate a richer, more nuanced picture of their experiences than they were able to in the context of the ad hoc tribunals...

Where SaCouto and this author differ is in relation to the scope of the role that the President of the Trial Chamber has in relation to questions a Civil Party may wish (and be permitted) to ask. She characterises ECCC Internal Rules r 91(2), which states that 'any questions that Civil Parties want to ask themselves – as opposed to through their legal representatives – must be asked "through the President of the Chamber"', as being inimical to victim participation.<sup>56</sup> In my view, whether this is in fact the case depends on the questions that the Civil Party is permitted ask, and the modalities of the way in which he is allowed to ask them.

Keen to redress the 'language-destroying' consequences<sup>57</sup> of mass crime, the ECCC Trial Chamber has granted Civil Parties an opportunity to make Statements of Suffering and has allowed questions to be put to the Defendants through the President of the Chamber in both Case 001 and Case 002/01.<sup>58</sup> Statements of Suffering are, in practice, made at the conclusion of the Civil Party's testimony. In doing so, the Trial

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<sup>55</sup> S SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' 18 *Michigan Journal of General and Law* 297, 350.

<sup>56</sup> Ibid 326: 'Victim participation at the ECCC is further procedurally limited by the decision-making power of the Chambers.'

<sup>57</sup> J Geddes, 'On Evil, Pain, and Beauty: A Conversation with Elaine Scarry' (2000) 2(2) *The Hedgehog Review* 78; E Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1985): In her account of violence and its relationship to language, E Scarry describes the deterioration of language when a body experiences pain, particularly the repetitive, prolonged quality of pain induced during torture. Calling this 'language-destroying', she goes on to state that it not only unmakes the one who is being tortured, but unmakes all that we understand to be ordered about the world around us.

<sup>58</sup> See *Co-Prosecutors v Chea and Samphan* (Decision on request to recall civil party TCCP-187, for review of procedure concerning Civil Parties' statements on suffering and related motions and responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2) (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 2 May 2013) 7 [13].

Chamber has not ‘generally required Civil Parties to differentiate between the harm they suffered in consequence of facts within the scope of Case 002/01, and overall harm during the [Democratic Kampuchea period when the Khmer Rouge was in power], at least when this does not infringe upon the Accused’s right to a fair trial’.<sup>59</sup> The Trial Chamber had sought to distinguish between testimony on ‘facts at issue, which is confined to the scope of Case 002/01 and subject to adversarial argument, and general Statements of Suffering, which the Civil Party can freely make at the conclusion of their testimony’.<sup>60</sup>

This practice had been consistently followed in Case 002 until the testimony of Civil Party Yim Sovann in October 2012. The Defence challenged her testimony on the basis that her Statement of Suffering exceeded the scope of the Severance Order. One of the arguments made by the Defence was that Civil Parties also had lawyers and, consistent with practice at the ICC, ‘they should be instructed on how to state their suffering in a way that is limited to the scope of the proceedings’.<sup>61</sup> They also argued that while compartmentalizing suffering is difficult, it is not a difficulty which pertains exclusively to Civil Parties, but affects Defence witnesses as well. More specifically, Defence lawyers for Defendant Nuon Chea argued that ‘if the Civil Parties are going to be given the leeway to talk about everything that’s happened to them, allegedly, then [the Accused] should be given, as parties to the proceedings, [...] equal leeway’.<sup>62</sup>

The Civil Party lawyers asked in turn that Civil Parties be allowed to ‘make their statement concerning harms that occurred for entire Case 002’<sup>63</sup> in order to give Civil Parties ‘the opportunity to complete their statement and better contribute to national reconciliation’.<sup>64</sup> Significantly, the Co-Prosecutors supported this position, adding that ‘suffering cannot be compartmentalized as one would want to do’.<sup>65</sup>

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<sup>59</sup> Ibid 7 [14].

<sup>60</sup> Ibid.

<sup>61</sup> ‘KRT Trial Monitor: Case 002 - Hearing on Evidence Week 36’ (*KRT Trial Monitor*, 22-25 October 2012).

<sup>62</sup> Transcript of Proceedings, *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 22 October 2012) 10.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

Although the ECCC Trial Chamber had ordered the Civil Party Lawyers to make an application to allow Civil Parties to make a 'global statement of suffering',<sup>66</sup> the Trial Chamber had provided the following guidance:

[T]he Chamber feels it is wise to allow the Civil Party to express herself on the totality of the suffering that is relevant to Case 002. However, if the other Parties feel that some of the statements made by the Civil Party are not irrelevant, the Parties will be given the opportunity, once the Civil Party has finished with her statement to raise the point and to address the elements of the statement that seem irrelevant.<sup>67</sup>

Notably, the Trial Chamber took an inclusive approach to Civil Party Yim Sovann's Statement of Suffering. By allowing the Civil Party to express herself on the totality of her suffering, the Trial Chamber allowed her not only to share her 'views and concerns' but to truly pursue her interest as a victim seeking closure for the suffering she had endured, which may differ in material respects from the prosecution's interest in securing convictions against the Defendants.

For Civil Party Chau Ny, the ability to speak freely at the conclusion of his testimony on facts at issue to the Court, was precious. There exists, in the limited terms set by the Court, an opportunity to exercise a degree of agency, which is precisely what the Khmer Krom Civil Party set out to do. Chau Ny was called to testify on 23 November 2012 on what happened to him and his extended family in the immediate aftermath of 17 April 1975 and his forced transfer to the northwest province of Battambang.

At the conclusion of his evidence, Chau Ny was given the opportunity to deliver his Statement of Suffering. Instead of relating his suffering in the form of a prepared speech, Chau Ny, on his own accord, chose to put forward a proposal to the Trial Chamber, saying that he wanted to ask some questions of the Defendant Khieu Samphan, regarding a deceased uncle:<sup>68</sup>

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Transcript of Proceedings, *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 23 November 2012) 91.

## CIVIL PARTY CHAU NY:

Mr. President, I would like to put a proposition to Mr. President, and the Prosecution and some questions for Khieu Samphan. One of my uncles had some connection with Khieu Samphan.

(Judges deliberate)

The mere mention of Khieu Samphan's name after the Defence lawyers had said they were done with their questions for Civil Party Chau Ny created a stir in the courtroom. Chau Ny had disrupted the *status quo*, which was for the lawyers to have the last word. Prior practice suggested that it was for the Defence to choose if they had wished to cross-examine a Civil Party further after any perfunctory statements are made towards the end of his testimony, and not for the Civil Party to attempt to ask their client any questions. Chau Ny's request to ask questions of the Defendant introduced interpolative speech – indeed a dialectic between a Civil Party and the Defendant. Importantly, such a dialectic departed from the standard practice of declaratory Statements of Suffering which civil parties made of the incidents that had occurred causing them physical and emotional hardship.<sup>69</sup> The novelty of Chau Ny's request in the Trial Chamber can be seen most clearly in reactions of the Defendant Khieu Samphan and his lawyers following Chau Ny's request.<sup>70</sup>

Defence lawyers objected, stating that it was 'not appropriate' for Chau Ny, as a Civil Party, 'to refer directly to one of the accused persons like this', and reminded Chau Ny, and the Court, of 'the rules that govern this Chamber'.<sup>71</sup> However the Court agreed with lawyers for the prosecution and Civil Parties<sup>72</sup> that the procedural rules of the Court do not specify the precise way in which Civil Parties may 'express the suffering they went through'. They only state that Civil Parties may give statements to the Court, and can be questioned about their statements by other parties in the proceedings with permission of the President.<sup>73</sup>

The questions that were ultimately put to Khieu Samphan in court via the Presiding Judge of the ECCC's Trial Chamber were powerful. They are illustrative of the

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<sup>69</sup> Ibid.

<sup>70</sup> The transcripts and video recordings of Chu Ny's testimony in 2012 and 2013 are available at this website: ECCC, *Mr Chau Ny* (23 May 2013) Case 002, Extraordinary Chambers in the Courts of Cambodia <<http://www.eccc.gov.kh/en/witness-expert-civil-party/mr-chau-ny>>.

<sup>71</sup> Transcript of Proceedings, *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 23 November 2012) 91-92.

<sup>72</sup> Ibid 92.

<sup>73</sup> Internal Rules r 91.

interpolative innovation that Statements of Suffering can represent. Given the floor to ask his questions through the President of the Chamber, Chau Ny told the court about his late uncle Chau Sau, a prominent Khmer Krom banker and societal leader at the time, who, he alleged, was a friend of Khieu Samphan's. He asked why the Defendant wrote a letter to Chau Sau inviting him to return to Phnom Penh soon after he was evacuated from the city on 17 April 1975, and whether the two men eventually met. Chau Ny was given to understand that Chau Sau refused to return to the city unless all residents who had been evacuated were also permitted to do the same.<sup>74</sup> Finally, relating the facts of his uncle's disappearance, Civil Party Chau Ny asked Defendant Khieu Samphan where Chau Sau had died, so that the Civil Party could recover his remains and perform the necessary religious rites to appease the deceased's soul.<sup>75</sup> Last seen being taken away by Khmer Rouge soldiers, Chau Sau is presumed dead. Furthermore, a prosecution witness has given evidence as to the identity and position of Chau Sau in 1975, and his alleged death.<sup>76</sup>

It appears Chau Ny's request caused the Chamber to acknowledge that it 'might be understood as asserting its state-sanctioned linguistic power to determine what will and will not count as "speech" and, in the process, enact a potentially injurious form of juridical speech.'<sup>77</sup> Civil Party Chau Ny's questions provoked a response as well. In a surprising turn, the Defendant Khieu Samphan stood up and said that he would respond, so long as his right to remain silent was not compromised.<sup>78</sup> There was, at this juncture during the hearing, a peculiar inversion: Khieu Samphan ostensibly spoke, but his Defence counsel pulled him down to his seat. In choosing to respond before he was advised not to do so, one wonders whether Khieu Samphan acknowledged, however briefly, seems to have acknowledged the felicity of Chau Ny's belief that a senior leader of the DK regime, who had known his uncle, would be best equipped to respond to these questions, if only to acknowledge the cogency of the speaker.

Judge Lavergne made clear that the court is 'working in a civil law framework here, as well, and as far as (he was) aware, the Civil Parties are parties, they are allowed to ask

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<sup>74</sup> Transcript of Proceedings *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No.002/01, 23 November 2012) 95.

<sup>75</sup> Ibid 95-96.

<sup>76</sup> Transcript of Proceedings *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 23 May 2013) 13.8-17.

<sup>77</sup> See Butler, above n 37.

<sup>78</sup> Transcript of Proceedings, *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 23 November 2012) 96.23-25, 98.1-4.

questions and the accused are also entitled to exercise their right to remain silent.<sup>79</sup> When Ms. Guisse, Counsel for the Defence, sought to clarify whether she could then ask questions after a Civil Party's Statement of Suffering had been given, particularly where new issues arise, in what appeared to be a moment of judicial activism, Judge Lavergne stated, 'if it appears necessary, in seeking the truth, then (he thought) such questions (were) fully authorized and acceptable.'<sup>80</sup> Their exchange in this regard deserves to be quoted in full:

Ms GUISSE:

I would like to ask Judge Lavergne for a small point of clarification. Should I, therefore, understand that when civil parties bring up in their (victim impact) statements new facts that have not been referred to when they were questioned by the different parties, if there are new issues that come up, as indeed was the case in the civil party's hearing we have heard just now, because at the earlier stage there was never any reference to this letter written to my client, or the question of the disappearance of his uncle, subsequent to possible contacts with my contact; does this mean that in the future we, therefore are authorized to ask questions after the statement by the civil party?

...

JUDGE LAVERGNE:

I don't think you've ever been denied that right. If it appears necessary, in seeking the truth, then I think such questions are fully authorized and acceptable. Therefore, Mr. President, I would like to ask your permission to ask further questions to the civil party on what he said about [certain] correspondence...<sup>81</sup>

The utterance of this right by the Court to ask further questions in the aftermath of Chau Ny's own questions, had the effect of transforming this particular aspect of the trial process. As Butler has stated regarding the interpolative power of speech, they allowed the process 'to move outside of the domain of "speakability" is to risk one's status as a subject. To embody the norms that govern speakability in one's speech is to consummate one's status as a subject of speech.'<sup>82</sup> The question posed by Ms Guisse is valid as it reveals that, at that time, the procedural contours of the lawyers' right to ask further questions of the Civil Party were undetermined. Just as valid were Trial Chamber Judge Lavergne's observation that the court too may have fresh questions

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<sup>79</sup> Ibid 104.7-10.

<sup>80</sup> Ibid 104-105.

<sup>81</sup> Ibid.

<sup>82</sup> J Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 133.

for the Civil Party and the Defendants following a Statement of Suffering for the purposes of 'seeking the truth', which until that point, was rare if not unprecedented.

Khieu Samphan's Defence team filed a motion to recall Chau Ny. It also requested that, the order in which hearings on the testimony of the Civil Parties were held be changed, to allow for adversarial challenge. The Co-Prosecutors and Civil Party Lawyers did not object to Chau Ny's recall to court. In its decision of 2 May 2012, the Trial Chamber partially granted the request and recalled Chau Ny, who came to testify a second time on 24 May 2013. The only limit placed on his testimony was that it was to be purely in relation to any 'new allegations made against the Accused Khieu Samphan during the Civil Party's Statement of Suffering'.<sup>83</sup> Ahead of Chau Ny's testimony, the Trial Chamber ruled that 'in the interests of the expeditiousness of proceedings, the Chamber urges the Lead Co-Lawyers to ensure that a Civil Party's testimony in relation to facts is confined to matters at issue in Case 002/01 and to ensure that their Statements of Suffering, whilst not so confined, is limited to the purpose for which they are intended'.<sup>84</sup> Yet, one might argue that if the purpose of such statements, broadly speaking, is for Civil Parties to exercise their right to express their suffering, which is a right 'inherent in their status as Civil Parties',<sup>85</sup> it stands to reason that Civil Parties may defer in how they wish to exercise this right.

On 2 May 2013, the Trial Chamber issued a decision, which agreed with the Civil Party Co-Lawyers and the Co-Prosecutors on the scope of Civil Party Statements of Suffering and modalities of questioning of the Defendants by the parties, concluding that since 'Civil Parties are asked to testify before the Chamber only in relation to matters relevant to Case 002/01', such questioning is not generally 'prejudicial to the Accused's right to a fair trial'.<sup>86</sup> The Trial Chamber made the following directions:

Firstly, it is only statements of suffering that have been unconstrained by the limits of the severance order and related decisions. Where the Accused's rights

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<sup>83</sup> *Co-Prosecutors v Chea and Samphan (Decision on request to recall civil party TCCP-187, for review of procedure concerning Civil Parties' statements on suffering and related motions and responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2) (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 2 May 2013) 10.*

<sup>84</sup> *Ibid* 8 [18].

<sup>85</sup> Transcript of Proceedings *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 002/01, 23 May 2013) 10.

<sup>86</sup> *Co-Prosecutors v Chea and Samphan (Decision on request to recall civil party TCCP-187, for review of procedure concerning Civil Parties' statements on suffering and related motions and responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2) (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 2 May 2013) 7 [17].*



are alleged to be violated, the Defence has been granted ample opportunity to object.

Secondly, in the interests of the expeditiousness of proceedings, the Trial Chamber has also required the Lead Co-Lawyers to ensure that Civil Parties are asked to testify before the Chamber only in relation to matters relevant to Case 002/01. The Trial Chamber has further directed the Lead Co-Lawyers assist Civil Parties in the preparation of their statement of suffering so as to discourage new allegations being made against the Accused at that stage. Sufficient safeguards are therefore in place to ensure full respect for the Accused's rights.<sup>87</sup>

Given the floor again to continue his Statement of Suffering in 2013, Chau Ny returned to the subject of his late uncle's disappearance and as if damning the process itself, said, 'Even if I am here, my suffering still remains; it doesn't go away because I don't have the answer.'<sup>88</sup> Embedded in his anguished reiteration, Chau Ny had introduced a sense that his suffering had been reignited, not by the act of giving testimony, but by being refused the answers he sought from one of the chief architects of the DK regime. The following excerpt of Chau Ny's questions via the President of the Trial Chamber and Khieu Samphan's response is noteworthy:

MR. KHIEU SAMPHAN:

Allow me to inform you that I used to know Mr. Chau Sau during the 1960s. He was the president of a bank, the National Credit Bank. I understand your feeling, your suffering, and how your family could have felt by trying to find out about your uncle's whereabouts and information and his fate. And you also emphasized that if Mr. Chau Sau were - passed away, you would like to bring his remains for Buddhist ritual ceremony. Unfortunately, I have no information at all about the fate of your uncle and I did not have any information about him during the Democratic Kampuchea. ... Today I may wish to also tell you that I fully appreciate the sufferings you and your family could have had. And for this reason, I would like to take this opportunity to talk to you in person. I feel sorry that there is no way I can help you to entertain your request or to answer to your request, and I hope you understand me and my situation.

...

MR. CHAU NY:

Mr. President, I'm still not satisfied because Mr. Khieu Samphan and Mr. Chau Sau were very close. Mr. Khieu Samphan would come to eat at Mr. Chau Sau's home at Tuol Kork. I still feel that he has not told me all the truth. I don't really

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<sup>87</sup> Ibid.

<sup>88</sup> Transcript of Proceedings, *Co Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 23 November 2012) 98.20-22.

say that he has killed my uncle, but I just wish to get more truthful information from him.<sup>89</sup>

## V ANALYSIS AND CONCLUSIONS

Because victims are not allowed to deliver their statements in person at the ICC, there is no comparative incident in the ICC's jurisprudence. However, the difference in how the ICC and ECCC deal with victims and their participation warrants attention. The ICC has been shown to take a more restrictive approach, wherein victim's participation must be properly applied for, and must abide by the specified procedure. While the ICC Victims' Legal Representative 'may participate in all hearings',<sup>90</sup> it is 'for the Chamber to state the conditions under which the legal representatives of victims may exercise the right thus granted to them to attend and participate in the hearings.'<sup>91</sup> The ECCC had taken a liberal approach, that if there are 'no preclusions in the Internal Rules preventing a Civil Party from raising a query',<sup>92</sup> then the Civil Party should be allowed to proceed. It might even be argued that the 'dimension of victims' rights has been further heightened at the ECCC, mainly by offering an unprecedented characterization of victims as full 'parties' to, rather than just as "participants" in, proceedings.<sup>93</sup>

A few points bear mention in relation to Civil Party Chau Ny's Statement of Suffering. First, it added to important factual evidence that was before the Trial Chamber. Even though it was originally thought that the Khmer Rouge senior leaders, including Defendant Khieu Samphan, had allegedly identified only 'seven super-traitors' by radio broadcasts who were part of the Khmer Republic administration<sup>94</sup> which was in power in Cambodia prior to the Khmer Rouge,<sup>95</sup> Chau Ny's, and other witness and

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<sup>89</sup> Transcript of Proceedings, *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Case No 002/01, 23 May 2013) 16-19.

<sup>90</sup> *Katanga*, [69].

<sup>91</sup> *Katanga*, [70].

<sup>92</sup> Internal Rules rr 91, 92.

<sup>93</sup> R Jasini, 'Victim Participation in International Criminal Justice: Real Power or Empty Rhetoric?' (Research Proposal, University of Oxford Centre for Criminology, 2016).

<sup>94</sup> For more information on the Khmer Republic and its relationship with the Khmer Rouge, see K Dy, *Khmer Rouge History*, Cambodia Tribunal Monitor <<http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history/>>.

<sup>95</sup> 'Closing Order', *Co-Prosecutors v Chea and Samphan*, Extraordinary Chambers in the Courts of Cambodia, Case No 002/19-09-2007, 15 September 2009, [208] (Public declarations of intent in February 1975 to execute the most senior Khmer Republic figures upon victory were followed after 17 April 1975 by a secret decision to kill many other members of the Khmer Republic elite [and] 'to do whatever had to be done in order to make it impossible for them to stage a counter-revolutionary comeback'), [209] (during the evacuation of the population of Phnom Penh, former officials of the Khmer Republic,

Civil Party evidence, has, *inter alia*, led the ECCC's Trial Chamber to conclude that other high-ranking civilian officials had also been 'publicly ear-marked for certain death' in the Trial Judgment.

Ironically, Chau Ny's direct evidence in this regard was only put before the Trial Chamber on cross-examination by Khieu Samphan's lawyers. Put differently, just as the Defendant had the right for adversarial challenge in relation to new factual allegations, as the Trial Chamber has ruled, so too did the Civil Party have an equal right to elaborate and provide further evidence to explain the reasons that animated his allegation. Although evidence pertaining to the Khmer Krom minority by the DK regime was beyond the scope of Case 002/01, the recall hearing provided an opportunity for Chau Ny to testify about the harm that this community had suffered. Chau Ny was asked by the Civil Party lawyer why Chau Sau instructed his driver to return home instead of accompanying him. Chau Ny responded that it was likely Chau Sau knew he was going to be executed. This allowed the Civil Party lawyer to follow up with a question on why Chau Ny was so adamant about finding the remains of Chau Sau. Chau Ny was then able to share how Chau Sau was so important to him and his community, and how it was a loss for him to have disappeared.<sup>96</sup> The Civil Party lawyer was thus given the opportunity to draw a connection between what allegedly happened to Chau Ny's uncle, Chau Sau, and the larger Khmer Krom minority group. Such evidence – which is, strictly speaking, beyond the scope set by the Severance Order – was only put before the Court because Chau Ny's allegations were disputed by the Defendants.

In addition, Khieu Samphan's responses to Chau Ny's questions regarding his late uncle also set the stage for the Trial Chamber Judge Cartwright to ask him questions of his own about whether or not he wishes to maintain his right to remain silent when other Civil Parties similarly posed questions. Khieu Samphan was quick to say that his response to Chau Ny was unique and not to be taken as his general approach towards

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especially high-ranking officials, were targeted to be arrested and killed), [1108] (discussing the Second National Congress at which the Congress called for the killing of the '*seven traitors in Phnom Penh*'), [1110] (discussing the killing of Long Boret and Sirik Matak), [1113] (in December 1996, IENG Sary said in an interview that he knew nothing at all about the plan to kill LON Nol military officers and civil servants during the evacuation of Phnom Penh) [1150] (the content of Khieu Samphan's speeches included, among others, the overthrow of the traitorous LON Nol regime and the elimination of certain members of the regime), [1158] (noting Khieu Samphan's communiqué on behalf of the FUNK stating that the '*seven traitors in Phnom Penh ... Lon Nol, Sirik Matak, Son Ngoc Thanh, Cheng Heng, In Tam, Long Boret and Sosthene Fernandez*' should be killed), [1193] (same).

<sup>96</sup> Transcript of Proceedings *Co-Prosecutors v Chea and Samphan* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 002/01, 23 May 2013) 29-30.

Civil Parties.<sup>97</sup> However, in the trial management meetings that followed after Chau Ny's recall, the Trial Chamber established a new practice which permitted Civil Parties to pose questions and statements in the form of a 'Victim Impact Statement', in advance of the hearings, and placed the burden on the defendants to expressly state if they wished to respond to these questions or not.

As Melanie Vianney-Liaud has observed:

[F]or the fifteen other Civil Parties who came to testify on the impact of the crimes on the victims, after Chau Ny's second testimony, at the end of May and in the beginning of June 2013, the procedure was different. Instead of giving their testimony on the facts at issue, these Civil Parties each made a 'victim impact statement'. Their statement on the harm they suffered under the Democratic Kampuchea regime took place either before or after being questioned by their lawyer. Because during these statements, the Civil Parties recounted their own experience of the facts, in addition to their suffering, the Prosecution and the Defence were allotted limited time to question them after they spoke.<sup>98</sup>

Civil Party Lead Co Lawyers Pich Ang and Elisabeth Simonneau-Fort have explained the purpose of Victim Impact Statements, which can possibly elicit an exchange with the Defendants, as an 'undeniably important aspect of these hearings'.<sup>99</sup> They allow 'a limited number of Civil Parties to tell their stories in an official, judicial setting with the presence of (and sometimes exchange with) one or more of the Accused'.<sup>100</sup>

Ang and Simonneau-Fort are correct to suggest that Statements of Suffering and Victim Impact Statements can, under the right circumstances, be empowering and healing for Civil Party victims of mass crime. Broadly speaking, they provide 'reparative benefit'. But this author would add that such circumstances should be victim-led, and through means that may appear unusual to lawyers and judges. Such speech is crucially important for victims of mass crime and the transitional justice process, and in exploring appropriate responses to victims of mass crime, transitional justice scholars should locate modalities: Victim Impact Statements or Statements of Suffering which allow the victim to play the role of questioner in limited circumstances to ask 'essential questions', albeit through and moderated by the Judges.

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<sup>97</sup> Ibid 46-47.

<sup>98</sup> M Vianney-Liaud, *Civil Parties' Statements of Suffering at the ECCC* (2 August 2013) Destination Justice <<http://destinationjustice.org/civil-parties-statements-of-suffering-at-the-eccc/>>.

<sup>99</sup> Olsen, above n 38.

<sup>100</sup> Ibid.

Of the kinds of felicity conditions that have been identified, three are particularly striking with respect to what occurred in the dialogue, or more accurately, non-exchange between the Civil Party Chau Ny and the Defendant Khieu Samphan. The first is the ‘preparatory precondition’: the speaker believes the hearer can perform the requested act; and it is not obvious that the hearer would perform the requested act without being asked. The second is the ‘sincerity condition’: the speaker genuinely wants the listener to perform the requested act. The third condition is the ‘essential condition’: the utterance counts as an attempt by the speaker to have the hearer do an act – in this case, for Khieu Samphan to reveal what he knows about what happened to Chau Ny’s late uncle. However, for speech acts by victims to convey a sense of agency in the context of trial proceedings which are inherently bound up in evidentiary and procedural rules that govern the legal dialectic, this author suggests that there should be a fourth, somewhat *ex post*, feature. After all, any exchange in the ECCC’s criminal legal proceedings involving a victim and a defendant does not refer to a conversation exclusively between the two of them. It is interpolated by several interveners, including prosecutors, defence lawyers, the victim’s own lawyers, and trial judges – all suggesting the contours of what is or is not permissible speech.

In order to ‘heal’ victims through truth telling, transitional justice mechanisms often pathologise victims as ‘sick’ – as ‘dysfunctional, traumatized, amnesiac and passive in its relationship to memories of past political violence’.<sup>101</sup>

But, as Rosalind Shaw has explained, such depictions of conflict-affected developing nations are outmoded metaphors, harking back to the nineteenth century.<sup>102</sup> The author posits that such anachronistic depictions are no longer appropriate for characterising the intended subject – the genocide victim – either.

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<sup>101</sup> P Maning, ‘Moving Forward Through Justice: Human Rights and Memory Politics in Justice and Reconciliation’ (Oxford Transitional Justice Research Working Paper Series, 8 August 2011) 2.

<sup>102</sup> R Shaw, ‘Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone’ (Special Report No 130, United States Institute of Peace, 13 February 2005) 7: ‘The idea of healing a nation that is wounded or traumatised is primarily nation-building rhetoric that anthropomorphizes the nation as a feeling, suffering entity, as Brandon Hamber and Richard Wilson have noted. This notion derives from nineteenth-century models of society as akin to an organism that can be healthy or sick. Such biological models for societies have, however, long been discredited. While mass violence certainly disrupts and transforms social institutions and practices, it is not valid to conceptualize these changes in terms of a damaged collective national psyche that can be healed through a cathartic process of truth-telling’.

Ultimately, scholars and practitioners of transitional justice should be mindful of the words of Tatiana Bachvarova who astutely distinguishes victim-led justice at the ECCC as compared to rules and procedures at the ICC:

Not surprisingly, at the ECC, the situation in that respect is different. To start with, the perusal of the legal framework manifests that *the part assigned to victims before the Cambodia tribunal goes beyond the presentation of views and concerns*. Victims at the ECCC assume a central role which emanates from their standing as a party to the case – i.e., civil parties.<sup>103</sup> (Emphasis added).

Civil Party Chau Ny's interpolative Statement of Suffering, or more precisely 'essential' questions to the accused, is an example of victim-led justice. In this regard, Chau Ny and other civil parties at the ECCC have testified about his community's suffering under the DK regime. This not only aided in providing closure or a space to ask questions, but has also made a positive contribution to their communities, the court's jurisprudence regarding Statements of Suffering and Victim Impact Statements, and serves as a prime example of victim-led justice. It shows that significance should be attached not only to 'truth telling' by victims, but also to their 'truth-asking'. Going forward, further empirical research should be conducted to delineate ways in which interpolative speech (that is, 'essential' and 'sincere' questions) can be strengthened in the structural design of these tribunals. To address concerns that the defendants' rights could be sacrificed by doing so, these questions could be moderated by the Presidents of the Trial Chambers so as to retain due process and expediency in proceedings whilst also delivering justice for victims of mass crime.

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<sup>103</sup> T. Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill Nijhoff, 2017) 214.

# Proportionality in Self-Defence – Proportionate to What?

Dr Alison Pert

## I INTRODUCTION

Since at least 1945, the use of armed force by one state against another has been prohibited in international law, both by treaty (art 2(4) of the *Charter of the United Nations*) and at customary international law, as confirmed by the International Court of Justice (ICJ) in the *Nicaragua* case.<sup>1</sup> There are two unquestioned exceptions to this prohibition: self-defence, and collective action authorised by the Security Council.<sup>2</sup> This article concerns the right of self-defence, a customary international law right which is both recognised and qualified by art 51 of the *Charter of the United Nations*.<sup>3</sup>

It is a well-settled rule of customary international law that any use of armed force by a state, to be justified as lawful self-defence under either art 51 or customary law, must satisfy various conditions including the essential criteria of necessity and proportionality. This has been confirmed by the ICJ on numerous occasions;<sup>4</sup> as the Court stated in the *Nicaragua* case, the measures taken in self-defence must be ‘proportional to the armed attack and necessary to respond to it’.<sup>5</sup> But behind this elegant and apparently simple formula lie many uncertainties. This article focusses on the criterion of proportionality, and examines some of the questions concerning its meaning and application. As will be seen, many of those questions remain unanswered.

## II THE FIRST QUESTION: PROPORTIONATE TO WHAT?

To what, exactly, must the measures taken in self-defence be proportional? On this there are two broad schools of thought. The first is that proportionality should relate to the armed attack, as suggested by a literal interpretation of the ICJ formula quoted

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<sup>1</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 (**Nicaragua**). Brownlie argues that aggression has been outlawed since the 1928 Kellogg-Briand Pact: see, eg, I Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 84-87.

<sup>2</sup> *Charter of the United Nations*, arts 51 and 42.

<sup>3</sup> There has long been debate about the extent to which art 51 reflects existing customary international law.

<sup>4</sup> *Nicaragua*, [176], [194]; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (**Nuclear Weapons Advisory Opinion**), [41]; *Case Concerning Oil Platforms (Iran v U.S.A)* [2003] ICJ Rep 161 (**Oil Platforms**), [76]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 (**Armed Activities**), [147].

<sup>5</sup> *Nicaragua*, [176].

above – ‘proportional to the armed attack’. This is a quantitative or ‘tit-for-tat’ approach, where the forcible response is equivalent to the armed attack in terms of scale or means of attack, or the harm or damage caused. Thus, if the attack consisted of the firing of ten missiles, causing the destruction of 25 homes and 50 casualties, the response in self-defence may be of similar magnitude and effects.

The other school of thought is that the response should be proportionate to the aim of halting or repelling the attack, and the response might therefore be of a greater or lesser scale than the original attack. In the example suggested above, if it were possible for the victim state to halt the attack by firing a single missile which disabled the source of the incoming missiles, then any use of force in excess of that would be considered disproportionate. Similarly, if the attack could only be halted by launching 50 missiles, that too would be proportionate.

Support for each of these views can be found in the jurisprudence of the ICJ and in the literature, as explained below.

### III THE INTERNATIONAL COURT OF JUSTICE ON PROPORTIONALITY

The ICJ has had several opportunities to discuss proportionality in the context of claims of self-defence.

#### *A The Nicaragua Case 1986*

In the 1986 *Nicaragua* merits decision, the ICJ considered the proportionality of the United States’ actions in and against Nicaragua. The case was brought by Nicaragua, which complained that the United States had violated the prohibition on the use of force, both directly through its own actions and indirectly through its assistance to the *contras*, a rebel group fighting to overthrow the Nicaraguan government. In 1984, the ICJ had ruled that the case was admissible,<sup>6</sup> over the strenuous objections of the United States, following which the United States refused to take any further part in the proceedings. This meant that in the merits phase of the case the Court did not have the benefit of receiving argument from the US, but it was able to rely on the submissions made during the earlier jurisdiction and admissibility phase.<sup>7</sup> In its counter-memorial, the US had claimed that its actions were justified as collective self-defence of El Salvador, Honduras and Costa Rica, which had been subjected to

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<sup>6</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392, 431-436.

<sup>7</sup> *Ibid*, [24], [126].



aggression by Nicaragua.<sup>8</sup> It was alleged, *inter alia*, that Nicaragua had conducted armed incursions into Honduras and Costa Rica, and had supplied arms to the opposition in El Salvador.

The United States' official position was that its actions were 'necessary and proportionate means of resisting and deterring Nicaraguan military and paramilitary acts against its neighbors',<sup>9</sup> implying that proportionality related not only to the attack, but also to the object of preventing future attacks.

The Court found that on the evidence, there had been no armed attack by Nicaragua against any of these states, and so the United States' claim of collective self-defence failed.<sup>10</sup> However, although it was therefore unnecessary to do so, the Court went on to discuss the criteria of necessity and proportionality as a potential 'additional ground of wrongfulness'.<sup>11</sup> It declined to express a view on the United States' assistance to the *contras*, but found that the direct actions of the United States, such as mining Nicaraguan ports and attacking Nicaraguan ports and oil installations, were not proportionate to the aid allegedly provided by Nicaragua to rebels in El Salvador.<sup>12</sup>

The Court's conclusion on proportionality was very brief, but does seem to relate proportionality to the alleged armed attack – here, Nicaragua's alleged incursions and aid to rebels in neighbouring states. However, the Court then appeared to expand proportionality to an anticipated attack, when it observed that:

... the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.<sup>13</sup>

Perhaps what the Court meant was that, even if the United States could prove an armed attack by Nicaragua, the former's use of force continued long after the alleged attack; but the words of the judgment do little to clarify the issue.

In his dissenting opinion, Judge Schwebel discussed proportionality at greater length. In his view, Nicaragua's 'measures of depredation' in El Salvador did amount to an

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid [192].

<sup>10</sup> Ibid [230], [231], [238].

<sup>11</sup> Ibid [237].

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

armed attack, and the United States' actions were proportionate to that attack.<sup>14</sup> However, Judge Schwebel also seemed to relate proportionality to the purpose of halting and repelling the attack, when he cited<sup>15</sup> the 1980 Report of Roberto Ago, the International Law Commission's then Rapporteur on State Responsibility. Indeed, it is this report which is often cited in support of the second school of thought mentioned above, and so it is worth quoting at some length:

The requirement of the proportionality of the action taken in self-defence ... concerns the relationship between that action and its purpose, namely ... that of halting and repelling the attack ... It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain. Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals. There must of course be some proportion between the wrongful infringement by one State of the right of another State and the infringement by the latter of a right of the former through reprisals. In the case of conduct adopted for punitive purposes, of specifically retributive action taken against the perpetrator of a particular wrong, it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale.

Within these limits and in this sense, the requirement of proportionality is definitely confirmed by State practice. The occasional objections and doubts expressed about it have been due solely to the mistaken idea of a need for some kind of identity of content and strength between the attack and the action taken in self-defence. It must be emphasized once again that, without the necessary flexibility, the requirement would be unacceptable. As indicated at the beginning of this paragraph, a State which is the victim of an attack cannot really be

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<sup>14</sup> Ibid [12], [211] (Judge Schwebel).

<sup>15</sup> Ibid [212] (Judge Schwebel).

expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end.<sup>16</sup>

Judge Schwebel then seemed to apply both tests in his concluding comments on proportionality:

As Judge Ago pointed out in the passages from his Report to the International Law Commission quoted in paragraph 212 of this opinion, measures taken in self-defence, to be proportional, need not mirror offensive measures of the aggressor. Moreover, it may be noted that, as Honduras charged in its protest note to Nicaragua of 30 June 1983, Nicaragua apparently has mined Honduran roads with a resultant loss of life (Counter-Memorial of the United States, Ann. 61); the mining of roads in El Salvador by Salvadoran insurgents, using land-mines and explosives reportedly provided by or through Nicaragua, is a commonplace. The consequential casualties far exceed those caused by the mining of Nicaraguan ports. Thus the fact that Nicaragua may have confined itself to land mining, or to assisting in the laying of land mines, and to no more than threatening the mining of foreign ports (see the appendix, paras. 119, 136), does not of itself render United States mining of Nicaraguan ports, as a measure in the exercise of its right of collective self-defence, disproportionate, or otherwise unlawful – as against Nicaragua.<sup>17</sup>

#### B *The Legality of the Threat or Use of Nuclear Weapons Advisory Opinion 1995*

The ICJ did not elaborate on proportionality in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, merely referring to proportionality as a requirement of self-defence.<sup>18</sup> In another dissenting opinion, however, Judge Schwebel quoted the United Kingdom Attorney-General's oral submissions to the Court during the hearing:

If one is to speak of 'disproportionality', the question arises: disproportionate to what? The answer must be 'to the threat posed to the victim State'. It is by reference to that threat that proportionality must be measured. So one has to look at all the circumstances, in particular the scale, kind and location of the threat. To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded. ... any

<sup>16</sup> 'State Responsibility' [1980] II(1) *Yearbook of the International Law Commission* 13, [121].

<sup>17</sup> *Nicaragua*, [237] (Judge Schwebel).

<sup>18</sup> See, eg, *Nuclear Weapons Advisory Opinion*, [43].

government faced with such a threat will have to decide, what reliance on deterrence or degree of action is necessary for self-defence.<sup>19</sup>

Judge Schwebel spoke again of deterrence when referring to the 1991 First Gulf War, commenting that if Iraq had used weapons of mass destruction against coalition forces, then even if the use of nuclear weapons were treated as prohibited, 'their proportionate use [against Iraq] by way of belligerent reprisal in order to deter further use of chemical or biological weapons would have been lawful.'<sup>20</sup>

Judge Weeramantry, also dissenting, was of the view that 'the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever.'<sup>21</sup> He argued that a nuclear response to a nuclear attack could and should not be permitted under the test for proportionality, as this would lead to 'global Armageddon'.<sup>22</sup> He too cited the Ago report, repeating that the purpose of the defensive action 'is to halt and repulse the attack, not to exterminate the aggressor, or to commit genocide of its population.'<sup>23</sup>

Judge Koroma agreed, stressing that 'in terms of the law, the right of self-defence is restricted to the repulse of an armed attack and does not permit of retaliatory or punitive action.'<sup>24</sup> Judge Higgins agreed with the Court's judgment in *Nicaragua* that 'the concept of proportionality in self-defence limits a response to what is needed to reply to an attack.'<sup>25</sup> This suggests that proportionality is determined by the attack, but Judge Higgins then cited the Ago report to the effect that 'the concept of proportionality referred to was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response'.<sup>26</sup>

### *C The Oil Platforms Case 2003*

In the *Oil Platforms* case the ICJ's discussion of proportionality was again strictly *obiter*, as the Court found that there had been no armed attack by Iran against the United States.<sup>27</sup> However in considering the proportionality of the United States' attacks on

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<sup>19</sup> Ibid 321 (Judge Schwebel).

<sup>20</sup> Ibid 328 (Judge Schwebel).

<sup>21</sup> Ibid 433 (Judge Weeramantry) (emphasis in original).

<sup>22</sup> Ibid 514 (Judge Weeramantry).

<sup>23</sup> Ibid 518 (Judge Weeramantry).

<sup>24</sup> Ibid 562 (Judge Koroma).

<sup>25</sup> Ibid, 583 (Judge Higgins).

<sup>26</sup> Ibid.

<sup>27</sup> *Oil Platforms*, [64], [72].

Iranian oil platforms, the Court referred to an armed attack: the scale of the United States' operation was found to be disproportionate to 'the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life'.<sup>28</sup>

This corresponds to the position taken by the United States in its counter-memorial, although this also related the criterion of proportionality to deterrence: citing the Ago report, it emphasised 'the result to be achieved' by the action taken in self-defence.<sup>29</sup> Similarly, in the the *Aerial Incident* case, the United States argued that its actions against the Iranian oil platforms had been 'a proportionate measure to deter further Iranian attacks on merchant vessels'.<sup>30</sup> This case was settled at an early stage of the proceedings and so the Court had no opportunity to comment on these submissions.

#### D *Armed Activities Case 2005*

While there was some discussion of proportionality in the ICJ's *Israeli Wall Advisory Opinion*,<sup>31</sup> it mostly concerned proportionality in international humanitarian law, and shed little light on its application in the field of self-defence. It did arise briefly, however, in the 2005 *Armed Activities* case between the Democratic Republic of the Congo and Uganda. Again the Court's pronouncements on this were strictly *obiter*, as it found that there had been no armed attack by the DRC in response to which Uganda claimed to have acted.<sup>32</sup> The Court merely observed that Uganda's 'taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence',<sup>33</sup> thus apparently relating proportionality to the armed attack.

In his separate opinion, Judge Kooijmans was of the view that Uganda's seizure of towns and airports in the DRC, close to the border with Uganda, was in the circumstances not 'unnecessary or disproportionate to the purpose of repelling the

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<sup>28</sup> Ibid [77].

<sup>29</sup> 'Counter-Memorial and Counter-Claim submitted by the United States of America', *Oil Platforms*, [4.32], citing 'State Responsibility' [1980] II(1) *Yearbook of the International Law Commission* 13, [121].

<sup>30</sup> 'Preliminary Objections submitted by the United States of America', *Case Concerning the Aerial Incident of 3 July 1988 (Iran v USA)* [1991] ICJ Pleadings 3, 22.

<sup>31</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

<sup>32</sup> *Armed Activities*, [147].

<sup>33</sup> Ibid.

persistent attacks of the Ugandan rebel movements' emanating from those areas.<sup>34</sup> However:

... when Uganda acted upon the invitation of Rwanda and sent a battalion to occupy the airport of Kisangani located at a considerable distance from the border area on 1 September 1998 ... it grossly overstepped the limits set by customary international law for the lawful exercise of the right of self-defence. ... These [and subsequent] actions moreover were grossly disproportionate to the professed aim of securing Uganda's border from armed attacks by anti-Ugandan rebel movements.<sup>35</sup>

Judge Kooijmans thus seemed to be referring not only to the Ago view of proportionality, relating proportionality to the purpose of repelling the attack, but also to a wider preventative purpose – that is, securing the border from further attack.

#### IV THE 'HALT AND REPEL' TEST OF PROPORTIONALITY

From the above examination of the ICJ jurisprudence on proportionality it can be seen that the Court has not engaged deeply with the principle of proportionality, and that scant attention has been paid to determining the 'to what?' aspect of the principle. The literature on this particular aspect is equally thin, but it would be fair to say that most writers who have addressed the issue, however briefly, favour the second, 'halt and repel', view of proportionality.<sup>36</sup> Daniel Bethlehem, for example, puts the test this way: 'the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat'.<sup>37</sup>

This 'halt and repel' view of proportionality – that is, that the defensive force used must be proportionate to the purpose of halting or repelling the attack – has a long

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<sup>34</sup> Ibid [33] (Judge Kooijmans).

<sup>35</sup> Ibid [34] (Judge Kooijmans).

<sup>36</sup> See, eg, C Gray, *International Law and the Use of Force* (Oxford University Press, 3<sup>rd</sup> ed 2008) 150; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 481-493; J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 156-162.

<sup>37</sup> D Bethlehem, 'Principles relevant to the scope of a state's right of self-defense against an imminent or actual armed attack by non-state actors' (2012) 106 *Australian Journal of International Law* 1, 3.

pedigree. Not only does it feature prominently in the 1980 Ago report referred to, it can be seen in 18<sup>th</sup> Century works such as Martens, who in 1788 wrote:

[f]orcible means are of several degrees, which differ widely from each other, and every sovereign is obliged to confine himself to the employment of the lowest degree by which he can obtain due satisfaction.<sup>38</sup>

The ‘halt and repel’ test makes perfect sense in the case of an armed attack which is actually in progress, such as an invasion or other sustained use of large-scale force: force can be used literally to halt the attack and repel the attackers. This would also presumably be so in the aftermath of an armed attack such as a belligerent occupation following the initial invasion. It would hardly be reasonable to confine ‘armed attack’, and therefore the use of force in self-defence, to the period of the initial action only. A clear example is the Argentinian invasion of the Falklands Islands, where it took the United Kingdom several weeks to reach the islands and begin to repel the attackers.

However, in contemporary times, few attacks are in progress at the time of the response in self-defence. Often the attack is over, but the victim state wishes to respond, or the attack is imminent or anticipated, and the victim state wants to forestall an attack. Often both are in play: the victim state feels the need to respond because the previous attack increases the likelihood or fear of a further attack.

## V RESPONDING TO PAST ATTACKS?

A number of questions arise in situations where actions are taken in self-defence once the attack is over. First, how can any forcible response be necessary, let alone proportionate? Yet there is abundant evidence of such situations in state practice; with a few notable exceptions, states seem willing to claim, and ready to accept, the need to respond in self-defence to a recent attack, even where there is no evidence of the attack continuing. Paradoxically, armed reprisals are universally condemned as unlawful, and yet many of these actions could justifiably be regarded as reprisals. As Roberto Ago stated:

... armed resistance to armed attack should take place *immediately*, i.e., while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has

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<sup>38</sup> G Friedrich von Martens, *Summary of the Law of Nations* (W Corbett trans, Thomas Bradford, 1795) 266.

made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier.<sup>39</sup>

Thus a response in self-defence cannot be justified by reference to a previous attack if that attack is over.

## VI AVERTING FUTURE ATTACKS?

If not by reference to a past attack, can the proportionality of a response in self-defence be justified by reference to an imminent or anticipated attack? The lawfulness of anticipatory self-defence is dealt with extensively in the literature and will therefore only be mentioned briefly here. The obvious question is how proportionality is to be measured when the attack has not yet occurred. Many writers and jurists have referred to this when discussing proportionality; Bethlehem for example speaks of measures 'to avert the threat', or being 'proportional to the threat that is faced',<sup>40</sup> while a group of experts convened by Chatham House in London confines the permitted degree of force to what is needed 'to avert the ... attack'.<sup>41</sup>

This means that the lawfulness of the defensive force will turn on an assessment of the legality of anticipatory self-defence, and the reasonableness of the measures considered necessary to avert the attack or remove the threat. Ago in 1980 considered anticipatory action at least arguable, describing proportionality as concerning the relationship between the defensive action and its purpose, which could include the purpose, 'in so far as preventive self-defence is recognized, of preventing [the attack] from occurring'.<sup>42</sup> Currently, it is also being invoked by some of the states taking part in the military action against Islamic State in Iraq and the Levant (**ISIL**) in Syria, in their letters notifying the Security Council of action taken in individual and collective self-defence under art 51 of the UN Charter. The United States, for example, in its letter of 23 September 2014, declared that:

... the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by

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<sup>39</sup> 'State Responsibility' [1980] II(1) *Yearbook of the International Law Commission* 13, [122].

<sup>40</sup> Bethlehem, above n 37.

<sup>41</sup> E Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (Working Paper No 05/01, Chatham House, October 2005) 4.

<sup>42</sup> 'State Responsibility' [1980] II(1) *Yearbook of the International Law Commission* 13, [121].



protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders.<sup>43</sup>

In similar vein, Canada declared that:

ISIL also continues to pose a threat not only to Iraq, but also to Canada and Canadians, as well as to other countries in the region and beyond. ... Canada's military actions against ISIL in Syria are aimed at further degrading ISIL's ability to carry out attacks.<sup>44</sup>

Assessment of proportionality is still relatively manageable where there are single, identifiable attacks or anticipated attacks. But what about the vague, or at least less specific, existence of a perceived threat? In these circumstances, is there a permissible response? Some writers suggest that a broader, more flexible interpretation of these terms and concepts should be adopted. Kretzmer, for example, argues that there is no 'one size fits all' solution, and that:

the legitimate ends of using force in self-defence may differ, depending, inter alia, on ... whether the attack is ongoing, completed, or imminent; whether it was carried out by non-state actors and, if so, whether it can be imputed to a state; and, finally, the scale and effects of the attack, when judged in the context of the relations between those responsible for the attack and the victim state.<sup>45</sup>

This degree of flexibility has been criticised by Nolte as unacceptably broadening the right of self-defence, but he does agree that proportionality here turns on how the 'legitimate ends' of self-defence are identified.<sup>46</sup>

This leads to another difficult question: must the response in self-defence be proportionate to the single attack – whether past or anticipated – or can the response remove the whole of the threat posed? Thus we revert to considering what is the 'threat' that is to be averted – is it the threat of one attack, or of a number of future attacks? To take an example, let us suppose that the facts in the *Oil Platforms* case had been slightly different: that the United States, and other states, had been subjected to attacks by Iran, the attacks were regular, and they were being launched or coordinated

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<sup>43</sup> Letter from Permanent Representative of the United States 23 September 2014, UN Doc S/2014/695 (23 September 2014).

<sup>44</sup> M Grant, Letter from Charge d'Affaires of the Permanent Mission of Canada to the United Nations, UN Doc S/2015/221 (31 March 2015).

<sup>45</sup> D Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24 *European Journal of International Law* 235, 240, 267.

<sup>46</sup> G Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer' (2013) 24 *European Journal of International Law* 283, 284-285.

from the Iranian oil platforms in the Gulf. In those circumstances would it not be reasonable that the United States should be able to destroy those platforms, the source of the past, continuing and future attacks? Similarly, in the fight against ISIL, must states justify each individual use of force? They clearly do not do so as a matter of practice; some states (not all) have reported to the Security Council once or twice at most.<sup>47</sup>

One answer to these questions is to accept the 'accumulation of events' theory: a series of discrete attacks is treated as one continuing attack, and the legality of the response in self-defence is measured against the series as a whole rather than against each individual incident. The ICJ has acknowledged, but not ruled on the validity of, the theory,<sup>48</sup> but in any event it is not a complete answer the question whether a proportionate response would include a major offensive to defeat the threat or eliminate it altogether.

## VII PROPORTIONALITY IN MAJOR ARMED CONFLICT

Where the situation involves not just a major offensive but an all-out war, the final questions arise: what is the relevance of proportionality in an armed conflict? Some writers take the view that the law on the use of force – *jus ad bellum* – becomes irrelevant, and questions of proportionality are determined exclusively by the well-established and much more detailed rules of international humanitarian law (*jus in bello*).<sup>49</sup> Others point out that, while proportionality in *jus ad bellum* is quite distinct in content and underlying rationale from proportionality in *jus in bello*, the two will often overlap in practice.<sup>50</sup> As to the relationship between them when this occurs, the force used in self-defence must always comply with the rules of international humanitarian law – the *jus in bello* – and so to be proportionate under the *jus ad bellum*, the action must also be proportionate under the *jus in bello*.<sup>51</sup> Conversely, however, an action

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<sup>47</sup> L Sievers and S Daws, *Reporting, and non-reporting, pursuant to Article 51 in 2016* (26 February 2016) Update Website of *The Procedure of the UN Security Council* (Oxford University Press, 4<sup>th</sup> ed, 2014) <<https://www.scprocedure.org/chapter-7-section-12g>>.

<sup>48</sup> *Nicaragua*, [231]; *Oil Platforms*, [64]; *Armed Activities*, [146].

<sup>49</sup> See, eg, Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 3<sup>rd</sup> ed, 2001) 209; Wrachford, 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?' (2007) 60 *Air Force Law Review* 29, 88.

<sup>50</sup> See, eg, E Cannizzaro, 'Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War' (2006) 864 *International Review of the Red Cross* 779, 791-792.

<sup>51</sup> *Ibid*, 792; J Gardam, 'Proportionality as a Restraint on the Use of Force' (1999) 20 *Australian Yearbook of International Law* 161, 168.

might satisfy the proportionality test in international humanitarian law but still be considered disproportionate in the *jus ad bellum*.<sup>52</sup>

A particular difficulty arising in the case of a sustained armed conflict is that the right of self-defence is supposed to be only temporary, ‘until the Security Council has taken measures necessary to maintain international peace and security’.<sup>53</sup> An unresolved question is, where the Security Council fails to act, for how long can a military action be justified as self-defence?<sup>54</sup>

### VIII THE FUNDAMENTAL QUESTION: WHAT IS THE PURPOSE OF SELF-DEFENCE?

As trite and obvious as it sounds, the question of what, at heart, is the purpose of self-defence has yet to be satisfactorily answered. Yet the answer to all the questions posed above ultimately turns on this. As canvassed above, states claiming to be acting in self-defence may be responding to a single discrete armed attack which is over by the time of the response, or to an attack which is still in progress, or they may be acting to forestall an anticipated attack, usually anticipated because there have already been one or more past attacks. Further, the action taken may not always be limited to a literal interpretation of the ‘halt and repel’ test but extend to whatever is necessary to eliminate the threat of further attacks altogether – such as eradicating a terrorist group.

Of these categories, only the continuing attack fits easily within the traditional, or narrow, notion of self-defence – the state is defending itself against an actual armed attack. But it is evident from state practice that force used in response to recent but completed armed attacks is rarely questioned, despite bearing an uncanny resemblance to (prohibited) armed reprisals. What is the purpose of self-defence in this situation? It can only be either to punish or retaliate – both prohibited in international law – or to deter further attacks. Deterrence would not even be regarded as a form of anticipatory self-defence, assuming for present purposes that this is lawful, because there may be no evidence of any imminent armed attack. Nevertheless, as seen above, variations of the verb ‘deter’ appear frequently in the discourse on self-defence without

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<sup>52</sup> Gardam, above n 51.

<sup>53</sup> *Charter of the United Nations*, art 51.

<sup>54</sup> An example is the United States’ actions in Afghanistan after the 9/11 attacks. One aspect of this operation was claimed as self-defence for several years: see, eg, C Gray, above n 36, 203.

apparent criticism. Anticipatory self-defence itself is increasingly, if not universally, accepted as lawful, as is (arguably) action to eliminate the risk of any future attack.

To explain this breadth and variety of situations in which claims of self-defence are broadly accepted, the purpose of self-defence must be far broader than just to 'halt and repel' an armed attack. The essence (and therefore the purpose) of self-defence must be, it is submitted, to protect the state against both present and reasonably likely future attacks. The likelihood of future attacks is assessed on the evidence: factors such as the occurrence of past attacks, the nature of the attacker, and the severity of the threat will be relevant. Viewed this way, proportionality in self-defence should permit a state to use the minimum degree of force that is reasonably necessary to protect itself from any present or likely future attacks.

# Refugee Protection and State Security in Australia: Piecing Together Protective Regimes

Peter Billings\*

## I INTRODUCTION

The *Convention relating to the Status of Refugees* (**Convention**), and the protections contained therein, applies to those persons who answer the description of a refugee.<sup>1</sup> Article 1A(2) of the Convention provides the *positive* elements of the refugee definition, stating that a refugee is a person outside their country of origin or place of habitual residence, who is unable or unwilling to return, due to a ‘well-founded fear of persecution’, by reason of, ‘race, religion, nationality, membership of a particular social group or political opinion’. A refugee is someone who engages the protection obligations assumed by a State party to the Convention, unless particular exclusionary provisions apply. The foundation of refugee protection is art 33(1): it prohibits the return, either directly or indirectly, of a person to a place where they have a well-founded fear of persecution (*non-refoulement*). The principle of *non-refoulement* is a fundamental human right and, in conjunction with art 32(1) (prohibition on expulsion of refugees lawfully residing), it imposes ‘significant obligations’ on Contracting States.<sup>2</sup> Indeed, the observance of the *non-refoulement* obligation (in the absence of a status determination) may equate, *functionally*, to a grant of asylum.<sup>3</sup> For a State to remove a person, claiming refugee status, to their country of nationality, or some third country willing to receive them, without first having assessed whether that person is a refugee, would put that State in breach of its international obligations under art 33(1).

In the battle for freedom, if not life itself, non-citizens fleeing alleged persecution and significant harm may have to satisfy decision-makers that they are not a threat to the safety of the members of the host community. The Convention represents a compromise between humanitarian concerns for the individual and state sovereign concerns about border integrity and security.<sup>4</sup> Specifically, the Convention is animated

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<sup>1</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>2</sup> *Plaintiff M47/2012* (2012) 251 CLR 1 (**M47**), [17] (French CJ).

<sup>3</sup> *Plaintiff M70/2011 v Minister for Immigration* (2011) 244 CLR 144 (**M70**), 225 [216] (Kiefel J).

<sup>4</sup> *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [213] (Crennan J).

by several aims, and seeks to reconcile distinct protective purposes – refugee protection primarily, and also community safety. The pursuit of these twin aims has, post 9/11 (during the ‘war on terror’) and within a ‘culture of exclusion’,<sup>5</sup> increasingly given rise to tensions within States’ practices as domestic laws and procedures have been reshaped, generating friction with international refugee protection norms.

Article 1F of the Convention contains *negative* refugee criterion and singles out individuals to whom the Convention does not apply. Article 1F serves to exclude, *ab initio*, those who are not *bona fide* refugees at the time they *claim* refugee status. It permits States to exclude applicants who are undeserving of refugee status because they have committed egregious crimes, who are a threat to community safety and the interests of the receiving State. As Kirby J noted in *Minister for Immigration and Multicultural Affairs v Singh*: ‘Without such entitlement [to exclude] in defined extreme cases, there would be a risk that the protective objectives of the Convention might be undermined by strong popular and political resentment.’<sup>6</sup> Article 1F is an exhaustive provision that contemplates exclusion from refugee status in limited circumstances. It captures those non-citizens with respect to whom there are ‘serious reasons’ for considering that they have committed a crime against peace or against humanity, or a war crime (para (a)), or ‘a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee’ (para (b)), or have ‘been guilty of acts contrary to the purposes and principles of the United Nations’ (para (c)). A person caught by art 1F is not, and cannot be, a refugee.

Articles 32 and 33(2) more directly reflect the compromise at the heart of the Convention, and acknowledge that the pursuit of humanitarian concerns should not come at the cost of community safety. Articles 32 and 33 of the Convention are to be distinguished from art 1F, because these two norms speak to the content of refugees’ rights, and deal with refugees who pose a danger or security threats. Article 32 permits the expulsion of a lawfully residing refugee on grounds of national security/public order, in accordance with due process of law. Article 33(2) qualifies the core – *non-refoulement* – obligation on States. Article 33(2) serves to withdraw the benefit of *non-refoulement* protection, where the refugee, residing either lawfully or unlawfully, presents a prospective and serious danger to the community of the surrogate State. A person caught by arts 32 and 33(2) retains their status as a refugee even if the benefit

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<sup>5</sup> See, eg, G Gilbert, ‘Running scared since 9/11: refugees, UNHCR and purposive approach to treaty interpretation’ in JC Simeon (ed), *Critical Issues in International Refugee Law* (Cambridge University Press, 2010) 85-118.

<sup>6</sup> (2002) 209 CLR 533, [94]-[96].

of *non-refoulement* is, *subsequently*, withdrawn by the State of asylum.<sup>7</sup> In short, arts 32 and 33 do not qualify the reach of art 1; rather, they apply to a person who has *first* been recognised as falling within the refugee definition and sanction the withdrawal of refugee protection, albeit in strictly limited circumstances.

## II WIDER OBLIGATIONS OWED BY STATES ('COMPLEMENTARY PROTECTION')

Human rights law has extended States' protection obligations beyond the *Convention*. As a State party to the *International Covenant on Civil and Political Rights*<sup>8</sup> (**ICCPR**) and *Convention Against Torture*<sup>9</sup> (**CAT**), Australia has *non-refoulement* obligations contained in art 3 of CAT or implied from art 7 of the ICCPR.<sup>10</sup> Article 3 of CAT prohibits States from removing an individual in any manner where there are substantial grounds for believing they would be in danger of being subjected to torture. Article 7 has been interpreted as prohibiting removal to a place where a person would be subject to torture, inhuman or degrading treatment or punishment. The principle of *non-refoulement* is both absolute and non-derogable under human rights law. As such, it constitutes a greater restraint on State action, because (and by contrast with the Convention) it precludes the removal of non-citizens, however dangerous or undesirable they may be, without qualification.

## III REFUGEE PROTECTION UNDER DOMESTIC LAW

The *Migration Act 1958* (**Act**) provides the means to deal with refugee (and complementary) protection claims. The association between the Act and international law is complex and fraught. The Act does not directly translate into domestic law the obligations of Contracting States under the Convention.<sup>11</sup> Consequently, asylum seekers and refugees cannot *simply* assert, as rights under Australian law, international law rights under Chs II, III and IV of the Convention, including: 'free access to the

<sup>7</sup> G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, 2007) 244.

<sup>8</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**).

<sup>9</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (**CAT**).

<sup>10</sup> Art 3 of CAT provides: 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'; art 7 of the ICCPR states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

<sup>11</sup> *M47*, 61 [123] (Gummow J), citing *M70*, 225-226 [217]-[218], where it was said, '[the Act] does not provide for the enactment of the various obligations respecting domestic status and entitlement which are found in the Convention.'

courts of law' (art 16), rights of gainful employment (Ch III) and rights to welfare (Ch IV). Rather, the Act codifies selected terminology and concepts drawn from the Convention – including, the refugee definition (art 1A), exclusion clause (art 1F) and disentitling security/public safety criteria (arts 32, 33(2)) – imperfectly, and subject to modifications.

Equally, the Act has introduced certain aspects of the CAT and ICCPR into domestic law.<sup>12</sup> In *Minister for Immigration and Citizenship v MZYYL* the Federal Court flagged the idiosyncratic approach taken to complementary protection in Australia:

The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions: [...] Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties.<sup>13</sup>

Moreover, the Act draws in qualifications, found in arts 32 and 33(2) of the Convention, to the complementary protection regime, thereby conflating refugee and human rights norms. Significantly, this conflicts with the absolute and non-derogable nature of *non-refoulement* under the ICCPR and CAT. In short, domestic law relating to the protection of refugees' rights is neither congruent nor conformable with international law, and this places genuine refugees at risk of return to danger. The municipal law relating to refugees is parochial and increasingly inward looking, animated by conservatives' (largely erroneous) concerns about an activist judiciary, and the nature and extent of the threats non-citizens (seeking refuge) pose to national security and community safety. Where does this anti-elitism and exclusive populism leave the state of refugee protection in Australia?

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<sup>12</sup> *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 (**SZQRB**), 560 [313] (Besanko and Jagot JJ).

<sup>13</sup> (2012) 207 FCR 211, [18]. See, also, *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, which reveals how the complementary protection obligations are both wider and narrower than particular international law obligations under the CAT and ICCPR respectively (as Edelman J observed at [76] and [78]). A majority of the court (Gageler dissenting) construed the meaning of 'intentionally inflicted' (per s 5(1) *Migration Act 1958*) narrowly, such that *unintended* cruel or inhuman treatment or punishment, or degrading treatment or punishment, would not enliven Australia's *non-refoulement* obligations under the Act. The definition of 'cruel or inhuman treatment or punishment' was described by the majority of the court as a partial adaptation of the definition of torture in s 5(1) which, in turn, was derived closely from art 1 CAT. However, as the Court accepted, the legislative requirement of intention was not taken from the ICCPR, which contains no requirement that humiliation of the requisite degree be intentionally inflicted ([2017] HCA 34 [4]-[5] (Kiefel CJ, Nettle and Gordon JJ) and [78]-[79] (Edelman JJ)).



Before a protection visa is granted to a non-citizen, they must satisfy at least one of two criteria: either the *refugee criterion* in s 36(2)(a) or the *complementary protection criterion* in s 36(2)(aa).<sup>14</sup> Following reforms to the Act in December 2014, the meaning of ‘refugee’ is defined exhaustively. Section 5H contains qualifications that parallel the exclusionary norms in art 1F of the Convention. The criterion in s 36(2)(aa) codifies aspects of the ICCPR and CAT, and prohibits return to a place where a person would suffer significant harm.<sup>15</sup> This paragraph correlates to Australia’s (wider) human rights obligations. However, as noted above, it imports qualifications on those human rights from art 1F of the Convention, permitting exclusion from protection on grounds relating to, *inter alia*, international criminal law offences and serious non-political offences.<sup>16</sup> This arose because parliament intended to enact refugee and complementary protection regimes that mirrored each other, notwithstanding the asymmetry between the relevant international protection regimes.

Sub-sections 36(2)(a) and (aa) do not completely and exhaustively govern the criteria for the grant of a protection visa. There are additional principles that relate to security matters. An applicant whom the Minister is satisfied has engaged Australia’s protection obligations, either because they are a refugee or because a necessary and foreseeable consequence of removal is a real risk of significant harm, may still fail to qualify for a visa.<sup>17</sup> They may be excluded from obtaining a visa on the basis of other *mandatory requirements* contained in the Regulations or the Act, including:

- (i) failing public interest criteria – notably, the ‘character test’ – (s 65 and cl 866.25 of Sch 2 to the Migration Regulations);
- (ii) national security grounds (s 36(1B)); and
- (iii) they present a danger to the community (s 36(1C)).

Significantly, none of these mandatory, exclusionary criteria necessitates any active consideration of the protection criteria in s 36(2). The significance of this is examined

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<sup>14</sup> *Migration Act 1958* (Cth) s 36(2)(b) and (c) relate to protection visa claims based on membership of the same family unit as a person holding a protection visa on either refugee/complementary, protection grounds.

<sup>15</sup> *SZQRB*, 560 [313] (Besanko and Jagot JJ).

<sup>16</sup> Section 36(2C)(a). Also, note s 36(2C)(b) which qualifies s 36(2)(aa) on the basis the person is a *danger to security or the community*; this provision is found in almost identical terms, in s 36(1)(C) and the provisions form a duplicate role.

<sup>17</sup> *M47*, [136] (Gummow J) [180] (Hayne J) and [265]-[266] (Heydon J).

in the next section, which explains and explores how essential '*non-refoulement* obligations' are protected under the Act.

#### IV THE PRINCIPLE OF NON-REFOULEMENT AND THE SCHEME OF THE MIGRATION ACT

In 2014, a suite of reforms were enacted, aimed at clarifying Australia's international law obligations.<sup>18</sup> It is somewhat strange that the 2014 legislative amendments, that purported to codify parliament's understanding of its international law obligations, did *not* include a direct reference to the cornerstone of refugee protection: the prohibition on *refoulement*. The particular obligation not to return refugees to persecution is absent; paradoxically, the security exception to that principle (art 33(2)) is included. This omission was by legislative design, and part of a concerted political effort to diminish the relevance of the Convention (and the normative significance of the *non-refoulement* principle) for the purposes of statutory interpretation.

In order to understand the new legislative scheme fully, attention must turn to one of the recent, significant, amendments – s 197C. This provision provides that, for the purposes of the statutory power of removal (s 198), *non-refoulement* obligations are *irrelevant*. Further, an immigration officer's duty to remove, as soon as reasonably practicable, an unlawful non-citizen under s 198 'arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.' Section 197C is a provocative provision and is squarely directed at overcoming the reasoning in several key High Court decisions, including the *Offshore Processing* case<sup>19</sup> and the *Malaysian Declaration* case,<sup>20</sup> which promoted and preserved refugees' fundamental rights. These decisions effectively frustrated different elements of Australia's policies for deterring rising numbers of 'irregular maritime arrivals' (or, more straightforwardly, *refugees*) fleeing alleged persecution and conflict. In the *Offshore Processing Case*, the High Court stated that the Act was 'directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol'.<sup>21</sup> Furthermore, the High Court stated that the text and structure *Act*:

provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly

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<sup>18</sup> *Migration and Maritime Powers Legislation (Resolving the Asylum Seeker Legacy Caseload) Act 2014* (Cth).

<sup>19</sup> *M61/2010E v Minister for Immigration* (2010) 243 CLR 319 (**M61**).

<sup>20</sup> *M70*.

<sup>21</sup> *M61*, [27].

or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.<sup>22</sup>

The intended effect of s 197C was to negate the High Court's interpretation of the Act,<sup>23</sup> and, more specifically, to decouple the statutory removal power from the *non-refoulement* norm. This is highly significant. Under s 197C, it appears that (as a matter of law, if not policy) non-citizens can be removed to a place *irrespective* of whether the government has even determined or made an assessment, according to law, of Australia's *non-refoulement* obligations in respect of that person. Yet the government has claimed that it will continue to meet its *non-refoulement* obligations,<sup>24</sup> so why the concern? The problem here is that the administrative means by which the government purports to give effect to its primary, international *non-refoulement* obligations is unjust; lacking in transparency, procedural fairness, and effective accountability. Arguably, exorbitant power is reposed in the Minister, with inadequate oversight over decisions that can have profound, adverse, human consequences. The following hypothetical illustrates the dangers.

The government claims that *non-refoulement* obligations may be considered *solely* during the protection visa application process, and not thereafter. Assume that, following a refugee status determination, a non-citizen satisfies the legal description of a person who is owed protection obligations under s 36(2)(a) or (aa), meaning that they are *not excludable* per the terms of art 1F, as codified in s 5H. But, nevertheless, the person is *disentitled* to a visa. For example, because they are either: (i) considered to be a risk to national security (per s 36(1B)); or (ii) they fail to meet public interest criteria – the character test (s 65 and Sch 2 to the Regulations). Prior to the insertion of s 197C into the *Act*, such a person would have been exposed to mandatory immigration detention, as an unlawful non-citizen, for a protracted and potentially indefinite period. This non-citizen would be effectively caught in a state of legal limbo; as a refugee who *was* owed protection obligations (protection from *refoulement*), but who was *denied* a protection visa to enter and remain in Australia under domestic law. Potentially, the

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<sup>22</sup> Ibid; M70, [44] (French CJ), [90].

<sup>23</sup> In *Le v Minister for Immigration and Border Protection* (2015) 237 FCR 516, 529 [53], Logan J opined that s 197C did not completely abrogate, for domestic law purposes, the *non-refoulement* obligation assumed under international law by Australia's subscription to the Convention. Rather it was directed to the operation of the removal power under s 198.

<sup>24</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Seeker Legacy Caseload) Bill 2014 (Cth) 166.

Immigration Minister could manage their case in an alternative manner, personally, pursuant to discretionary and unreviewable powers.<sup>25</sup>

Markedly, following the insertion of s 197C into the Act, there is, seemingly, *no legal impediment* to the removal of this non-citizen and their return to their country of origin or habitual residence, where they fear persecution and/or significant harm. This is because immigration officers are under a duty to remove unlawful non-citizens in detention as soon as reasonably practicable (s 198), and that removal power is no longer conditioned by the legal requirement to observe the *non-refoulement* principle. In short, the operation of s 197C appears to abrogate the principle of *non-refoulement*,<sup>26</sup> though the scope and effect of this section has yet to be fully determined.<sup>27</sup> A non-citizen who is refused a protection visa (on the basis of one of the security exceptions, or on adverse character grounds) is liable to be removed from Australia, potentially in breach *non-refoulement* norms, *unless and until* the Minister elects (there being no means of compulsion) to manage the situation through alternative mechanisms that are not subject to administrative review.<sup>28</sup>

It is wholly inadequate to rely on ministerial intervention, through discretionary, non-compellable and non-reviewable powers, to safeguard fundamental human rights principles when a person is subject to detention and the removal power. This is perhaps best illustrated by the case of *Minister for Immigration and Citizenship v SZQRB*.<sup>29</sup> For present purposes, it is sufficient to note that the Federal Court found that the Minister intended to remove the asylum applicant to Afghanistan, without a lawful assessment of his case, and even if he was a person to whom Australia owed protection obligations.<sup>30</sup> As Flick J observed in *SZQRB*, '[T]he fundamental rights of individuals and the discharge by Australia of its international obligations, were the very matters that the Minister was saying he did not need to consider.'<sup>31</sup>

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<sup>25</sup> For instance, in appropriate cases the Minister can exercise, non-compellable, non-reviewable, discretionary powers and make 'residence determinations' that facilitate the transfer of non-citizens into community detention, as an alternative to the more austere conditions of a closed detention facility (*Migration Act 1958* (Cth) ss 197AE, 197AF).

<sup>26</sup> *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 [27] (ACJ North).

<sup>27</sup> *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 [57] (Bromberg and Mortimer JJ).

<sup>28</sup> For example, s 195A of the *Migration Act 1958* (Cth) provides the Minister with a broad, personal, non-compellable and non-reviewable power, enabling the grant of a visa to a person in detention if it is in the public interest.

<sup>29</sup> (2013) 296 ALR 525.

<sup>30</sup> *Ibid* [246]-[268] (Lander and Gordon JJ, Besanko, Flick and Jagot JJ agreeing).

<sup>31</sup> *Ibid* [376].

## V CAN STATUTORY REMOVAL POWERS BE ENGAGED AND EXERCISED WITHOUT A REFUGEE STATUS DETERMINATION?

There is an additional drawback with the scheme of the Act that exposes asylum seekers and refugees to removal (and *refoulement*), and this has only recently been brought to light in the case of *BCR16 v Minister for Immigration and Border Protection*.<sup>32</sup> The weakness with the Act is that it appears that there is nothing governing the order in which particular legal criteria, bearing on protection visa claims, are examined. The Act does not appear to *require* the assessment of refugee protection visa criteria (s 36(2)) before other (disentitling) public interest criteria (s 65) are considered. As the Full Court of the Federal Court accepted, in *BCR16*, there is ‘nothing in the legislative scheme to prevent the character criteria to which s 65(1)(a)(ii) refers being considered first. The Minister ... could decide to examine, first, the criteria in public interest criteria 4001’.<sup>33</sup> Accordingly, the Minister would ‘never reach an active consideration of the criteria in s 36(2)(a) and (aa).’<sup>34</sup> Similarly, the exclusionary provisions in art 36(1B) and (1C) could be invoked before any consideration of positive protection obligation criteria. While it can be strongly argued that it is permissible, under international refugee law, to consider art 1F grounds for exclusion before questions of inclusion,<sup>35</sup> the same cannot be said for the much broader disentitling criteria relating to security and community safety.

Again, the concern here is that refugees may be refused protection on character grounds or national security grounds before any active assessment of whether they positively engage protection obligations – and this is not a fanciful concern. There are reported cases where character issues have been considered ahead of other legal criteria.<sup>36</sup> Under the Act, as currently configured, refugees may not (and need not) be identified before broad exclusionary provisions are invoked and removal processes are engaged. Consequently, *non-refoulement* obligations may be breached, precisely because

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<sup>32</sup> [2017] FCAFC 96.

<sup>33</sup> *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96, [43] (Bromberg and Mortimer JJ) (Davies J dissenting), applied in *ALN 17 v Minister for Immigration and Border Protection* [2017] FCA 726, [23].

<sup>34</sup> *Ibid* [44]. As explained in Part VI (below), the public interest criteria permit exclusion on a much broader basis than the limited grounds in art 1F.

<sup>35</sup> See the arguments canvassed in, D Kasor, ‘Inclusion Versus Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say’ (2013) 25(1) *International Journal of Refugee Law* 87.

<sup>36</sup> As noted in *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96, [52] (Bromberg and Mortimer JJ).

the statutory power of removal is now unconditioned by the requirement to consider the *non-refoulement* principle.<sup>37</sup>

## VI RISKY REFUGEES: NATIONAL SECURITY AND COMMUNITY PROTECTION

As outlined earlier, both refugee protection and complementary protection are qualified on the basis that a person will not obtain a protection visa if they are adjudged to be a national security threat or dangerous. Section 36(1B) mandates that a protection visa applicant must not have been assessed as a risk to security by the Australian Security and Intelligence Organisation (**ASIO**) – a specialist intelligence organisation that carries out an assessment of risks to security as defined in its Act.<sup>38</sup> Additionally, s 36(1C) is intended to codify art 33(2) of the Convention. It provides that a criterion for a protection visa is that the applicant is not someone whom the Minister reasonably considers to be a danger to Australia's security, or having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.<sup>39</sup>

Section 36(1B), read in conjunction with the *ASIO Act 1979* (Cth), empowers the Director-General of Security to issue an adverse security assessment on the basis that a non-citizen is a direct or indirect threat to 'security' (as defined, in s 4 of the *ASIO Act*), and should be refused a visa under the *Migration Act 1958*. The meaning of security relates to *national* threats and also Australia's performance of its responsibilities to *foreign* States. Accordingly, it has a broader scope than art 1F,<sup>40</sup> and a broader reach than the corresponding terms in either art 32 or 33(2) of the Convention, which are restricted to *national* security threats/dangers. Indeed, in *Plaintiff M47/2012*, French CJ considered that the scope of security concerns had broadened, as the nature of global terrorist threats evolved. Accordingly, a non-citizen no longer had to pose a direct danger to the deporting country; threats to the security of another State would suffice.<sup>41</sup> In short, a person who poses no risk to Australia may, nonetheless, be subject to a negative security assessment and denied a protection visa.

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<sup>37</sup> See the discussion in Pt IV above.

<sup>38</sup> Subsection 36(1B) was inserted by the *Migration Amendment Act 2014* (Cth), applying to visa applications made on or after 28 May 2014, or made before, but not finally determined as at that date.

<sup>39</sup> Subsection 36(1C) was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (Cth), and is applicable to protection claims made after 16 December 2014.

<sup>40</sup> *M47*, 63 [126] (Gummow J).

<sup>41</sup> *Ibid* 47 [67] (French CJ).

The *ASIO Act* does not set out a threshold level of risk necessary to support an adverse security assessment, but a high state of satisfaction is required given the gravity of the consequences of such a finding. Yet the standard required for art 33(2) is even more exacting. In *M47/2012*, Heydon J ventured that a decision-maker would have to reach a *higher* state of satisfaction in respect of art 33(2) matters, owing to the serious consequences of such a finding, compared with the ‘high’ state of satisfaction required for an adverse security finding, per s 4 of the *ASIO Act*.<sup>42</sup> It follows that the threat to security must be *serious* – substantial rather than negligible – if it is to enliven the disentitling conditions in Arts 32(2) and 33(2) of the Convention,<sup>43</sup> but the threshold for enlivening s 4 is relatively lower. While a negative security risk assessment does not inexorably lead to *refoulement*, it does expose the non-citizen to adverse legal and practical consequences. Where a protection visa is refused those consequences include indeterminate and, arguably, arbitrary detention, contrary to human rights (art 9(1) of the ICCPR) and the risk of *refoulement*.

Second, s 36(1C) draws into the refugee protection criteria, terms lifted from art 33(2), and this permits the denial of a protection visa to a person who has committed a particularly serious crime, which is further defined to mean a serious Australian offence or serious foreign offence.<sup>44</sup> Recall that art 33(2) speaks to refugees’ rights, and the limited circumstances in which those rights can be extinguished. Whereas, s 36(1C) translates into domestic law, criteria on which refugees’ rights can be eclipsed *before* a finding is made on the person’s status as a refugee. Viewed from an international refugee law perspective, this is an unconventional approach to the application of art 33(2) that is contrary to the framework of the Convention – a case of putting the cart before horse.

## VII RISKY REFUGEES: THE ‘CHARACTER TEST’ (S 501 MIGRATION ACT 1958)

Decisions based upon the character test also have consequences for Australia’s protection obligations under international law. The character test serves as a legal foundation for preventing entry or facilitating removal of delinquent or risky non-citizens from the community, permitting the government to exclude non-citizens (including refugees), by reason of their criminal record, past activities, relationships or reputation. Several elements of the character test direct attention to, and intersect with,

<sup>42</sup> Ibid 126 [319].

<sup>43</sup> Ibid [68] (French CJ), citing *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 51 [89]–[90].

<sup>44</sup> As defined in the *Migration Act 1958* (Cth) s 5M.

arts 32 or 33(2) of the Convention, and the references to 'security' within those two norms. The High Court has accepted that there is a clear overlap between s 501(6)(d)(v) (person would 'represent a danger to the Australian community or to a segment of that community') and the basis for expulsion or withdrawal of protection from *refoulement*.<sup>45</sup>

Additionally, following recent amendments to the character test, s 501 now prescribes a broader range of circumstances in which a person does not pass the character test. Section 501 permits the refusal or cancellation of a visa on several new grounds, including those that correlate to art 1F grounds for exclusion. Section 501(6)(ba)(iii) provides that a person does not pass the character test if the minister *reasonably suspects* that they have been *involved* in conduct that would constitute international crimes: the crime of genocide, a crime against humanity, a war crime, torture, slavery, or any other crime of serious international concern.<sup>46</sup> Moreover, s 501(6)(f) also links with art 1F, providing that a person does not pass the character test if the person has, in Australia or in a foreign country, been charged or indicted with, *inter alia*, genocide, a crime against humanity, or war crime. The standard of proof in s 501(6)(ba)(iii) is too low, in view of the standard set out in art 1F, which requires 'serious reasons for considering' that the individual *has committed* the crimes referred to in art 1F(a)-(b) or *been guilty of* the acts referred to in art 1F(c). This unique evidentiary standard has been interpreted as more exacting than a 'reasonable suspicion' test. In *Al-Sirri v Secretary of State for the Home Department* the United Kingdom Supreme Court stated that 'serious reasons' is stronger than 'reasonable grounds' and that 'considering' is stronger than 'suspecting'. Therefore, 'there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is.'<sup>47</sup> Agreeing with the UNHCR, the Supreme Court stated that the exclusion clause must be restrictively interpreted and cautiously applied.

The character test goes much further than the enumeration of grounds that purport to 'pick up', or give effect to, international refugee law's exclusionary grounds. This clearly has the potential to limit refugees' access to protection visas and asylum in Australia. The problem of legislative overreach can be illustrated by reference to

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<sup>45</sup> M47, 37 [40] (French CJ), [191] (Hayne J), [380] (Crennan J).

<sup>46</sup> A *reasonable suspicion* is not an exacting threshold to overcome: it 'lies on the spectrum between certainty and irrationality' but in order to avoid arbitrariness it sits 'not too close to irrationality': *Goldie v Commonwealth* (2002) 117 FCR 566, 569 (Gray and Lee JJ). The relevant state of mind may be reached without proof on the balance of probabilities: *George v Rockett* (1990) 170 CLR 104, 115-116.

<sup>47</sup> [2012] UKSC 54, [69]-[75]. See also *Ezokola v Canada* [2013] SCC 40, [101] where the Canadian Supreme Court also accepted something more than 'reasonable grounds for suspecting', was required.



s 501(6)(aa)-(ab) which extends the character test to embrace non-citizens convicted of a criminal offence while in, during or after an escape from, immigration detention, or the act of escaping itself.<sup>48</sup> In these circumstances a non-citizen ‘fails’ the character test automatically, regardless of the gravity of the crime, sentence imposed, or danger they present to the community. Consequently, criminal offences committed while in detention, are not as confined as either the offences provided for in art 1F, or the security-related terms in arts 32 and 33(2) of the Convention.

In *WASB v Minister for Immigration*, Barker J rejected an argument that the term ‘offence’, in s 501(6)(aa), should be read narrowly and consistently with international law obligations.<sup>49</sup> So, contrary to international refugee law, any criminal law infractions can activate visa refusal and cancellation powers, and serve to justify the exclusion of refugees from protection. Accordingly, non-citizens who are not excludable pursuant to art 1F can be denied a protection visa and rendered vulnerable to removal for comparatively minor offences, such as property damage. Again, although refusal of a protection visa does not inescapably lead to a person’s removal from Australia, it can lead to indefinite immigration detention if the Minister chooses not to exercise discretionary powers and take ameliorating steps.

A relevant example is the case of *NBNB v Minister for Immigration and Border Protection*.<sup>50</sup> The Minister had refused protection visas to a group of refugees, all of whom had serious mental health issues, who had committed criminal offences while in detention.<sup>51</sup> NBNB had spat on an official working at the detention centre, while four others had acted in concert in what was effectively an organised riot. Each applicant was a refugee, but had been denied a visa to enter Australia. The Federal Court held that the Minister’s decision to refuse visas to this group of refugees was defective, owing to a failure to consider relevant mandatory considerations, namely ‘critical legal consequences of his decisions’.<sup>52</sup> Those consequences included indefinite detention and, further, that Australia owed protection obligations to the refugees and that ‘refusal of a visa represented a refusal to honour those obligations’.<sup>53</sup> Accordingly, for

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<sup>48</sup> *Migration Act 1958* (Cth) s 501(1)-(aa) — conviction for crimes committed while in immigration detention — and s 501(ab) — offence contrary to s 197A (a detainee must not escape from immigration detention).

<sup>49</sup> (2013) 217 FCR 292, 301-302 [38]-[43].

<sup>50</sup> (2014) 220 FCR 44 (*NBNB*).

<sup>51</sup> Pursuant to s 501(6)(aa) Migration Act that permits visa refusal where a criminal offence is committed in immigration detention or during or after an escape from immigration detention. *NBNB* has spat on an official working at the detention centre, four others had in concert, engaged in a riot.

<sup>52</sup> *NBNB*, 78 [126].

<sup>53</sup> *Ibid*.

the purposes of exercising power under s 501, the decision-maker is obliged to consider the plight of a refugee in detention, and to take into account the legal and practical consequences of the decision to refuse a visa (the real possibility of indefinite detention, by operation of the Act).<sup>54</sup>

Another case of note is that of *Minister for Immigration and Border Protection v Le*.<sup>55</sup> Le had been accepted as a Convention refugee,<sup>56</sup> and had entered Australia lawfully on a Refugee (Vietnamese) Permit in 1984.<sup>57</sup> Ms Le's husband, and dependants, obtained Australian citizenship, but Ms Le had not. Relevantly, she also had never been granted a refugee protection visa. More than thirty years after her arrival as a refugee, Le's visa was cancelled on character grounds. Le had trafficked drugs and, therefore, she had a 'substantial criminal record' for the purposes of s 501(6)(a) and (7). At first instance, the Court held that Le had acquired accrued rights under international law, including the benefit of *non-refoulement*, as Australia had accepted her as a refugee in 1984. Furthermore, the Court found that the Minister was legally obliged to consider whether the decision to cancel Le's visa would lead to a breach of the *non-refoulement* obligation.<sup>58</sup>

The Full Court of the Federal Court found that Australia's *non-refoulement* obligations to the respondent were not a mandatory consideration for the Minister when taking action, pursuant to s 501(2), in Le's case. This was because Le had not had a protection visa cancelled, and because seeking a refugee protection visa was *theoretically* an option available to her. Therefore, whether Le's removal to Vietnam would breach Australia's *non-refoulement* obligations, or whether there were some other personal factors (such as ill-health) that precluded removal as soon as reasonably practicable, were matters to be considered at a later date.<sup>59</sup>

The decision of the Full Court in *Le* reveals the labyrinthine features and complexity of the Act. It was critical to the Full Court's decision that the Australian government conceded there was no legal impediment to Le lodging a protection visa application.<sup>60</sup> Certainly, the Court's advertence to the spectre of a prospective protection visa

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<sup>54</sup> *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513, 519 [18]-[19]. See also *COT15 v Minister for Immigration and Border Protection (No 1)* (2015) 236 FCR 148.

<sup>55</sup> (2016) 244 FCR 56 (*Le*).

<sup>56</sup> *Ibid* [25].

<sup>57</sup> *Ibid*.

<sup>58</sup> *Le v Minister for Immigration and Border Protection* (2015) 237 FCR 516, 528 [47]-[48] (Logan J).

<sup>59</sup> *Le*, [41], [65].

<sup>60</sup> *Ibid* [41].

application is, legally, accurate, but this serves to mask the fact that a future protection visa application would be a futile exercise. Logically, it would be doomed to failure on character grounds. Indeed, any other finding would appear specious: to find that Ms Le satisfied refugee protection visa requirements would be wholly inconsistent with the prior adverse decision about her character, the negative finding which had led to visa cancellation. The effect of *Le* is to permit the deferral of consideration of the legal and practical consequences of an adverse visa decision for a refugee (*assuming* an application is lodged). During such time, the visa applicant is subject to mandatory detention.

Finally, it is important to acknowledge and appreciate that it is commonplace for immigration detainees to develop mental health problems and/or become frustrated due to prolonged and indeterminate detention pending administrative decision-making and removal.<sup>61</sup> There is an increased propensity for people to act out of character or engage in anti-social and criminal conduct as a result of the length and circumstances of their detention.<sup>62</sup> A striking example is *MZZYO v Minister for Immigration and Citizenship*, a case concerning a stateless person with a well-founded fear of persecution in Iran.<sup>63</sup> The process of refugee status determination was protracted and, consequently, the applicant was held in immigration detention for twelve months before he first offended, causing public property damage. He subsequently committed a violent offence, cutting an immigration official with a small knife. Medical evidence showed that he became depressed, frustrated and angry while incarcerated.<sup>64</sup> Seemingly borne out of frustration with the ordeal of prolonged and indeterminate detention, the commission of three criminal offences while in detention is perhaps comprehensible, if not excusable. Relevantly, the visa applicant was a refugee, with a history of suffering physical mistreatment and discrimination in Iran and no history of prior offending, who had been deprived of his liberty for over a year, ostensibly for processing purposes.

The policy of mandatory detention for unlawful non-citizens produces circumstances, including indeterminate detention that can enervate refugees who may be particularly

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<sup>61</sup> There is a large body of research on the relationship between the detention of asylum seekers in Australia and detainees health and wellbeing. See, M Bull et al, 'Sickness in the System of Long-Term Immigration Detention' (2013) 26(1) *Journal of Refugee Studies* 47.

<sup>62</sup> D Mercurio and F Millevoi, 'Out of Character: the impact of the 2011 amendments to the character test' (2013) 35(7) *Bulletin (Law Society of South Australia)* 36, 36-37, citing the sentencing remarks of Hulme J in *R v Chenarjaafarizad* [2013] NSWSC 388, [58] and the observations of Southwood J in *Habib Urahman v Semrad* [2012] NTSC 95, [32].

<sup>63</sup> *MZZYO v Minister for Immigration and Citizenship* (2013) 214 FCR 68.

<sup>64</sup> *Ibid* 70 [7]-[10].

vulnerable. This increases the likelihood that they will act out of character, because experiencing the ordeal of detention (and attendant uncertainties) can lead to new health problems or exacerbate underlying problems associated with a person's experiences at home or in transit to Australia. This circumstance is compounded by the application of the character test. Sub-sections 501(6)(aa)-(ab), uniquely, focus on non-citizen *detainees* who offend, and these provisions contain a much lower threshold for activation compared to relevant international refugee law standards that permit states to refuse or revoke refugee protection.

## VIII CONCLUSIONS

At the end of World War II, States came together and recognized the need to protect those fleeing persecution. The humanitarian impulse informing the Convention was tempered with a concern that surrogate States should not become a refuge for the undeserving, or be exposed to dangers presented by refugees considered to be a security risk or threat to the safety of the host community. The purpose of art 1F is to exclude the perpetrators of heinous acts and serious crimes the benefit of refugee protection. Given the serious consequences of exclusion that clause must be applied cautiously and pursuant to a fair and robust status assessment process based on clear and credible evidence. By contrast, arts 32 and 33(2) deal with expulsion of, and withdrawal of protection from, *recognized* refugees who pose a prospective and serious threat to the host state. Again, these Articles must be applied carefully and cautiously, given the seriousness of expulsion of a refugee and withdrawal of refugee protection. Other international human rights instruments, including the ICCPR and CAT, provide additional forms of protection. While the Convention contemplates legitimate exceptions to the principle of *non-refoulement*, under human rights law the return of an individual to a country where there is a risk of significant harm (including torture) is absolutely prohibited.

Piecing together the refugee protection regime in Australia is, as this article has explored, challenging for several reasons. First, there is disconformity between domestic and international law relating to refugee status. As currently configured, domestic laws in Australia erect a convoluted and overlapping set of substantive qualifications to both refugee and complementary protection. The wide scope of the domestic, exclusion, provisions extends well beyond the reach of international norms governing exclusion (art 1F), expulsion (art 32) and the withdrawal of refugee protection (art 33(2)). Second, under the Act, decision-makers must reach a very modest level (or state) of satisfaction before certain exclusionary provisions are activated. That is, the requisite standard of proof is demonstrably lower under

domestic law, compared with international law standards that regulate ‘risky’ refugees who pose a danger to the host state. Third, the assessment of cases involving ‘risky’ refugees, is insufficiently rigorous and is characterized by high levels of political interference and control, a lack of transparency, and, frequently, an absence of independent administrative review and accountability.

The substantive restrictions on protection, and procedural deficiencies, are encased in a disjointed statutory regime that permits all the exclusionary and disempowering issues to be dealt with before the subject of inclusion. This is problematic, precisely because the Act appears to expose non-citizens to *refoulement* due to the operation of s 197C. For the reasons outlined, extant political safeguards against *refoulement* are inadequate and in need of urgent revision.



## How to Avoid 'Summoning the Demon': the Legal Review of Weapons with Artificial Intelligence

Damian Copeland and Luke Reynoldson\*

### I SUMMONING THE DEMON

Elon Musk famously referred to the development of artificial intelligence (AI) as 'summoning the demon'.<sup>1</sup> His concern is shared by many;<sup>2</sup> however, it has not deterred the research and development of AI. International corporations such as Google<sup>3</sup> and IBM<sup>4</sup> are investing heavily in AI to capitalise on increasingly powerful computers that process enormous volumes of data to make decisions for commercial, scientific and medical purposes.<sup>5</sup> As AI is revolutionising civil sectors with its speed, accuracy and efficiency, for the same reasons, its military applications are the subject of State research and development. For example, Australia's Defence Science and Technology Group is studying the military applications of AI with autonomous communications nodes, unmanned aerial systems (UAS) and sub-surface vessels.<sup>6</sup>

Within this environment, the development of 'Lethal Autonomous Weapon Systems' or 'LAWS', that is, weapons with AI, is an increasingly likely proposition. While in the authors' opinion the prospect of 'Terminator' style AI weapons is unlikely, the use of AI in weapons will occur incrementally, relieving humans of roles where fatigue and speed of decision making are limitations. Weapons with AI that are capable of

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<sup>1</sup> J Paire, 'Interview with Elon Musk, SpaceX and Tesla CEO' (Interview at the Massachusetts Institute of Technology AeroAstro Centennial Symposium, 24 October 2014) 1:01:22 <<http://aeroastro.mit.edu/videos/centennial-symposium-one-one-one-elon-musk>>.

<sup>2</sup> See, eg, the 2016 open letter from AI and Robotic Researchers including E Musk, S Hawking and S Wozniak to the UN calling for a ban on autonomous weapons that are beyond meaningful human control: *Autonomous Weapons: An Open Letter From AI & Robotics Researchers* (28 July 2015) Future of Life Institute <<https://futureoflife.org/open-letter-autonomous-weapons>>.

<sup>3</sup> See generally Google's DeepMind projects.

<sup>4</sup> See generally IBM's Watson project.

<sup>5</sup> See generally Yunhe Pan, 'Heading toward Artificial Intelligence 2.0' (2016) 2(4) *Engineering* 409.

<sup>6</sup> Department of Defence, Defence Science and Technology Group, *Autonomous Systems* <<https://www.dst.defence.gov.au/research-area/autonomous-systems>>.

‘machine learning’<sup>7</sup> and making targeting decisions, such as the identification, tracking, selection and attacking of targets, will inevitably follow.

The development of LAWS has been the subject of international debate since 2014, under the auspices of the United Nations Convention on Certain Conventional Weapons (CCW).<sup>8</sup> The UN has sought the input of States and non-governmental experts to consider the issues raised by LAWS and the basis of possible international law regulation. The CCW will move to the formal ‘Group of Governmental Experts’ in late 2017. While this debate is ongoing, the development of AI is expanding to include more capable machine learning and the development of artificial neural networks.

An important question for States developing such capabilities is how can they ensure that they avoid ‘summoning the demon’ by developing weapons with AI that are both lawful and are used lawfully.

All States share an international law obligation to undertake a legal review of new weapons. William Boothby argues that this review obligation ‘flows logically from the truism that States are prohibited from using illegal weapons, means and methods of warfare or from using weapons, means and methods of warfare in an illegal manner.’<sup>9</sup> The purpose of the legal review is to ‘prevent the use of weapons that would violate international law in all circumstances and to impose restrictions on the use of weapons that would violate international law in some circumstances.’<sup>10</sup> While not uniformly practised by States, the obligation to legally review new weapons is an important, internally regulated, check and balance to ensure that their use in armed conflict is lawful. The importance of this obligation is particularly heightened by the lack of a specific treaty regulating weapons with AI. The unique nature of such weapons raises some difficult challenges for States seeking to legally review them, and in particular ensuring that the weapon will act in a manner that is reliable and lawful. These review challenges include determining the scope, methodology, standards of compliance and

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<sup>7</sup> Machine learning ‘gives computers the ability to learn without being explicitly programmed’: see A Samuel, ‘Some Studies in Machine Learning Using the Game of Checkers’ (1959) 3(3) *IBM Journal of Research and Development* 210.

<sup>8</sup> For a background to LAWS, see The United Nations Office at Geneva, *Background - Lethal Autonomous Weapons Systems*, The United Nations Office at Geneva <[http://www.unog.ch/80256EE600585943/\(httpPages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument)>.

<sup>9</sup> W Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2009) 341.

<sup>10</sup> ICRC, ‘A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977’ (2006) 88(863) *International Review of the Red Cross* 933.



the translation of International Humanitarian Law (IHL) rules into code and algorithms.

This article will consider these challenges of the legal review process for a weapon with AI, noting that if a review is unable to be completed, then such a weapon cannot be used in armed conflict without significant risk that the using State may breach its international legal obligations. This article also proposes the development of an IHL testing and learning loop to assist with the legal review process by assessing the ability of the weapon with AI to comply with the relevant IHL rules.

## II WHAT IS AI AND HOW CAN IT BE WEAPONISED?

The concept of AI relates to 'the ability of machines to understand, think and learn in a similar way to human beings'.<sup>11</sup> Since its establishment as a field of research in 1956, the study of AI has advanced significantly, particularly concerning 'machine learning'. While this term is defined as 'giving computers the ability to learn without being explicitly programmed',<sup>12</sup> in practice it is achieved through the development of algorithms that can learn and make predictions on data.<sup>13</sup>

To progress the pursuit of computers replicating human beings' ability to think and learn, studies have been undertaken on biological neural networks including the human brain and nervous system.<sup>14</sup> These biological neural networks have been emulated in a reduced form with advanced statistical models that use different learning algorithms, known as 'artificial neural networks'.<sup>15</sup> As an AI tool, artificial neural networks provide one of the most advanced means of dealing with complex problems.<sup>16</sup>

The development of AI operating systems with machine learning ability and artificial neural networks continues to progress, in part by State-based research aimed at exploiting the military applications of AI. AI has significant potential to benefit weapons through, among other things, its speed of decision making, indefatigability and reduced human input requirements. The speed of AI decision-making capabilities allows decisions to be made in circumstances that would not otherwise be achievable by a human operator. It is this same logic that has, for example, led to the installation

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<sup>11</sup> Pan, above n 5, 410.

<sup>12</sup> Samuel, above n 7.

<sup>13</sup> M Vahdat et al, 'Can machine learning explain human learning?' (2016) 192 *Neurocomputing* 14.

<sup>14</sup> S Walczak and N Cerpa, *Artificial Neural Networks* (Academic Press, 2003) 632.

<sup>15</sup> Ibid 632-633.

<sup>16</sup> Ibid.

of close-in weapon systems (**CIWS**)<sup>17</sup> on naval vessels to defend against incoming anti-ship missiles. AI operating systems by their very nature do not suffer from some inherent human limitations, such as fatigue or boredom. This development has clear implications for weapons that utilise a surveillance or reconnaissance function. Further, the human resources required to operate complex weapons could be significantly reduced by an AI operating system.

However, there are limitations with AI that would currently detract from its successful utilisation in weapons. The fidelity of speech, image, facial and video recognition are such limitations that could impact upon target identification and the distinction between civilians and combatants. Given these limitations, in the authors' opinion, the development of weapons with AI will not initially involve new weapons per se but rather AI enhancements to existing weapon.

### III WHAT IS THE CURRENT LEGAL REVIEW PROCESS?

The legal review process, described by the International Committee of the Red Cross (**ICRC**) in their 2006 'Guide to the Legal Review of New Weapons, Means and Methods of Warfare',<sup>18</sup> follows a two-part test. This test was first espoused by the International Court of Justice in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.<sup>19</sup> The approach, referred to as the 'normal review process' for the purpose of this article, considers both the general and specific legal prohibitions and restrictions against which a State must analyse the 'normal or expected use'<sup>20</sup> of a weapon. Legal prohibitions and restrictions are sourced from the customary international law and treaty law applicable to the reviewing State. They can be categorised as providing two different types of regulation in that 'specific' prohibitions and restrictions are primarily concerned with regulating types of weapons,<sup>21</sup> whereas the 'general' prohibitions and restrictions are primarily concerned with regulating the effects of weapons. In particular, the general prohibitions include prohibitions against the use of weapons that; cause superfluous injury or unnecessary

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<sup>17</sup> Such as the American Phalanx CIWS, Dutch Goalkeeper CIWS or Russian AK-630.

<sup>18</sup> ICRC, above n 10.

<sup>19</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 51.

<sup>20</sup> ICRC, *Commentary to Additional Protocol One of the Geneva Conventions of 1949* (Rapporteur of Committee III O.R. XV, CDDH/215/Rev.1) [30]-[31].

<sup>21</sup> Types of weapons regulated by specific prohibitions and regulations include, for example, biological weapons, chemical weapons and anti-personnel mines.

suffering,<sup>22</sup> have indiscriminate effects,<sup>23</sup> or cause widespread, long-term and severe damage to the natural environment.<sup>24</sup>

This normal review process, however, relies on the assumption that the weapon user will use the weapon lawfully. This assumption is appropriate as States, particularly those party to the First Additional Protocol to the Geneva Conventions (**AP1**), are subject to a range of measures intended to ensure compliance with the rules of the Geneva Conventions and their Additional Protocols. These include the dissemination and study of the rules by members of their armed forces,<sup>25</sup> the imposition of duties upon military commanders to prevent and, where necessary, to suppress breaches of the rules by persons under their control<sup>26</sup> and the requirement of States to ensure that legal advisors are available to military commanders at the appropriate level.<sup>27</sup>

It also relies on an assumption that all relevant empirical information relating to the weapon, including military, technical, health, and environmental data<sup>28</sup> will be available for consideration during the review process. The challenge this poses for weapons with AI (that are capable of machine learning) is that the AI must be able to convey the reasoning behind its decisions and actions in an understandable way to the legal reviewer.

A weapon that has not or cannot be legally reviewed is unable to be used in armed conflict without the using State placing itself at significant risk of breaching its international legal obligations. The question is therefore whether the normal review process, including the reliance on the presumption of lawful weapon use, is appropriate for the review of weapons with AI which not only make decisions independently of their human operators but also learn how to solve new problems. If not, how can the review process be improved to provide States with sufficient legal analysis to ensure that their development and use of weapons with AI is lawful?

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<sup>22</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 35(2).

<sup>23</sup> *Ibid* art 51(4).

<sup>24</sup> *Ibid* arts 35(3) and 55.

<sup>25</sup> *Ibid* art 83. Article 83 also requires military authorities who assume responsibilities under AP1 during an armed conflict to be fully acquainted with its rules.

<sup>26</sup> *Ibid* art 87.

<sup>27</sup> *Ibid* art 82.

<sup>28</sup> ICRC, above n 10, 945.

#### IV POLICY ISSUES IN THE LEGAL REVIEW OF WEAPONS WITH AI

The legal review of a weapon with AI is unable to rely on the same presumption of lawful weapon use that a review of a weapon without AI can. Accordingly, the essential feature of a legal review of a weapon with AI is an assessment of whether the weapon will act in a manner that is reliable and lawful. To be able to make such an assessment, it may be necessary for the reviewing State to create a review methodology suited to the specific features or capabilities of a weapon with AI. The State will also likely have to determine, as a matter of policy, its approach to the following issues.

##### A *What is the Scope of the Legal Review?*

States are unlikely to legally review all aspects of a weapon's operation that are enabled by AI and would review only those aspects that have direct or indirect IHL consequences. For example, a UAS may employ AI to only perform certain pilot functions, such as take-off, navigation and landing. This aspect of the UAS is unlikely to be the subject of a legal review unless the navigation is relevant to the UAS targeting capability. If, however, the UAS relied upon AI to locate, identify and select a person or object for lethal targeting, these aspects are certainly reviewable on the basis that they require the application of IHL.

##### B *What is the Standard of the Legal Review?*

This question concerns the acceptable standard that the legal reviewer will apply to an aspect of the weapon's capabilities. Standards of accuracy are a relevant factor to the legal review of a weapon on the basis that it is unlawful to employ a weapon that is, by nature, indiscriminate.<sup>29</sup> It is possible that certain aspects of the weapon's capability, for example, the ability to distinguish between a civilian object such as a truck and a military objective such as a tank, lend themselves to the application of a standard. A State may require a weapon with AI to undertake the distinction between certain lawful and unlawful targets to do so with a minimum standard of accuracy. This standard may be influenced by the weapon's normal or expected use. For example, a weapon designed for use in an environment where the risk of civilian collateral damage is low, such as under the water, may be assigned a lower standard based on the risk compared to a weapon expected to be used in an urban environment where the risk of collateral damage is significantly higher.

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<sup>29</sup> Art 51(4) of AP1 provides examples of indiscriminate attacks.

C *What is the Weapon's Normal or Expected Use and what are the Most Likely Scenarios in which the Weapon will Perform its Normal or Expected Use?*

The definition of the weapon's normal or expected use will follow the State's reason for developing the weapon with AI. If an existing human operated weapon is modified to enable autonomous operation, then the normal or expected use will follow the employment of the weapon by a human operator. The description of the normal or expected use will be an important basis for the creation of the weapon AI operating system. Similarly, the likely scenarios for the use of the weapon will inform the development of its AI.

D *What are the IHL Tasks or Decisions that the Weapon with AI will be Required to Undertake?*

It is possible, early in the development of a weapon capability, to anticipate the likely IHL-related tasks or decisions that a weapon with AI will be required to undertake. This determination may be undertaken during an initial legal review within the process of capability development. For example, a weapon that is required to distinguish between a civilian and a combatant must be able to comply with the basic rule of distinction in art 48 of AP1 and consequently be able to undertake the two-limb test in art 52(2) of AP1 to identify when an object is a 'military objective.' Alternatively, it may be determined that the weapon will be required to identify only certain, readily identifiable objects, such as aircraft, tanks or submarines with unique physical and electronic signatures, as military objectives. All other objects are civilian by default.

E *What is the Standard of IHL Compliance for each IHL Task or Decision?*

This question differs slightly from the preceding question as certain IHL obligations require the application of subjective, distinctly human decision making. For example, Article 57 of AP1 requires those who plan or decide upon an attack to do 'everything feasible' to verify that the objectives of an attack are neither civilians nor civilian objects and are not subject to special protections. If a weapon can use AI to undertake this level of planning it will need to understand what standard of diligence is sufficient to do 'everything feasible.' Similarly, a weapon with the ability to distinguish between civilians and combatants, as required by art 48 of AP1, must be able to, in cases of doubt, consider the person to be civilian as required by art 50(1) of AP1. The State must therefore determine the necessary threshold of doubt to program the AI and, for a system capable of machine learning, establish the minimum standard of compliance.

F *What are the Anticipated or Likely Operating Environments in which the Weapon will Operate and what are the Factors that will Affect its Ability to make the IHL Decisions?*

The utility of any weapon will be influenced by its ability to operate in a range of physical environments. The capacity of a weapon with AI to perform its role will be dependent on its ability to do so in a complex environment where unforeseen factors will affect the weapon's operating system. Environmental factors such as smoke and other obscuration of sensors, extremes of weather, electromagnetic interference, cyber-attack and physical interferences could confuse sensors and present unanticipated problems. The weapon with AI must, therefore, be tested in an operating environment that replicates that for which it is being designed. Such testing may determine that, while the weapon is capable of functioning, the AI operating system may itself have difficulty. Such a limitation in the operating system, if unable to be rectified, would be addressed as a necessary limitation in the legal review of the weapon.

G *What is the Method of Review for the Legal Review of the Operating System?*

Weapons with AI are unlikely to be new in terms of their means of causing an effect, that is, they are likely to be the same as or similar to weapons that are employed entirely by human operators. In this regard, it is possible that such weapons will already be 'in service' with the State that is developing the AI enhancement of the weapon and so already be the subject of an earlier legal review. Accordingly, the primary focus of the legal review is the AI operating system that augments the function of the weapon and its ability to do so in a lawful manner.

H *Addressing New Methods of Use*

The conventional scope of the legal review of any weapon is bound by the 'normal or expected use.' This means that any weapon for which a new method of use is developed should be the subject of a further legal review. In the case of a weapon with AI with the capacity for machine learning, it is possible that the weapon itself will identify a new method of achieving a weapon effect. The performance specifications for any weapon with machine learning should include the requirement for it to self-identify the fact that it can achieve its effect in a manner that is outside the normal or expected use that was the basis of its legal review.

## V AN APPROACH TO THE LEGAL REVIEW OF WEAPONS WITH AI

The legal review of a weapon with AI will require two steps. First, the review will consider the lawfulness of the weapon in the context of the 'normal' review process described by the ICRC. This step requires a consideration of the general and specific IHL prohibitions and regulations relevant to the weapon in the context of its normal or expected use. This does not, however, address the weapon's decision-making ability. The second step of the review process must therefore, assess the ability of the weapon with AI to make lawful IHL decisions that are necessary or incidental for it to perform its normal or expected use.

IHL does not prescribe the method of legal review and therefore a State is at liberty to determine its review methodology. The review process should allow the State to assess the range of IHL decisions that the weapon is required to make across the spectrum of operating circumstances and environments. This process, in the authors' opinion, should involve an incremental process that allows the legal review to consider the individual IHL decisions, the data inputs that inform those decisions and the standards of compliance that the weapon's AI will achieve.

### A *Assessment of the IHL Decision Making of a Weapon with AI*

It is important that the IHL decision making of a weapon with AI is assessed in a systematic and multi-disciplinary manner. A systematic approach will allow the identification of gaps or deficiencies in the weapon's AI decision making ability and allow these to be considered by a range of experts such as engineers, computer programmers, AI scientists, military operators and legal advisors. The legal review will ultimately assist the State to determine whether some or all of the normal or expected uses of the weapon can be employed in armed conflict or whether aspects of the weapon's capabilities require modification to ensure the weapon's lawful operation. Moreover, the review will assist in the identification of gaps in the AI operating system's ability to make lawful decisions that require either human input or human decision making.

The product of the policy issues above will allow a reviewing State to identify the individual IHL decisions, standards and environmental influences that affect the AI's decision making. These will enable the State to assess the ability of the weapon's AI enhanced operating system to lawfully perform individual aspects of the weapon's normal or expected use in its likely operating environments.

## VI DEVELOPING AN IHL TESTING AND LEARNING LOOP

States may consider the development of a testing and learning loop that both permits an assessment of the ability of the weapon with AI to perform its role lawfully and provides data for the AI to enhance its decision making. Specifically, the IHL testing and learning loop would assess the ability of the weapon to comply with the relevant IHL rules or obligations in the context of its 'normal or expected use'. These scenarios would be designed to replicate the weapon's normal or expected tasks and the IHL decisions that it may be required to make in the anticipated operational and environmental scenarios.

The testing loop would consist of different progressive testing levels, ranging from code, virtual and physical testing, and would assess the individual IHL tasks in each of the scenarios at each level of the loop. The progressions would permit the early identification of limitations in the weapon's IHL decision making ability and either 'train' the AI by returning it to a previous level for re-assessment, or impose operational limitations on the weapon's decision making by programming the requirement for human input to make the relevant decision.

This process may be best illustrated by way of an example. Assume that a weapon was designed to attack a range of military objectives, to locate and attack enemy armoured vehicles, but during testing it was discovered that the weapon was unable to accurately distinguish between certain armoured vehicles and civilian vehicles with particular physical dimensions. In these circumstances, the weapon developers may determine that the weapon should be programmed to not attack certain armoured vehicles in circumstances where there are civilians within the battle space, or otherwise to require a human decision to be made before attacking such armoured vehicles.

The progressive phases of the IHL testing and learning loop could include:

***Code Review Phase:*** in which the initial programming is reviewed to ensure that it identifies individual IHL rules and principles and how they are to be applied in the context of the weapon's normal or expected use. For example, the weapon programming may determine that the weapon is required to make decisions that require the application of 'precautions in attack' under art 57 of AP1. The programming of this rule would require the State's position on standards of compliance for rules to be codified. This phase of review would provide a starting point for the subsequent phases of review.



***Virtual Review Phase:*** in which the individual IHL tasks or decisions are represented within a virtual environment that simulates the normal or expected use of the weapon in the likely operating environments across the range of possible scenarios that the weapon may be employed in. The weapon's AI operating system would interact with the virtual environment to make decisions that can be assessed. An AI operating system with machine learning ability would build its database to help inform and refine its ability to make certain decisions in different circumstances based on its experience in the virtual environment. A failure or deficiency in the ability of the operating system's IHL decision making in the virtual environment would likely require the operating system to loop back to the code review phase to address the issue before it is tested again virtually. The virtual review phase would also allow the weapon developers to make initial assessments of the weapon's IHL decision making ability and what aspects of the normal or expected use may need to be restricted or altered to ensure that any limitations are mitigated through either programming or human input.

The result of the virtual review phase will be an understanding of which IHL decisions the weapon's AI operating system: (a) is capable of completing to the standard required by the State; (b) is not capable of making, but can be achieved through either programming restrictions or augmented human input; and (c) is unable to make and should not be developed without further developments in the weapon's AI ability.

***Physical Review Phase (controlled environment):*** if the weapon's AI operating system demonstrates in the virtual review phase that it is capable of lawfully completing the weapon's normal or expected use, it will be ready to progress to a controlled physical environment. The physical review phase in a controlled environment is an important stage in the IHL loop as it assesses the ability of the operating system using the data provided by the weapon's actual sensors and hardware. The same IHL tasks or decisions that would be assessed in the controlled physical environment would be consistent with those likely to occur in operating environments and scenarios, although without complexities such as live adversaries. This process may reveal deficiencies with the weapon's sensors that require remediation. It may also demonstrate that, despite the results of the virtual review phase, the weapon's sensors are unable to provide the AI operating system with the necessary data to make a lawful IHL decision to the standard identified by the State.

***Physical Review Phase (uncontrolled environment):*** The purpose of the physical review phase in an uncontrolled environment is to test the weapon's ability to make lawful IHL decisions in uncontrolled circumstances that have not been foreseen. This review phase would coincide with the operational test and evaluation process that would be undertaken by the State's capability development organisation responsible for the procurement of the weapon. The aim of this phase is to test the IHL decision-making in circumstances that will be as close to a realistic operational environment as possible, including deliberate interference designed to replicate enemy actions. The product of this review is the final assessment of the IHL decision making ability of the weapon to contribute to the first step of the legal review (the 'normal review' described above).

***Operational Review:*** The legal review obligation remains during the life of the weapon system. This is because, in the authors' opinion, there is potential that the role or use of the weapon will change beyond what was initially contemplated during the legal review. Therefore, the State should consider a legal review process that addresses new uses of a weapon after it has already been authorised for use in armed conflict. This will entail a further legal review of the new methods of use. This operational review is particularly pertinent to weapons with AI that are capable of learning. Such weapons may identify tactics or methods of warfare that are unforeseen and may not manifest during the legal review process. In this case, either the weapon or its human operator should identify the need for a further legal review.

## VII CONCLUSION

The legal review of weapons is an important IHL obligation to ensure that States only field lawful weapons. However, the legal review of weapons with AI is a complex task. This article has proposed a possible review methodology that permits a progressive test and evaluation of each of the specific IHL decisions required for the weapon to perform its normal or expected use. The 'IHL testing and learning loop' is intended to analyse the weapon's AI decision making in progressively complex environments and to address deficiencies through further development, restriction of the weapon's decision making ability or additional requirements for human input.

Ultimately, however, the onus is on States to develop their own review methodology that addresses the unique characteristics of AI and machine learning. This will require multi-disciplinary input to both design and conduct the legal review. Weapons with AI will need to be developed with the legal review in mind. Lawyers, policy advisors, programmers, computer scientists, roboticists and a range of experts will play a role in the legal review process. States will need to ensure that a weapon is able to perform its role in a lawful manner and also ensure that it does so reliably. If a State is unable to do this, then it is unable to lawfully employ the weapon with AI in armed conflict.



## R2P in the Age of Trump

Kevin Boreham

### I INTRODUCTION

The Responsibility to Protect (**R2P**) principle has been at the forefront of international debate about ‘humanitarian intervention’ since it was adopted by the UN World Summit in 2005. Yet the mass atrocity crimes which R2P was intended to prevent or stop continue to be committed with impunity, most notably in Syria. R2P has inspired some potentially useful practical developments in conflict prevention but its debatable status as an emerging norm has not advanced since its adoption. The new Trump Administration is following the principle of ‘America First’, reflected in a highly transactional foreign policy approach, which seems ill-suited to decisive acts of international altruism.

This article seeks to interpret the current status of R2P as political principle and norm of international law, and to assess its chances of practical application while Donald Trump remains in office. The article concludes that, while it is difficult to foresee circumstances in which R2P might be applied by the Trump Administration, the unpredictability of the Administration’s policy-making leaves open the possibility of the President being moved to action by a sufficiently dire situation of the sort that R2P was devised to address.

### II THE DEVELOPMENT OF R2P

The Responsibility to Protect as enshrined in the 2005 World Summit outcome states that:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. ...

139. ... In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, ... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>1</sup>

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<sup>1</sup> 2005 *World Summit Outcome*, GA Res 60/1, UNGAOR, 60<sup>th</sup> sess, Agenda items 46 and 120, UN Doc A/RES/60/1 (24 October 2005) [138]-[139].

Elaboration and implementation of R2P has made some subsequent progress. Former UN Secretary-General Ban Ki-Moon formulated the 'three pillars' approach to implementing R2P. His 2009 Report on implementing R2P said:

The provisions of paragraphs 138 and 139 of the Summit Outcome suggest that the responsibility to protect rests on the following three pillars:

Pillar one: The protection responsibilities of the State  
 Pillar two: International assistance and capacity-building  
 Pillar three: Timely and decisive response.

There is no set sequence to be followed from one pillar to another, nor is it assumed that one is more important than another. ... The State ... remains the bedrock of the responsibility to protect, the purpose of which is to build responsible sovereignty, not to undermine it.<sup>2</sup>

R2P has been implemented in the UN system by several measures:

[T]he creation of a joint office in New York for the Special Adviser for the Prevention of Genocide and Special Adviser on the Responsibility to Protect, the development of a 'convening mechanism' that would allow these two officials to bring Under-Secretaries-General of the UN together in crisis situations, and the establishment of a UN-wide 'contact group' on R2P.<sup>3</sup>

There are three current initiatives which would move forward the implementation of R2P.

In 2011, Brazil launched the concept of 'Responsibility While Protecting' (**RwP**) which called for a renewed focus on prevention, sequencing the three pillars, a set of principles to guide the Security Council's decision-making on the use of force for R2P purposes, a judicious approach to decision-making based on the facts of each case and a new mechanism to improve accountability by ensuring that those who act to enforce a mandate from the Security Council remain answerable to it.<sup>4</sup>

The former UN Secretary-General, Ban Ki-Moon, launched the Human Rights Up Front (**HRuF**) initiative in 2013 to change the UN's response to crises situations. HRuF requires the UN system to be alert to deteriorating human rights situations and

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<sup>2</sup> 'Report of the Secretary-General', *Implementing the responsibility to protect*, UN GAOR, 63<sup>rd</sup> sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) [11]-[12].

<sup>3</sup> JM Welsh, 'Norm Contestation and the Responsibility to Protect' (2013) 5 *Global Responsibility to Protect* 365, 366.

<sup>4</sup> AJ Bellamy, *The Responsibility to Protect: A Defense* (Oxford University Press, 2015) 189.

supports early warning and better coordination, including by generating political support for early warning and preventive action.<sup>5</sup>

In October 2015, the President of the General Assembly launched a Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes. The Code of Conduct, originally a French initiative, contains a pledge to support timely and decisive Security Council action in situations involving atrocity crimes, as well as a pledge not to vote against credible draft Security Council resolutions aimed at preventing or ending these crimes. At the time of the launch, 92 UN member States had committed themselves to the Code of Conduct.<sup>6</sup>

Spencer Zifcak assesses that:

[w]hile none of these measures [such as HRuF] has been explicitly linked to R2P, every one is consistent with its conceptual and ethical underpinnings. It can fairly be said, in this sense, that while R2P may have faded from the international diplomatic lexicon, its schema and commitments remain influential.<sup>7</sup>

The progress of implementation of R2P was reviewed at a high level thematic panel discussion at the UN General Assembly in February 2016. The panel discussion, titled 'From Commitment to Implementation; Ten Years of the Responsibility to Protect', was held to discuss the creation, development and implementation of R2P ten years after its adoption by the 2005 Summit.

The former Australian Foreign Minister Gareth Evans, who is credited with the development of R2P as Co-Chairman of the International Commission on Intervention and State Sovereignty (which first propounded the principle) said during the panel discussion that the responsibility to protect 'was designed for pragmatists, not purists'. He claimed that the concept of the Responsibility to Protect had succeeded in many of its aims. Those included becoming a normative force capable of building a North-South coalition for change, an institutional catalyst to deliver protection in practice and a framework for effective reaction when prevention failed.

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<sup>5</sup> Office of the High Commissioner for Human Rights, 'Summary of the Expert Group Meeting on Economic, Social and Cultural Rights and Social Unrest, Conflict and Early Warning' (Media Release, 8-10 July 2015).

<sup>6</sup> M Lykketoft, 'Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes' (Address delivered at the Launch of the Code of Conduct regarding Security Council action against genocide, crimes against humanity and war crimes, 23 October 2015).

<sup>7</sup> S Zifcak, 'What Happened to the International Community? R2P and the Conflicts in South Sudan and the Central African Republic' (2015) 16(1) *Melbourne Journal of International Law* 52, 84.

The responsibility to protect had been a change agent in the areas of civilian and military response capabilities, yet more needed to be done.<sup>8</sup>

The UN Deputy Secretary-General, Jan Eliasson said that, 'too often, there is no responsibility and there is no protection' but acknowledged that there had been some progress:

Through successive General Assembly dialogues, Member States had agreed that prevention was at the core of the United Nations agenda, while several international and regional organizations were meanwhile engaged in preventing downward spirals towards systematic violence. Success had been seen in Côte d'Ivoire, Guinea and Kenya, 'but our collective response to the Syrian crisis has been a catastrophic failure and the situation in South Sudan is deeply troubling'.<sup>9</sup>

Notwithstanding this conceptual and practical progress, there remain significant questions about R2P's status in international law and whether is it the subject of any effective political consensus.

### III THE STATUS OF R2P AS A NORM OF INTERNATIONAL LAW

The proponents of R2P do not claim that it has gained the status of a norm of customary international law, but believe that it has the status of an emerging norm.<sup>10</sup> The International Commission on Intervention and State Sovereignty which first introduced the concept into the international discourse on humanitarian intervention said that:

While there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle – which in the Commission's view could properly be termed 'the responsibility to protect'.<sup>11</sup>

The 2004 Report to the then Secretary-General of the High Level Panel on Threats, Challenges and Change stated that there was an '*emerging norm*' that there is a collective

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<sup>8</sup> "“Responsibility to Protect” Remains Worthy, yet Elusive, Concept in Decade After World Leaders Pledge to End Atrocities, General Assembly Hears' (Media release, GA/11764, 26 February 2016).

<sup>9</sup> Ibid.

<sup>10</sup> G Evans, *The Responsibility to Protect* (Brookings, 2008) 52.

<sup>11</sup> G Evans, M Sahnoun et al, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Report, International Commission on Intervention and State Sovereignty, December 2001) [15].



international responsibility to protect' (emphasis added).<sup>12</sup> Citing this reference, the Secretary-General in his subsequent report *In Larger Freedom*, said, 'I strongly agree with this approach.'<sup>13</sup>

Gareth Evans assesses that, following the endorsement of R2P by the 2005 UN World Summit, 'R2P had the pedigree to be described, at the very least, as a broadly accepted international norm, and maybe even one with the potential to evolve further into a full-fledged rule of customary international law'.<sup>14</sup>

An emerging norm is one which 'does not yet satisfy the requirements for the creation of custom but is regarded as likely to do so over time'.<sup>15</sup> R2P was not framed in the World Summit Outcome in terms which are likely to satisfy these requirements over time.

Carsten Stahn's analysis of the formulation of R2P as an 'emerging norm' in the High Level Panel report was that it was 'misleading':<sup>16</sup>

The passage on the responsibility of the international community is framed in ... cautious terms. It is difficult to imagine what legal consequences noncompliance by a political body like the Security Council [with R2P in a specific case] should entail. ... The uncertainty surrounding the consequences of noncompliance ... sheds doubt on the notion that responsibility to protect was meant to be an emerging hard norm of international law at all, instead of 'soft law' or a political principle.<sup>17</sup>

Mehrdad Payandeh agrees that 'As a multifaceted and holistic concept, the responsibility to protect lacks specific normative content and does not "indicate to a designated audience that certain things must henceforth be done or forborne."' <sup>18</sup>

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<sup>12</sup> United Nations, 'A more secure world: our shared responsibility' (Report, UN Doc A/59/565, United Nations High-level Panel on Threats, Challenges and Change, December 2004) [203].

<sup>13</sup> UN Secretary General, *In larger freedom: towards development, security and human rights for all*, UN GAOR, 59<sup>th</sup> sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) [135].

<sup>14</sup> Evans, above n 10, 52.

<sup>15</sup> GD Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis, 2<sup>nd</sup> ed 2011) 49.

<sup>16</sup> C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *American Journal of International Law* 99, 110.

<sup>17</sup> Ibid 109, 118.

<sup>18</sup> M Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking' (2010) 35 *Yale Journal of International Law* 469, 471, quoting WM Reisman, 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application' in R Wolfrum and V Roben (eds) *Developments of International Law in Treaty Making* (Springer, 2005) 15, 16.

Stahn assessed that the World Summit Outcome left ‘considerable doubt concerning whether and to what extent states intended to create a legal norm’.<sup>19</sup> Jennifer Welsh’s analysis is that the World Summit Outcome ‘makes clear that R2P is a political commitment, rather than a new legal obligation. ... Moreover, the diplomacy surrounding the Summit reveals that states did not want or intend to create additional legal obligations.’<sup>20</sup>

#### IV R2P AS A POLITICAL PRINCIPLE

Gareth Evans has claimed that R2P is a ‘conceptual breakthrough’ which ‘enable entrenched opponents to find new ground on which to more constructively engage’.<sup>21</sup> While this is a reasonable claim, important actors continue to contest R2P as a guiding political principle.

R2P has been accepted generally by Western states as a political commitment. At the thematic panel discussion in 2016,<sup>22</sup> the representative of the United Kingdom, noting how the concept was at the centre of his country’s recent Strategic Defence and Security Review, said it was a moment to take stock, look forward and consider ways to strengthen available mechanisms.<sup>23</sup> The representative of the European Union called for the mainstreaming of the principle in related activities of the United Nations such as peacekeeping operations.

Western and some non-Western States regretted the slow and uncertain implementation of R2P. The representative of Rwanda, on behalf of the Group of Friends of the Responsibility to Protect, said important strides had been made, but he shared concerns with a number of delegates about the international community’s collective failure to fully and effectively uphold the principle.<sup>24</sup>

The UK representative ‘echoed another common question heard during the discussion, asking when the world would raise the responsibility to protect in

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<sup>19</sup> Ibid 101.

<sup>20</sup> Welsh, above n 3, 375.

<sup>21</sup> Evans, above n 10, 38-42.

<sup>22</sup> ‘Responsibility to Protect’, above n 8.

<sup>23</sup> Ibid.

<sup>24</sup> The Group of Friends of the Responsibility to Protect is an informal cross-regional group of 50 UN member states that share a common interest in R2P and in advancing the norm within the UN-system. The Group of Friends is co-chaired by the governments of the Netherlands and Rwanda.

<sup>24</sup> ‘Responsibility to Protect’, above n 8.

Burundi.<sup>25</sup> Similarly, many delegates expressed alarm that, while the principle had been in place for more than a decade, far too many atrocities were still being perpetrated around the world. Some highlighted the situation in Syria in that regard, calling for the international community to generate the political will necessary to end human rights violations related to that conflict.<sup>26</sup>

A number of speakers disagreed. The representative of Sudan called the panel discussion a ‘monologue’ and not a dialogue.<sup>27</sup> The representative of China said it was clear that different opinions remained on the concept and its application. The responsibility to protect, he said, was still a concept, not a norm of international law, and the views of Member States must be taken into account when considering its application. He warned against ‘expansion or willful interpretations’ of the concept and especially against its abuse as a pretext for intervention in the affairs of any State.<sup>28</sup>

As one prominent US commentator has written ‘These twin responsibilities spell nothing less than conditional sovereignty.’<sup>29</sup> Thomas Weiss has commented that:

‘[T]he historical trajectory, as captured in paragraphs 138 and 139 of the World Summit’s outcome, has been extremely fastmoving. ... As a result, the four characteristics of a sovereign state - territory, authority, population, and independence – spelled out in the 1934 Montevideo Convention on the Rights and Duties of States have been complemented by another, a modicum of respect for human rights. State sovereignty seems less sacrosanct today than in 1945. Richard Haass proposes a bumper sticker, ‘abuse it and lose it.’<sup>30</sup>

These claims for R2P make some states nervous about what they see as a platform for Western intervention, including the use of force. These concerns were greatly aggravated by the outcome of the Security Council’s mandate for intervention in Libya in 2011. The Russian Federation, in the February 2016 panel discussion, noted that 2016 marked the fifth anniversary of the bombing of Libya, an action which many had called the first practical application of the responsibility to protect.<sup>31</sup> However, he

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> A Slaughter, ‘Security, Solidarity and Sovereignty: the Grand Themes of UN Reform’ (2005) 99 *American Journal of International Law* 619, 628.

<sup>30</sup> TG Weiss, ‘R2P after 9/11 and the World Summit’ (2006) 24 *Wisconsin International Law Journal* 741, 744.

<sup>31</sup> ‘Responsibility to Protect’, above n 8.

said, that action had in fact plunged Libya into chaos and there had been no attempt by the Secretariat or by States since then to analyse what had happened.<sup>32</sup>

Security Council resolution 1973 of 17 March 2011, which referred to the Responsibility to Protect, gave a specific mandate for the use of force in Libya:

To take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.<sup>33</sup>

It quickly became apparent, as the *New York Times* reported on 28 March, that the US and its European allies had 'given it the most expansive possible interpretation, amounting to an all-out assault on Libya's military.'<sup>34</sup> President Obama at a press conference with French President Sarkozy on 27 May in Deauville, admitted that 'meeting the U.N. mandate of civilian protection cannot be accomplished when Gaddafi remains in Libya directing his forces in acts of aggression against the Libyan people.'<sup>35</sup>

Russia, which abstained from the vote on SCR 1973, together with China, Brazil, Germany and India, denounced the expansion of the Western intervention. Foreign Minister Lavrov said on 28 March 2011 that 'intervention by the [Western] coalition in what is essentially an internal civil war is not sanctioned by the UN Security Council resolution'.<sup>36</sup>

The divisions over the Libya intervention have been a major obstacle to effective UN Security Council action on the Syrian civil war. Russian President Medvedev said on 20 June 2011 that Russia would use its veto in the UN Security Council to prevent the adoption of a resolution on Syria similar to the one passed against Libya. Medvedev said that 'What I will not support is a resolution similar to 1973 on Libya, because I

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<sup>32</sup> Ibid.

<sup>33</sup> SC Res 1973, UN SCOR, 6498<sup>th</sup> mtg, UN Doc S/RES/1973 (17 March 2011).

<sup>34</sup> E Schmitt, 'US Gives Its Air Power Expansive Role in Libya', *The New York Times* (online), 28 March 2011 <<http://www.nytimes.com/2011/03/29/us/29military.html?scp=1&sq=US%20gives%20its%20air%20power%20expansive%20role%20in%20Libya&st=cse>>.

<sup>35</sup> The White House Office of the Press Secretary, 'Remarks by President Obama and President Nicolas Sarkozy of France After Bilateral Meeting' (Press Release, 27 May 2011) <<https://obamawhitehouse.archives.gov/the-press-office/2011/05/27/remarks-president-obama-and-president-nicolas-sarkozy-france-after-bilat>>.

<sup>36</sup> K Fahim and DD Kirkpatrick, 'Rebel Advance Halted Outside Qaddafi's Hometown', *The New York Times* (online) 28 March 2011 <<http://www.nytimes.com/2011/03/29/world/africa/29libya.html>>.

am convinced that a good resolution has been turned into a piece of paper to cover a senseless military operation.’<sup>37</sup>

Concern about NATO's use of force to implement SCR 1973 permeated the annual dialogue on R2P in the UN General Assembly on 12 July 2011. China made a very pointed statement that ‘no party should engage in regime change or get involved in civil war in the name of protecting civilians. The implementation of the [relevant] Security Council resolution must be strict and accurate.’<sup>38</sup> Brazil noted that, ‘the use of force [in Libya] has made a political solution more difficult to achieve.’<sup>39</sup> Mexico referred to the divisive effect that the Libyan crisis was having on the international community, while Kenya said that the experience with implementation of R2P so far ‘has been at best worrisome, and at worst, deeply disconcerting.’<sup>40</sup>

Alex Bellamy, one of the most influential advocates of R2P, claims ‘that R2P has achieved ... genuine and resilient international consensus’.<sup>41</sup> However, any substantive discussion of R2P throws up the divisions which were aggravated by the Libyan intervention and have prevented effective UN Security Council action on Syria.

Jennifer Welsh sums up the continuing contestation over R2P:

[The] move from a horizontal system of sovereign states that demonstrate mutual respect, to a hierarchical system where conduct is subject to oversight and punishment by an unspecified and unaccountable agent of the ‘international community’, with its own legal personality and purposes ... has resulted in efforts to downplay the remedial responsibility of the international community, and the conditionality inherent in R2P’s understanding of sovereignty, and instead to emphasize the continued salience of principles and processes that emphasize domestic jurisdiction, consent, and multilateral cooperation.<sup>42</sup>

## V R2P AND PRESIDENT TRUMP

The ‘America First’ foreign and security policy of the Trump Administration constitutes a rebuttal of R2P as either an emerging norm which would bind all States

<sup>37</sup> ‘Medvedev Opposes Libya-style resolution on Syria’, *Sputnik International* (online), 20 June 2011 <<https://sputniknews.com/russia/20110620164716194/>>.

<sup>38</sup> K Boreham, ‘Libya and the ‘Responsibility to Protect’ doctrine’ (26 August 2011) ONLINE opinion <<http://www.onlinecopinion.com.au/view.asp?article=12522>>.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Bellamy, above n 4, 1.

<sup>42</sup> Welsh, above n 3, 394.

or an effective political principle. The President has been particularly clear that the United States will not undertake any interventions in other countries. In his major foreign policy speech during the Presidential Campaign he said that:

We're a humanitarian nation, but the legacy of the Obama-Clinton interventions will be weakness, confusion and disarray, a mess. ... Instead of trying to spread universal values that not everybody shares or wants, we should understand that strengthening and promoting Western civilization and its accomplishments will do more to inspire positive reforms around the world than military interventions.<sup>43</sup>

John Bellinger, Legal Adviser to the State Department under the Bush Administration, correctly says that the US Government has never recognized a right of humanitarian intervention.<sup>44</sup> It should also be acknowledged that the Obama Administration was cautious about R2P. Samantha Power, author of *A Problem from Hell: America and the Age of Genocide*,<sup>45</sup> a chronicle of failures by successive US presidents for their failures to prevent acts of genocide, as a National Security Council staffer lobbied Obama to endorse R2P in the speech he delivered when he accepted the Nobel Peace Prize in 2009. He declined to do so. Obama generally did not believe a President should place American soldiers at great risk in order to prevent humanitarian disasters, unless those disasters pose a direct security threat to the United States.<sup>46</sup>

The Obama Administration was willing to give careful political support to R2P. The 2010 National Security Strategy which was endorsed by President Obama, said that:

The United States and all member states of the U.N. have endorsed the concept of the 'Responsibility to Protect.' In so doing, we have recognized that the primary responsibility for preventing genocide and mass atrocity rests with sovereign governments, but that this responsibility passes to the broader international community when sovereign governments themselves commit genocide or mass atrocities, or when they prove unable or unwilling to take necessary action to prevent or respond to such crimes inside their borders. ... In the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and—in certain

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<sup>43</sup> President Trump, "'America First' Foreign Policy Speech' (Speech delivered at the Mayflower Hotel, Washington DC, 27 April 2017) <<http://time.com/4309786/read-donald-trumps-america-first-foreign-policy-speech/>>.

<sup>44</sup> J Bellinger, 'What Was the Legal Basis for the US Air Strikes Against Syria?' *Lawfare* (online) 6 April 2017 <<https://www.lawfareblog.com/what-was-legal-basis-us-air-strikes-against-syria#>>.

<sup>45</sup> S Power, *A Problem from Hell: America and the Age of Genocide* (Harper, 2002).

<sup>46</sup> J Goldberg, 'The Obama Doctrine' (2016) 317(3) *The Atlantic Monthly* 70, 73.

instances—military means to prevent and respond to genocide and mass atrocities.<sup>47</sup>

The Trump Administration's foreign policy by contrast seems to be oriented firmly and entirely away from international altruism as a political principle. Commentators, whether supporters or critics of President Trump, agree that his foreign policy is 'nationalist and transactional'<sup>48</sup> and that he has an 'isolationist, protectionist agenda'.<sup>49</sup>

A more positive assessment, prior to Trump's election victory asserted that his 'vision of the world — and his conception of statecraft' ... reflects a fairly coherent theory of international relations. It's realist, transactional, and Machiavellian'.<sup>50</sup> In practice the Machiavellian aspect has not been apparent, and the realism could be mistaken for bluster, but the transactional nature of Trump's foreign policy agenda has been clear.

The President has set out that agenda in his most important speeches. In his inaugural address the President declared that '[f]rom this moment on, it's going to be America First. ... We will seek friendship and goodwill with the nations of the world – but we do so with the understanding that it is the right of all nations to put their own interests first.'<sup>51</sup>

In his address to a joint session of Congress on 28 February 2017 the President declared that '[m]y job is not to represent the world. My job is to represent the United States of America. (Applause.)'<sup>52</sup>

In his first major foreign policy speech, to the Arab Islamic American Summit in Riyadh on 21 May, the President assured Arab and Islamic leaders that, '[w]e are not here to lecture—we are not here to tell other people how to live, what to do, who to be, or how to worship.'<sup>53</sup> As Elliott Abrams notes in a recent article '[t]he president

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<sup>47</sup> The White House, *National Security Strategy* (May 2010).

<sup>48</sup> SM Patrick, 'Trump and World Order' (2017) 96(2) *Foreign Affairs* 52, 52.

<sup>49</sup> D de Luce, 'Trump Sticks to a Protectionist, Isolationist Script in First Big Speech' *Foreign Policy* (online) 1 March 2017 <<http://foreignpolicy.com/2017/03/01/trump-sticks-to-a-protectionist-isolationist-script-in-first-big-speech/>>.

<sup>50</sup> R Brooks, 'Donald Trump Has a Coherent, Realist Foreign Policy', *Foreign Policy* (online) 28 April 2017 <<http://foreignpolicy.com/author/rosa-brooks/>>.

<sup>51</sup> President Trump, 'The Inaugural Address' (Speech delivered at the Inauguration of the 45<sup>th</sup> President of the United States', Washington DC, 20 January 2017).

<sup>52</sup> President Trump, '2017 Joint Address' (Joint Session of Congress, Washington DC, 28 February 2017) <<https://www.whitehouse.gov/joint-address>>.

<sup>53</sup> President Trump, 'Speech to the Arab Islamic American Summit' (Riyadh, 21 May 2017) <<https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit>>.

seems to have a deep aversion to telling friendly authoritarians how to run their countries, and that view will be difficult to displace'.<sup>54</sup>

The President's determination to pursue American national interests and refrain from promoting American values has been reinforced by senior members of his Administration. His National Security Adviser, General H R McMaster, and the head of his National Economic Council, Gary Cohn, published an op-ed column in the *Wall Street Journal* following the President's first foreign trip, in which they said that:

The president embarked on his first foreign trip with a clear-eyed outlook that the world is not a 'global community' but an arena where nations, nongovernmental actors and businesses engage and compete for advantage. ... Rather than deny this elemental nature of international affairs, we embrace it.<sup>55</sup>

In much-reported comments, Secretary of State Rex Tillerson told State Department employees that:

[I]f you condition our national security efforts on someone adopting our values, we probably can't achieve our national security goals or our national security interests. If we condition too heavily that others must adopt this value that we've come to over a long history of our own, it really creates obstacles to our ability to advance our national security interests, our economic interests.<sup>56</sup>

The President told the Arab and Islamic leaders in Riyadh that:

We are adopting a Principled Realism, rooted in common values and shared interests. Our partnerships will advance security through stability, not through radical disruption. ... And, wherever possible, we will seek gradual reforms – not sudden intervention. ... We must seek partners, not perfection—and to make allies of all who share our goals.<sup>57</sup>

Richard Haass, the President of the US Council on Foreign Relations, recently wrote that:

The Trump administration has shown a clear preference for not involving the United States in the internal affairs of other countries. ... But there is a danger in taking this approach too far, since prudent nonintervention can all too easily

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<sup>54</sup> E Abrams, 'Trump the Traditionalist' (2017) 96(4) *Foreign Affairs* 10, 16.

<sup>55</sup> WA Galston, 'A Turning Point for Trumpinology Many thought a strong staff could steady the ship of state. No longer', *Wall Street Journal* (online), 6 June 2017 <<https://www.wsj.com/articles/a-turning-point-for-trumpinology-1496792460>>.

<sup>56</sup> RW Tillerson, 'Remarks to US Department of State Employees' (State Department, Washington DC, 3 May 2017) <<https://www.state.gov/secretary/remarks/2017/05/270620.htm>>.

<sup>57</sup> President Trump, above n 53.



shade into active support for deeply problematic regimes. Careless relationships with ‘friendly tyrants,’ as such rulers used to be called, have burned the United States often in the past, and so it is worrying to see Washington take what look like the first steps down such a path again with Egypt, the Philippines, and Turkey.<sup>58</sup>

It is frequently stated that Trump’s foreign policy has turned out to be more conventional and less disruptive than his campaign rhetoric foreshadowed. The realities of governing, it is said, have produced ‘a fairly familiar Republican foreign policy’,<sup>59</sup> and a ‘return to convention’.<sup>60</sup> Reassuring as that may be to foreign policy professionals, it offers little hope for R2P interventions; the Republicans have never been proponents of humanitarian intervention in any form.

A few international law experts have tried to argue that the US airstrike against a Syrian airbase on 7 April 2017 were an exercise of a right to humanitarian intervention, given the Security Council’s inability to act against Syria’s use of chemical weapons. Harold Hongju Koh, the Legal Adviser to the State Department under President Obama, supported by Associate Professor Jens David Olin of the Cornell Law School, has suggested that the missile attack might meet his criteria for humanitarian intervention as an exception to the prohibition on the use of force in art 2.4 of the *Charter of the United Nations*.<sup>61</sup>

There are three objections to this analysis. Firstly, the Administration, following this ‘dizzying turnabout’<sup>62</sup> from Trump’s America First policy, has given no consistent indication that the missile attacks are part of any ongoing international activism which would support a norm of humanitarian intervention. Although the Administration has suggested that it may act again against any chemical weapons attack, the *Washington Post* has reported that ‘the Trump administration has struggled to explain how the attack ... fits into its broader policy on Syria and the Middle East’.<sup>63</sup> The *Post* quotes

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<sup>58</sup> RN Haass, ‘Where to Go From Here’ (2017) 96(4) *Foreign Affairs* 2, 6.

<sup>59</sup> E Abrams, ‘Trump the Traditionalist’ (2017) 96(4) *Foreign Affairs* 10, 10.

<sup>60</sup> M Landler, ‘From America First to a More Conventional View of US Diplomacy’, *The New York Times* (online) 1 March 2017 <[https://www.nytimes.com/2017/03/01/us/politics/national-security-foreign-policy-white-house.html?\\_r=0](https://www.nytimes.com/2017/03/01/us/politics/national-security-foreign-policy-white-house.html?_r=0)>.

<sup>61</sup> JD Olin, ‘I Agree with Harold Koh’, *Opinio Juris* (online), 8 April 2017 <<http://opiniojuris.org/2017/04/08/i-agree-with-harold-koh/>>.

<sup>62</sup> B Hounsell, ‘Trump’s Syria Whiplash’, *Politico*, 6 April 2017 <<http://www.politico.com/magazine/story/2017/04/trumps-syria-whiplash-214997>>.

<sup>63</sup> D Nakamura, ‘Continued bombing by Assad shows limits of single U.S. attack’, *Washington Post* (online), 8 April 2017 <[https://www.washingtonpost.com/politics/continued-bombing-by-assad-shows-limits-of-single-us-attack/2017/04/08/1c70cb1a-1c83-11e7-bcc2-7d1a0973e7b2\\_story.html?utm\\_term=.6ffd13532a4a](https://www.washingtonpost.com/politics/continued-bombing-by-assad-shows-limits-of-single-us-attack/2017/04/08/1c70cb1a-1c83-11e7-bcc2-7d1a0973e7b2_story.html?utm_term=.6ffd13532a4a)>.

an administration official as saying that 'We don't yet know if this is a one-time effort or not. We can't predict what may or may not happen'.<sup>64</sup>

The President described the sarin gas attack in definitely emotional terms:

Yesterday's chemical attack, a chemical attack that was so horrific in Syria against innocent people, including women, small children and even beautiful little babies, their deaths were an affront to humanity. . . . These heinous actions by the Assad regime cannot be tolerated. The United States stands with our allies across the globe to condemn this horrific attack and all other horrific attacks, for that matter.<sup>65</sup>

Other Administration leaders were usually more careful to describe the US response in terms of US self-interest. Secretary of State Tillerson said:

Our missile strike in response to his [Assad's] repeated use of banned weapons was necessary as a matter of U.S. national security interest. We do not want the regime's uncontrolled stockpile of chemical weapons to fall into the hands of ISIS or other terrorist groups who could, and want to, attack the United States or our allies.<sup>66</sup>

However, there were a couple of occasions when even Tillerson and UN Ambassador Nikki Haley seemed to be carried away with the emotions generated by the sarin attack. Ambassador Haley, speaking in the Security Council, said that 'when the United Nations consistently fails in its duty to act collectively, there are times in the life of States that we are compelled to take our own action'.<sup>67</sup> Tillerson in comments at a memorial in Italy to Italian victims of the Germans in World War II said 'we re-dedicate ourselves to holding to account any and all who commit crimes against the innocents anywhere in the world'.<sup>68</sup>

The New York Times reported that, 'In truth, it was an emotional act by a man suddenly aware that the world's problems were now his. . . . The President's advisers

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<sup>64</sup> Ibid.

<sup>65</sup> T Schleifer and D Merica, 'Trump: 'I now have responsibility' when it comes to Syria', *CNN* (online) 6 April 2017 <<http://edition.cnn.com/2017/04/05/politics/trump-syria-comments-response/index.html>>.

<sup>66</sup> RW Tillerson, 'Remarks at a Press Availability' (G-7 Foreign Ministers' Meeting, Lucca, Italy, 11 April 2017) <<https://www.state.gov/secretary/remarks/2017/04/269693.htm>>.

<sup>67</sup> P Engel, 'The Trump administration seems to be hinting at military intervention in Syria', *Business Insider* (online), 6 April 2017 <<https://www.businessinsider.com.au/trump-syria-intervention-2017-4>>.

<sup>68</sup> RW Tillerson, 'Remarks at the Wreath Laying for The Commemoration of the Sant'Anna di Stazzema Massacre', (G-7 Foreign Ministers' Meeting, Lucca, Italy, 10 April 2017).

insisted his decision was guided by strategic considerations. They were clearly uncomfortable with the suggestion that Mr. Trump was acting impulsively.<sup>69</sup>

Secondly, such an intervention by the United States, acting alone and without consulting the Security Council, is likely to provoke the fears of China, Russia and some states in the Third World about the great power motives behind the notion of humanitarian intervention.

Thirdly, the air strike was not preceded by any careful application of criteria for a military intervention, such as those strongly recommended by ICISS,<sup>70</sup> or in fact any policy consideration at all. The application of criteria for an intervention is one of the key aspects of R2P, intended to legitimise military intervention, but only as a last resort.

However, that is the way Trump is likely to act. In his testament to his own success, 'The Art of the Deal', Trump says that, 'More than anything else, I think deal-making is an ability you're born with. ... It does take a certain intelligence, but mostly it's about instinct'.<sup>71</sup> The President's reliance on his instinct has become the hallmark of his chaotic Presidency. The Syrian airstrike shows us how his instinct might lead him in other humanitarian crises.

Abrams noted that if Trump's support for authoritarian leaders changes 'it will be because Trump comes to see human rights abuses not as abstractions but as instances of raw and obvious inhumanity – as he saw the killing of children in Syria with sarin gas'.<sup>72</sup> In a particularly scathing analysis Max Boot, who generally writes from a conservative viewpoint, said that 'The Trump doctrine appears to be: The United States reserves the right to use force whenever the President is upset by something he sees on TV'.<sup>73</sup>

A slightly more nuanced, but no more positive or reassuring, interpretation was given by Aaron David Miller and Richard Sokolsky looking back at the first five months of the Trump Administration's foreign policy, assessing that:

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<sup>69</sup> M Landler, 'Acting on Instinct, Trump Upends His Own Foreign Policy', *New York Times* (online), 7 April 2017 <<https://www.nytimes.com/2017/04/07/world/middleeast/syria-attacktrump.html>>.

<sup>70</sup> Evans and Sahnoun, above n 11, 32-37.

<sup>71</sup> D Trump with T Schwartz, *Trump: The Art of the Deal* (Random House, 1987) 45.

<sup>72</sup> Abrams, above n 54, 16.

<sup>73</sup> M Boot, 'The Trump Doctrine Was Written by CNN', *Foreign Policy* (online), 10 April 2017 <<http://foreignpolicy.com/2017/04/10/donald-trumps-incredible-shrinking-syria-intervention/>>.

It seems likely that the pattern set in the early months of the Trump administration isn't going to change dramatically any more than the president himself will undergo some kind of profound transformation. The ... determination to disrupt on issues that either resonate with Trump personally or politically with his base [is] going to continue.<sup>74</sup>

The most that can be said about the airstrike on Syria is that it keeps alive the principle of intervention to respond to mass atrocity crimes, but the aim of R2P was to rationalise and thereby legitimise such interventions as a last resort.

## VI CONCLUSION

Susan Breau's examination of the status of R2P in international law concludes that: 'It is astonishing that within less than two decades it has become a constant feature of the global conversation'.<sup>75</sup> Payandeh agrees that 'The introduction of the responsibility to protect has significantly changed the grammar of political discourse with regard to the prevention of and reaction to massive human rights violations'.<sup>76</sup>

R2P continues to be acknowledged in some cases as the justification for intervention. France grounds the legality of its ongoing intervention in Mali under Operation Serval in R2P.<sup>77</sup>

The concept of RwP offers a way forward. Gareth Evans at the 2016 UNGA panel discussion described it as 'the most viable' of strategies for furthering the implementation of R2P.<sup>78</sup> Hardeep Singh Puri, the Indian Permanent representative to the UN during the Libyan crisis in 2011 agrees:

Should the Libyan experience and political considerations deter us from pursuing RwP? I would say, no. The international community needs to act if a mass atrocity seems likely to take place. In my view, if the concept of R2P is to survive and form the basis of action by the Security Council, it must be anchored in the concept of RwP.<sup>79</sup>

<sup>74</sup> A D Miller and R Sokolsky, 'Why Trump's Foreign Policy Can't Be Stopped', *Foreign Policy* (online), 20 June 2017 <<http://foreignpolicy.com/2017/06/20/why-trumps-foreign-policy-cant-be-stopped/>>.

<sup>75</sup> S Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016) 257.

<sup>76</sup> Payandeh, above n 18, 472.

<sup>77</sup> A Seyedfarshi, 'French Interventionism in the Age of R2P: A Critical Examination of the Case of Mali' (2016) 7(1) *Creighton International & Comparative Law Journal* 2, 5.

<sup>78</sup> 'Responsibility to Protect', above n 8.

<sup>79</sup> H Singh Puri, *Perilous Interventions* (Harper Collins 2016) 208.

Spencer Zifcak, while finding that R2P has been missing in action in the UN's response to mass atrocity crimes in South Sudan and the Central African Republic, nevertheless finds that:

[T]he more that is learnt about R2P's failures and successes; about its plans and their misconceptions; about implementation and its errors; about its politics and conflicting interests; about national, regional, political, economic and cultural differences in its spheres of application; the better will be the chance that practical experience of innovative, astute and diverse forms of international intervention to protect human life will in time develop.<sup>80</sup>

However, the development of R2P and its practical application are unlikely to proceed very far under the Trump Administration's 'America First' policy, even if it is punctuated by episodes of humanitarian response, driven by the President's instincts, such as the airstrike on Syria.

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<sup>80</sup> Zifcak, above n 7, 85.



# Theories of Punishment: A Critical Analysis of Retributive Theory in International Criminal Law

Erin Germantis

## I INTRODUCTION

[Victims] must be atoned for, or there can be no harmony. But how? How are you going to atone for them? Is it possible? By their being avenged? But what do I care for avenging them? What do I care for a hell for oppressors? What good can hell do?

Fyodor Dostoyevsky, *The Brothers Karamazov*

In *The Brothers Karamazov*, Dostoyevsky speaks to a very human desire for moral harmony. He reminds us that harmony is an unattainable want; a fiction born of a yearning to eliminate suffering - and never fully grasped. Ultimately, the suffering of one is not eradicated by the punishment of another, despite our aim to eliminate the wrong that has been caused. Our understanding of wrong and the converse desire to punish the wrongdoer translates into contemporary retributive understandings of international crime and punishment. By answering crime with proportionate justice, retributive theory aids society in cancelling the moral debt owed to victims - a chaotic and frustrated search for harmony. The thesis here advanced, however, is that traditional international legal avenues as they presently stand do not deliver the moral harmony Ivan Karamazov rhetorically demands. Strongly underpinning international criminal law is a retributive theory of justice, a context in which individual perpetrators are punished in proportion to the 'moral magnitude' of their crimes.<sup>1</sup> I suggest that retributive justice in the context of international criminal law relating to genocide does not form a complete basis for society's pursuit of harmony. Due to the enormity of the crime and the social complexities involved in the organic development of genocide, a society subject to genocide cannot be healed through retributive justice alone. The cannibalisation of retributive theory by international criminal law from its national counterpart reminds us that both the ordinary criminal and the extraordinary génocidaire are frustratingly subject to the same penology; whereas in reality, of course, international and national crime are fundamentally different.

This article will explore dissident views of retribution as a penological theory for the crime of genocide and offer solutions as to how a post-genocide context can be

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<sup>1</sup> KM Carlsmith and JM Darley, 'Psychological Aspects of Retributive Justice' (2008) 40 *Advances in Experimental Social Psychology* 193, 194.

addressed using a combination of retributive and restorative mechanisms.<sup>2</sup> We will begin by considering various issues affecting the theoretical application of retributive justice, such as proportionality, the high number of perpetrators involved in crime, inverted social norms associated with genocide, and difficulties surrounding the assessment of genocidal intent within this framework. Secondly, we will consider the more practical issues of retributive theory application and conclude that restorative justice has an important role to play in a post-genocide context. Ultimately, both retributive and restorative efforts must be implemented if society is able to realise any tangible progress following mass atrocity.

## II CRITICISMS OF RETRIBUTIVE THEORY: MASS INVOLVEMENT, PROPORTIONALITY, CULPABILITY

Retributive theory emphasises society's responsibility to punish a criminal wrongdoer in proportion to the gravity of their crime,<sup>3</sup> which becomes problematic in the context of mass atrocity, as perpetrators often constitute a considerable portion of society. While many perpetrators tried at the ad hoc tribunals served as high-ranking leaders during genocide and were prosecuted for their roles accordingly, many low-level perpetrators have also been selected for prosecution. When trying Dražen Erdemović, a Bosnian-Croat soldier tragically caught up in the 1995 Srebrenica massacre, the International Criminal Tribunal for the former Yugoslavia<sup>4</sup> demonstrated the use of court resources to convict a relatively minor individual.<sup>5</sup> Influenced by political considerations, the amount of evidence available, the sizeable number of guilty parties and prosecutor discretion, the ad hoc tribunals arguably do not exhibit a robust retributive function because the majority of wrongdoers escape prosecution altogether. Similarly, if the ad hoc tribunals were drawn from purely retributive sources, selection for prosecution would be based on culpability above any other factors. The *Rome Statute of the International Criminal Court*<sup>6</sup> additionally is 'almost totally silent with respect to the larger policy questions about which potential accused should

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<sup>2</sup> This article focuses on the crime of genocide, however, the author notes that retributive theory also broadly underpins international criminal jurisprudence relating to crimes against humanity and war crimes.

<sup>3</sup> TM Scanlon, 'Punishment and the Rule of Law' in M Tonry (ed) *Why Punish? How Much? A Reader on Punishment* (Oxford University Press, 2011) 161, 165.

<sup>4</sup> *Prosecutor v Erdemovic (Sentencing Judgment)* (International Criminal Tribunal for the former Yugoslavia, Case No IT-96-22-T, 29 November 1996); *Prosecutor v Erdemovic, Judgment* (International Criminal Tribunal for the former Yugoslavia, Case No. IT-96-22-A, 7 October 1997); *Prosecutor v Erdemovic (Sentencing Judgment)* (International Criminal Tribunal for the former Yugoslavia, Case No IT 96-22-Tbis, 5 March 1998).

<sup>5</sup> The author notes that Erdemovi was convicted for crimes against humanity.

<sup>6</sup> Opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).



be pursued by the Prosecutor'.<sup>7</sup> Moreover, a 'random confluence of political concerns' has established only a small handful of ad hoc tribunals, despite numerous instances of mass atrocity around the world throughout history.<sup>8</sup> It would appear that international criminal law, like its national counterpart, does not exist in a political vacuum. Ultimately, a myth of collective innocence is promulgated when only a handful of perpetrators are held accountable for the actions of many.<sup>9</sup>

With its emphasis on appropriate punishment for all wrongdoers, retributive theory becomes difficult to apply in the context of genocide due to the overwhelming number of lives lost and the extent of the damage to survivors. Consider the 1994 Rwandan genocide, for example. It is difficult to assess proportionate punishment for the crimes committed during this atrocity, particularly when considering key actors. Jean-Paul Akayesu, for example, was convicted on nine counts of genocide for his role in the massacres, yet we are left wondering if a life prison sentence is genuinely proportionate to the destruction and loss of life that the Taba mayor was held responsible for. This element of proportionality in sentencing is key to retributive theory. Looking at the Rwandan situation, however, we must question whether proportionality can genuinely be established and, therefore, if retributive theory can robustly withstand criticism in this context.

Is the death penalty, then, the ideal fate of the génocidaire? The 1961 trial of Adolf Eichmann brought to the forefront questions surrounding capital punishment in a country that had previously terminated the practice. Upholding the death penalty regardless, the Israeli Supreme Court held on appeal:

But our knowledge that any treatment melted out to the Appellant would be inadequate – as would any penalty or punishment inflicted on him – must not move us to mitigate the punishment... When, in 1950, the Israel legislature provided the maximum penalty laid down in the law, it could not have envisaged a criminal greater than Adolf Eichmann...<sup>10</sup>

Israel's retreat from an anti-death penalty stance in Eichmann's sentencing demonstrates the 'overwhelming force of retributive sentiments in the rare cases of

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<sup>7</sup> AM Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97(3) *American Journal of International Law* 510, 521.

<sup>8</sup> DM Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2(2) *International Criminal Law Review* 93, 116.

<sup>9</sup> MA Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 37.

<sup>10</sup> *A-G Israel v Eichmann* (1962) 36 ILR 5 (District Court, Jerusalem) 341-2. Eichmann was convicted of war crimes, crimes against humanity, and 'crimes against the Jewish People'.

genocide prosecutions'.<sup>11</sup> Capital punishment is the archetype of retribution, yet we must question if indeed *any* punishment can account for the atrocities committed during the Holocaust. Perhaps this form of compensatory penance is too simple and essentially cheapens the remembrance of the immense suffering endured during this wretched chapter of history. This paradox has no straightforward solution. At the very least, it reveals fundamental flaws in retribution as a theory of justice.

Retributive theory rests on the notion that perpetrators are fully culpable for their actions; that intent can be established or refuted according to the circumstances of the case. In reality, however, 'no device yet invented can dive into the heart and mind of an individual and come up with the exact apportionment of blame and blameworthiness which even a rationalised vengeance called 'solemn justice' demands as a prerequisite to castigation'.<sup>12</sup> It is human to understand the mass killer as clinically insane, taking genuine pleasure in the torture, rape, and death of others. While this assessment is no doubt accurate in certain cases, the vast majority of participants in genocide are ordinary citizens who become involved in widespread violence for an array of reasons. When reporting on the Eichmann trial, Hannah Arendt described this observation as 'the banality of evil'.<sup>13</sup> The 'neither demonic nor monstrous'<sup>14</sup> man became involved in the Nazi party and profited immensely until its demise, 'a regime which itself banalised evil through its bureaucratic apparatus'.<sup>15</sup> The organic, gradual development of a social context in which such violence flourishes is marked by a paradox: terribly grave crimes are committed by individuals with low levels of genocidal intent. By recognising the insane sadist as only a minor player in mass atrocity, we are faced with the alarming reality that genocide is committed, in Arendt's time and ours, largely by the ordinary.

Culpability becomes yet more problematic in an international criminal law context due to the complex nature of collective behaviour and 'universal deviance' observed during periods of genocide.<sup>16</sup> '[C]haracterised by erosion, if not inversion, of basic social

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<sup>11</sup> LS Sheleff, *Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture* (Ohio State University Press, 1987).

<sup>12</sup> S Glueck, 'Principles of a Rational Penal Code' in Michael Tonry (ed) *Why Punish? How Much? A Reader on Punishment* (Oxford University Press, 2011) 71, 74.

<sup>13</sup> J Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (Oxford University Press, 2002) 94.

<sup>14</sup> H Arendt, *The Life of the Mind* (Harcourt, 1978) 4.

<sup>15</sup> A Smeulers and W Werner, 'The Banality of Evil on Trial', in C Stahn and L van den Herik (eds.), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 2010) 30.

<sup>16</sup> Drumbl, above n 9.

norms',<sup>17</sup> genocide is typified by 'a social context [in which] using violence is no longer considered as something illegitimate but rather as something which needs to be done'.<sup>18</sup> Therefore, it is difficult to locate a deviant moral act when traditionally deviant behaviour becomes the norm, and culpability is hence more challenging to assign. Considering the collective social factors at play in the organic development of genocide, it has been suggested that individual perpetrators arguably lack full control over their actions.<sup>19</sup> We recognise that group pressure to conform and the power of collective violence influences the way genocide develops, and encourages mass involvement. An individual and collective identity together form a very human desire to create social bonds and act in concert.<sup>20</sup> The question as to whether individual autonomy should, or even could, override group pressures during genocide arises as a result, or whether gradual change in social behaviour encourages too great a compliance with group mentality which only leads to added indoctrination.<sup>21</sup> This cognitive dissonance<sup>22</sup> is obviously dangerous in the context of collective violence, increasingly rationalising what was once considered immoral behaviour.

Within this upset social framework, Alette Smeulers describes high-level offenders as criminal masterminds, sadists or fanatics.<sup>23</sup> While a developmental examination of the origins of a genocidal leader (for example, Joseph Kony of the Lord's Resistance Army) is an undoubtedly fascinating journey, more nuanced revelations about humanity and the occurrence of genocide are observed in lower-level offenders and bystanders. It is the profiteers and careerists, the followers and conformists, who best demonstrate the difficulty in assigning moral and legal culpability in genocide. By tacitly consenting to the Hutu sadist's actions by quietly complying with the Serbian fanatic's instructions, followers, conformists and bystanders provide the most confronting representation of the génocidaire. Personifying Arendt's 'banality of evil'

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<sup>17</sup> RD Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43(1) *Stanford Journal of International Law* 39, 41.

<sup>18</sup> A Smeulers and F Grünfeld, *International Crimes and Other Gross Human Rights Violations* (Martinus Nijhoff Publishers, 2011) 327-28.

<sup>19</sup> LE Fletcher and HM Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24(3) *Human Rights Quarterly* 573, 607.

<sup>20</sup> DK Gupta, *Path to Collective Madness: A Study in Social Order and Political Pathology* (Praeger, 2001) 73.

<sup>21</sup> RS Baron and NL Kerr, *Group Process, Group Decision, Group Action* (Open University Press, 2003) 110.

<sup>22</sup> A term coined by L Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press, 1957).

<sup>23</sup> For a detailed breakdown of each of Smeulers' typologies, see A Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in A Smeulers and R Haveman (eds), *Supranational Criminology: towards a criminology of international crimes* (Intersentia, 2008) 233-65.

narrative,<sup>24</sup> the low-level offender serves as a reminder of the terribly ordinary nature of those who engage in violence during periods of genocide, and the devastatingly cyclical nature of mass atrocity. If Smeulers' devoted warrior becomes 'convinced by the rhetoric of their own decrees and believe[s] that previous law [has] been swept away',<sup>25</sup> deviance becomes a missing link in retributive theory. These categories of offenders thus pose the most difficulty in advancing retributive justice as a penological theory, as they blur the space in which moral culpability can normally be assigned. In a situation where traditionally deviant behaviour becomes legitimate and morality is upended, we therefore must 'fear those who abide by the law more than those who break it'.<sup>26</sup>

Established retributive theory relies on proportionality and culpability in applying appropriate criminal sanctions. This becomes difficult in the context of genocide due to the *dolus specialis* required under the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>27</sup> as the crime is not committed by a single person, with a single mind. Instead, genocide presents a challenge to traditional retributive theory because the crime itself is sourced from a variety of motives. If 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'<sup>28</sup> are considered to be crimes of genocide, it follows that acts committed in the context of genocide, yet lacking specific intent, will fall short of this definition. Some have suggested that a more fluid and broad interpretation of genocidal intent should apply to perpetrators who may have lacked specific intent during the commission of their crimes, but who committed acts of genocide with an understanding of the consequences of their actions.<sup>29</sup> The present discussion extends on this understanding to suggest that genocidal intent could be assessed by the scope exercised within an individual perpetrator's agency, and thus allow courts greater room to punish the individual as appropriately and accurately as possible.

Take for example a careerist, to borrow Smeulers' typology, who becomes involved in the Rwandan genocide with a view to furthering his own financial situation or professional station within society. Prior to the violence, this example character

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<sup>24</sup> H Arendt, *Eichmann in Jerusalem – A Report on the Banality of Evil* (Penguin, 1963).

<sup>25</sup> Scanlon, above n 3, 170.

<sup>26</sup> Smeulers and Grünfeld, above n 18, 328.

<sup>27</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (**Genocide Convention**).

<sup>28</sup> Genocide Convention, art II.

<sup>29</sup> AKA Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99(8) *Columbia Law Review* 2259-94.

worked as a farmer and had no criminal history. However after the massacres begin, he contributes by delivering arms to others and by locating small, hidden groups of Tutsi and dissident Hutu. He works hard to deliver information concerning these groups to a local leader, and receives a promotion. He also participates directly in the violence by killing an immediate neighbour in order to acquire cattle and other property.

Again using Smeulers' categories, examine an alternative: the compromised perpetrator. This character held a mid-range political office job prior to the genocide and also had an equally clean criminal history. When the violence breaks out, he is required to coordinate large-scale attacks, and provide direction and guidance to Hutu gangs. He carries out his role with precision and regret, motivated by a fear of being labelled dissident. When a significant attack on neighbouring townships is planned, the compromised perpetrator knows that 100 Tutsi individuals are vulnerable in Town A. He also recalls that Town B is home to 200 Tutsi. With full knowledge of the consequences, he provides coordinates for a Hutu gang and directs them towards Town A, resulting in the deaths of 100 people.

In comparing the above scenarios, we see that the careerist is operating at maximum capacity to harm as many people within his vicinity as possible. He actively seeks out opportunities to further his own financial and professional position, and whether or not he believes in the good of his actions, he puts his own desires above the lives of others and does not pause to consider the long-term consequences. The compromised perpetrator provides a contrary example, as his actions cause a greater number of deaths but he nonetheless seeks to minimise overall loss of life. He knowingly signs 100 death warrants in Town A, but preserves 200 other lives.

The above examples display the polarity between a perpetrator using all space available to cause some degree of harm, and a perpetrator using minimal space within a wider scope of agency to cause a greater level of harm. Retributive theory holds that all wrongdoers are to be punished proportionately to the crimes they have committed. Using this methodology, the above compromised perpetrator example would receive a longer prison sentence than the careerist, who held a greater desire to cause harm to others yet did not have the capacity to do so. Retributive theory is therefore arguably restrictive in determining proportionate punishment in the context of genocide. Smeulers considers that by assessing perpetrators within the framework of their criminal typology, courts can more accurately 'attribute criminal responsibility and impose fair and just sentences which match the actual blameworthiness of the individual perpetrators and which do justice to their individual responsibilities within

the collective.<sup>30</sup> Extending on this notion, a critical assessment of perpetrator culpability could involve an examination of their capacity to act compared with the outcome of their actions, combined with an analysis of their criminal typology and its implications, which together form a more balanced and accurate application of retributive theory. As applied currently, however, retributive justice does not adequately grasp the psychosocial factors at work during the development of genocide, which thereby affects a court's ability to fully understand criminal motivation in mass atrocity. By more completely appreciating the reasons behind international crime, we will better understand the génocidaire and apply appropriate sentences using a more nuanced form of retributive theory.

### III CRITICISMS OF RETRIBUTIVE THEORY IN PRACTICE: THE NEED FOR RESTORATIVE JUSTICE

From the above discussion we may consider that current application of retributive justice is not a complete penological theory following genocide. Described as a form of 'sublimated social vengeance', retributive theory has been categorised as a policy founded on 'the hatred of those who commit [genocidal] acts'.<sup>31</sup> It therefore does not contribute towards victim healing or the reconstruction of societies following mass atrocity. With its focus on 'blameworthiness' and the futile pursuit of 'some moral balance', retribution 'remains strongly redolent of religious justice ill-suited to a diverse international community'.<sup>32</sup> Restorative justice can offer positive alternatives.

Restorative justice is often thought to be a less formal approach to righting wrongs,<sup>33</sup> described as 'community-oriented'<sup>34</sup> and concerned broadly with 'restoring victims, restoring offenders, and restoring communities as a result of participation of a plurality of stakeholders'.<sup>35</sup> There is a strong focus on the healing process, efforts seeking to 'attend fully to victims' needs – material, financial, emotional and social'.<sup>36</sup>

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<sup>30</sup> Smeulers, above n 23, 233–34.

<sup>31</sup> Glueck, above n 12, 74.

<sup>32</sup> Sloane, above n 17, 77.

<sup>33</sup> H Zehr and H Mika, 'Fundamental concepts of restorative justice' (1998) 1(1) *Contemporary Justice Review*, 47.

<sup>34</sup> L Keller, 'Seeking Justice at the International Criminal Court: Victims' Reparations' (2007) 29(2) *Thomas Jefferson Law Review* 189, 190.

<sup>35</sup> J Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1, 1.

<sup>36</sup> TF Marshall, *Restorative Justice: An Overview – A Report by the Home Office Research Development and Statistics Directorate* (1999), 6 <<http://fbga.redguitars.co.uk/restorativeJusticeAnOverview.pdf>>.

Processes that rely on a framework of restorative justice, however, often involve victim input, which can potentially push the boundaries of victim control in the situation. The Rwandan *gacaca* courts, for example, involved a series of community-based decisions and brought together victims and perpetrators with a focus on forgiveness. While victims ought to 'have the principal role in defining and directing the terms and conditions of exchange'<sup>37</sup> between themselves and perpetrators, it is in no sense guaranteed that individual victims homogenously desire to face their torturers, rapists or the murderers of their family. 'Individuals who have to deal with the aftermath of horrendous atrocities should not also be robbed of their independence to decide when to forgive or not', for the simple reason that '[f]orced forgiveness is insensitive, intrusive and morally isolating.'<sup>38</sup> This neo-traditional reconfiguration of traditional justice operated in practice largely under control of the state, thus reinforcing a lack of victim power or control.

In one sense, reconciliation between victims and perpetrators is a noble goal and, if achieved, could provide a strong foundation for future social harmony. Realistic factors have to be taken into account, however. There exists a valid risk that victim needs may be side-lined in favour of forced resolution between parties, and in reality the reconciliation process may place unnecessary burden on the victim or emotionally and mentally injure them further. Rwandan government policy has emphasised perpetrators' right to seek forgiveness following the genocide, placing pressure on victims to accept their offers of apology. There is no guarantee a victim will see this request as genuine or appropriate in the situation. Indeed, by coercing the victim towards acceptance of a perpetrator's forgiveness, this state policy exposes a terribly perpetrator-centric view of the situation.

The Trust Fund for Victims of the International Criminal Court tells us that:

Conflict affects all lives and livelihoods, but it continues for victims who face stigma, vulnerability, and marginalisation. It is impossible to fully undo the harm caused by genocide, crimes against humanity, and war crimes. However, it is possible to help survivors recover their dignity, rebuild their families and regain their place as contributing members of their societies.<sup>39</sup>

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<sup>37</sup> Zehr and Mika, above n 33, 53.

<sup>38</sup> MK Blewitt, *Restorative Justice: Healing Wounds and Repairing Lives* (12 May 2010) Is Violence Ever Justified? <<http://survivors-fund.org.uk/wp-content/uploads/2011/08/SURF-Restorative-Justice-Exhibition-lowres.pdf>>.

<sup>39</sup> The Trust Fund for Victims, The International Criminal Court, *Get Involved*, 1 <<http://www.trustfundforvictims.org/get-involved>>.

The recognition that suffering does not end with violence is an important factor when considering the role of restorative justice in societies following mass atrocity. Genocide is a complex product of long-standing prejudices; overt racism; power imbalance; political upheaval; and a myriad of other crises. It is impossible to eradicate the foundational issues associated with genocide simply by arresting perpetrators or convicting architects of the violence. Indeed, retributive justice implemented in the *absence* of restorative efforts can actually prove harmful to victims of genocide. In 1994, for example, victims of sexual violence in Rwanda were intentionally targeted by HIV-positive men for the purpose of continuing Tutsi suffering into the future.<sup>40</sup> By 2007, approximately 3,000 such victims had died due to HIV/AIDS.<sup>41</sup> Aside from ongoing health concerns, an overwhelming number of victims have been left impoverished and without access to proper shelter or food security.<sup>42</sup> Restorative justice efforts seek to address such concerns by restoring victims' rights, rather than by focussing on perpetrator guilt. With its focus on criminal trials and sanctions, traditional retributive mechanisms operate in a social vacuum alongside these realities, and as a result, are unable to confront the systemic problems faced by survivors.

A more troubling picture is painted when we consider the struggle of victims who have committed atrocities themselves, blurring the division between innocent and guilty. The obvious example is the child soldier, who comes to occupy a dual status of both victim and perpetrator in the eyes of the law. We are then faced with the knowledge that, despite having committed sadistic acts of violence, perpetrators have been victimised themselves and maintain their own physical and psychological scars. Currently before the ICC, former LRA commander Dominic Ongwen presents an interesting legal paradox by occupying the space between child victim and adult criminal.<sup>43</sup> We note that 'some child combatants fight reluctantly'; however, 'a small minority become hardened perpetrators who relish the sight and smell of blood and initiate or participate willingly'.<sup>44</sup> While at the centre of an extraordinarily sad situation, the child soldier can exist as both hardened criminal and abused victim, abandoned to

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<sup>40</sup> MK Blewitt, *Trauma in Young Survivors of the Rwandan Genocide* (2009) <<http://wagner.nyu.edu/files/leadership/SurvivorsRwandanGenocide040109.pdf>>.

<sup>41</sup> SURF: Survivors Fund, *Annual Review 2007* (2007), 7 <<http://survivors-fund.org.uk/wp-content/uploads/2012/02/SURF-Annual-Report-2007.pdf>>.

<sup>42</sup> A De Brouwer, 'Reparations to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families' (2007) 20(1) *Leiden Journal of International Law* 207.

<sup>43</sup> MA Drumbl, *The Ongwen trial at the ICC: tough questions on child soldiers* (14 April 2015) Open Democracy <<https://www.opendemocracy.net/openglobalrights/mark-drumbl/ongwen-trial-at-icc-tough-questions-on-child-soldiers>>.

<sup>44</sup> M Wessells, *Child Soldiers – From Violence to Protection* (Harvard University Press, 2009) 74.



a culture of violence. A purely retributive framework used to assess culpability does not consider the nuances observed in the experience of genocide, refusing to acknowledge that trauma is not the sole property of the victim. Instead, restorative justice efforts can better address the diverse experiences of individuals affected by mass atrocity.

There is ample evidence of governments implementing restorative justice mechanisms following significant periods of violence, and indeed have demonstrated how atrocity can morph into a commercial project. Guatemala, Morocco, Chile and Germany have each developed their own reparations schemes involving direct compensation, cultural revitalisation and social support.<sup>45</sup> Without a doubt, architects of genocide must be held accountable, and traditional retributive avenues create ample space for their prosecution. However, recognising the inequities surrounding the prosecution of only a handful of génocidaires and the existing physical and social issues faced by survivors, it is not difficult to see how retributive justice alone can be viewed as inadequate. A multi-faceted approach involving both retributive and restorative justice efforts therefore best serves communities following mass atrocity.

#### IV CONCLUSION

This article has provided an exploration of dissident views of retribution as a penological theory for the crime of genocide, and offered alternatives regarding how culpability can be better assessed using criminal typologies and a close evaluation of perpetrator action within the scope of their agency. The development and devastating outcomes of mass atrocity are inherently more complex than national crime, and thus should not be assessed using identical methodologies. An individual murderer and ‘the enemy of all humankind’<sup>46</sup> cannot be more divergent. This dissonance creates a gap in penological theory. Arguably, less homogenous methods of international prosecution ought to be introduced, in that both national and international law currently use identical, ordinary methods of investigation, trial, and punishment. For example, ‘collective responsibility’, or a ‘middle ground between collective guilt and collective innocence’, has been suggested to better impose accountability on groups of perpetrators rather than individuals, which would address restorative justice aims by

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<sup>45</sup> N Schimmel, ‘The Moral Case for Restorative Justice as a Corollary of the Responsibility to Protect: A Rwandan Case Study of the Insufficiency of Impact of Retributive Justice on the Rights and Well-Being of Genocide Survivors’ (2012) 11(2) *Journal of Human Rights* 161, 168-170.

<sup>46</sup> D Luban, ‘A Theory of Crimes against Humanity’ (2004) 29(1) *Yale Journal of International Law* 85, 90.

recognising the responsibility of significantly more perpetrators than at present.<sup>47</sup> Considerations such as these will ideally expand in the future, with greater calls for restorative efforts to be implemented alongside traditional retributive processes.

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<sup>47</sup> MA Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99(2) *Northwestern University Law Review* 539, 576.

## Nuke Kid in Town: How Much Does the *Treaty on the Prohibition of Nuclear Weapons* Actually Change?

Alexander White and Matthew Paterson\*

### I Introduction

Every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us.<sup>1</sup>

Immediately after their first and only use by the United States on the Japanese cities of Hiroshima and Nagasaki in August 1945, there was recognition that recourse to atomic weapons was morally reprehensible. Despite this, nuclear-armed States have maintained that the possession and use of nuclear weapons is permissible under international law. In 1996 the International Court of Justice (ICJ) confirmed that their use might be permissible in a limited set of circumstances. While the successful adoption by the United Nations (UN) General Assembly of the *Treaty on the Prohibition of Nuclear Weapons*<sup>2</sup> (TPNW) is a significant development, it is unlikely to lead to the immediate prohibition of the use of nuclear weapons.

This paper will argue that the nuclear sword of Damocles that is currently hanging over humanity will only be removed by the recognition of a prohibition on the proliferation, testing, threat, use and possession of nuclear weapons under international law. This paper will examine the progress towards this goal by reference to state of international law prior to the adoption of the TPNW and the current constraints on the use of nuclear weapons before reflecting on the possible impact of the TPNW.

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\* Winners of the 2017 JATL Law and War Essay Competition.

<sup>1</sup> JF Kennedy, *Address to the United Nations General Assembly* (25 September, 1961).

<sup>2</sup> *Draft Treaty on the Prohibition of Nuclear Weapons*, UN GAOR, Agenda Item 9, UN Doc A/CONF.229/2017/L.3/Rev.1 (6 July 2017).

## II LEGALITY OF NUCLEAR WEAPONS PRIOR TO THE TPNW

As a general principle of international law, no weapon of war is *prima facie* illegal. The International Court of Justice noted in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.<sup>3</sup>

At present there are a number of treaties regulating the development and stockpiling of nuclear weapons.<sup>4</sup> None of these treaties contain an outright prohibition on the use of nuclear force. Rather, they foreshadow a general prohibition coming about in the future.<sup>5</sup> It therefore cannot be said that, as a matter of law, a comprehensive ban on the use of nuclear weapons exists by virtue of these treaties.<sup>6</sup> This can be contrasted with other armaments such as chemical and biological weapons which have been expressly prohibited by treaty.<sup>7</sup>

In the absence of a direct prohibition on the use of nuclear force it will be lawful for a State to deploy nuclear weapons so long as it complies with the broader prohibitions on the use of force under international law. It is, as will be shown below, a completely different matter as to whether or not the threat or use of nuclear weapons will be permitted in any given circumstance.

While the aforementioned treaties do not prohibit the use of nuclear force *per se*, they do place an obligation on nuclear States to proceed towards nuclear disarmament. The ICJ has noted that the *Non Proliferation Treaty* (NPT) places an obligation on States

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<sup>3</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 247.

<sup>4</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970); *Comprehensive Nuclear Test-Ban Treaty*, opened for signature 10 September 1996, 35 ILM 1439 (not yet in force); *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water*, opened for signature 5 August 1963, 480 UNTS 43 (entered into force 10 October 1963); *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).

<sup>5</sup> G Robertson, *Crimes Against Humanity* (Penguin Books, 4<sup>th</sup> ed, 2012) 276.

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 248-253; C Greenwood, 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law' (1997) 37(316) *International Review of the Red Cross* 65, 71.

<sup>7</sup> *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare* opened for signature 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928).

to work towards nuclear disarmament by pursuing negotiations in good faith.<sup>8</sup> While the march towards nuclear disarmament may be a gradual and halting process, it appears that all States (including nuclear States) have an obligation to work towards achieving this outcome.<sup>9</sup>

### III CONSTRAINTS ON THE USE OF NUCLEAR WEAPONS

While nuclear weapons are not *prima facie* illegal their use will generally be contrary to the rules of international law.<sup>10</sup> The following principles of *jus ad bellum* and International Humanitarian Law operate to constrain the circumstances in which a State may have recourse to these weapons.

#### *A Restrictions on the Use of Force in the UN Charter and under the Principles of Jus ad Bellum*

The *Charter of the United Nations* (**UN Charter**) places restrictions on the use of force in the international system. Article 2, para 4 requires that member States refrain from the threat or use of force.<sup>11</sup> The prohibition in art 2 is subject to art 51, which authorises States to use force for individual or collective self-defence in response to an ‘armed attack’.

The threat or use of nuclear weapons in a manner contrary to the requirements of the UN Charter, specifically arts 2(4) and 51, is unlawful.<sup>12</sup> This includes threatening to use nuclear weapons in circumstances where their use would also be contrary to other principles international law, such as international humanitarian law (**IHL**).<sup>13</sup>

This, however, is not the end of the matter. The ICJ has repeatedly affirmed that the use of force in self-defence against an armed attack must be both necessary and

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<sup>8</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 264.

<sup>9</sup> A Petrobon, ‘Nuclear Powers’ Disarmament Obligation Under the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty: Interactions Between Soft Law and Hard Law’ (2014) 27(1) *Leiden Journal of International Law* 169, 187.

<sup>10</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 257.

<sup>11</sup> *Charter of the United Nations*.

<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 266.

<sup>13</sup> *Ibid* 257.

proportional to level of the armed attack that the State is subject to.<sup>14</sup> Force will be necessary in circumstances where no alternative response is possible.<sup>15</sup>

The principle of proportionality restricts the quantum of force that may be exerted in repelling an armed attack. That is to say that a defending State must first assess whether the force is suitable to fulfil the defence purpose and then ensure that the defensive force is not obviously excessive in comparison to the force employed against the defending State.<sup>16</sup> The ICJ accepted in its Advisory Opinion that the principle of proportionality does not exclude the use of nuclear weapons in repelling an armed attack.<sup>17</sup>

Perhaps the most controversial statement of the Court was its opinion (split seven votes to seven with the President's casting vote deciding) that:

In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether... the use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>18</sup>

This statement has been criticised for its ambiguity.<sup>19</sup> The Court did not elaborate on what would constitute a use of force threatening the very survival of a State. It is particularly unclear as to what circumstances the threat or use of nuclear force in collective self-defence would be lawful under the UN charter and the rules of *jus ad bellum*.<sup>20</sup>

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<sup>14</sup> *The Republic of Nicaragua v The United States of America* [1986] ICJ Rep 14, [176]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, [147]; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245.

<sup>15</sup> C Gray, *International Law and the Use of Force* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 150.

<sup>16</sup> N Hayashi, 'Using Force by Means of Nuclear Weapons and Requirements of Necessity and Proportionality *ad Bellum*' in G Nystuen, S Casey-Maslen and A Golden Bersagel, *Nuclear Weapons Under International Law* (Cambridge University Press, 2015) 15, 23. It has been argued by some commentators that the principles of proportionality allow for the defending state to exert the requisite level of force required to obtain a final and decisive victory. See, eg, Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 3<sup>rd</sup> ed, 2001) 264-267.

<sup>17</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245.

<sup>18</sup> *Ibid* 266.

<sup>19</sup> E David, 'The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons' (1997) 37(316) *International Review of the Red Cross* 30, 30-34.

<sup>20</sup> N Hayashi, 'Legality of Nuclear Weapons Under *Jus Ad Bellum*' in G Nystuen, S Casey-Maslen and A Golden Bersagel, *Nuclear Weapons Under International Law* (Cambridge University Press, 2015) 31, 50.

Further ambiguity surrounds the policy of deterrence. The Court opted to leave open whether the use of nuclear deterrence was illegal under international law. Instead the Court merely noted that the international community was profoundly divided on the issue and as a result could not find any evidence of *opinio juris* either way.<sup>21</sup>

### B *The Rules Governing the Conduct of Hostilities*

In their Advisory Opinion the ICJ clearly reiterated the view that International Humanitarian Law applies to all forms of warfare and all types of weapons, including nuclear weapons.<sup>22</sup> The rules most applicable to constraining the use of nuclear weapons are the principles of distinction and proportionality.

#### 1 *Principle of Distinction*

During armed conflict combatants must insure that their operations are only directed against lawful military objectives.<sup>23</sup> To this end, parties to an armed conflict must distinguish between military and civilian objectives.<sup>24</sup> Weapons that are incapable of distinguishing between military and civilian targets are illegal.<sup>25</sup> It is accepted that this rule, codified in the 1977 *Additional Protocol I*, has achieved force as customary international law.<sup>26</sup> It may have obtained the position of *jus cogens*.<sup>27</sup>

Both the United States and the United Kingdom in their submissions to the ICJ argued that nuclear weapons did not constitute an indiscriminate weapon. To this end the United States contended that nuclear weapons ‘can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate’.<sup>28</sup> In

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<sup>21</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 254.

<sup>22</sup> *Ibid* 259.

<sup>23</sup> *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I)*, opened for signatures 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (**1977 Additional Protocol I**) art 48.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 257.

<sup>26</sup> Y Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press, 3<sup>rd</sup> Ed, 2016) 89.

<sup>27</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supp No. 10, UN Doc A/56/10 (November 2001) 113.

<sup>28</sup> Acting Legal Adviser to the Department of State, *Written Statement of the Government of the United States of America* (US Department of State, 1995) 23.

a similar vein, the UK posited, 'modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives.'<sup>29</sup>

The argument advanced by the US and the UK (as well as a number of other nuclear States) suggests that there are conceivable cases in which a nuclear weapon could be deployed against a military target and its deployment would not be inherently indiscriminate.<sup>30</sup> It appears relatively uncontroversial that nuclear weapons can be targeted accurately.<sup>31</sup> What is more controversial is whether or not the effects of nuclear weapons are indiscriminate. As the ICJ noted, the effects nuclear weapons cannot be contained to either space or time, causing damage that can last for generations.<sup>32</sup> A number of nuclear States counter that the use of low yield nuclear devices or specific nuclear weapons such as 'neutron bombs' which have intense, but limited, radioactive effect may be deployed in a manner that does ensure their effect does not offend the principle of distinction.<sup>33</sup>

## 2 Principle of Proportionality

This principle is distinct from the assessment of proportionality under the rules of *jus ad bellum* discussed above. A lawful military objective may not be attacked by nuclear weapons in circumstances where such attack would cause disproportionate damage to civilians.<sup>34</sup> The ICRC has expressed this rule of customary international law in the following terms:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.<sup>35</sup>

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<sup>29</sup> Legal Adviser to the Foreign and Commonwealth Office of the UK, Great Britain and Northern Ireland, *Written Comments of the United Kingdom* (Foreign and Commonwealth Office, 1995) 52.

<sup>30</sup> See, eg, *ibid* 52- 53; Acting Legal Adviser to the Department of State, *above* n 28, 23.

<sup>31</sup> S Casey-Maslen, 'The Use of Nuclear Weapons Under Rules Governing Hostilities' in G Nystuen, S Casey-Maslen and A Golden Bersagel, *Nuclear Weapons Under International Law* (Cambridge University Press, 2015) 92, 111.

<sup>32</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 243-244.

<sup>33</sup> Casey-Maslen, *above* n 31, 112-114.

<sup>34</sup> *Ibid* 114.

<sup>35</sup> J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 3<sup>rd</sup> Ed, 2009) 47.



What constitutes 'excessive' is a subjective test that cannot be reduced to an objective formula.<sup>36</sup> While there is a margin of appreciation provided to a commander under the principles of proportionality, they must act reasonably and in good faith.<sup>37</sup>

Consequently it may be possible for nuclear weapons to be deployed in circumstances where their area of effect does not include a significant civilian presence. The United Kingdom in its submissions to the Court put forward two possible examples of such deployment: the use of low yield nuclear weapons against warships on the High Seas or ground forces in sparsely populated areas.<sup>38</sup> Such examples may not offend the principle of proportionality where the likelihood of civilian casualties is slight.

### *C The Effects of the Constraints under International Law*

When taken together, the restrictions on the use of force and the rules of International Humanitarian Law confine the lawful use of nuclear weapons to a very limited set of circumstances.

While it is possible to develop hypothetical scenarios in which the deployment of nuclear weapons would not violate the above principles of International Humanitarian Law, the practical reality of modern armed conflict is that such scenarios are unlikely to occur. To this end the International Committee of the Red Cross has stated that it is difficult to envisage circumstances where the use of nuclear weapons could be compatible with international law.<sup>39</sup> This is especially so with the current trend of armed conflict being predominately fought in an asymmetrical fashion against combatants interspersed throughout civilian populations. The use of nuclear weapons against enemy combatants in such circumstances would be plainly illegal.

It is telling that States advocating for legality of nuclear weapons before the ICJ were unable to point to a precise set of circumstances where such use would be feasible.<sup>40</sup> Despite this, the Court felt that it had insufficient evidence to make a conclusive determination on this point.<sup>41</sup>

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<sup>36</sup> Dinstein, above n 26, 158.

<sup>37</sup> Ibid 159.

<sup>38</sup> Legal Adviser to the Foreign and Commonwealth Office of the UK, above n 29, 53.

<sup>39</sup> International Committee of the Red Cross, 'ICRC Statement to the United Nations General Assembly on the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons' (1997) 37(316) *International Review of the Red Cross* 118, 119.

<sup>40</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 262.

<sup>41</sup> Ibid.

It is however conceivable that nuclear weapons could be deployed lawfully. One such scenario in which they could be deployed is Judge Schwebel's the oft-cited example of a nuclear attack on an enemy nuclear submarine. In his dissenting opinion Judge Schwebel concluded that the use of a nuclear depth charge against an enemy submarine on the high seas would be unlikely to offend the above principles because of the absence of potential civilian casualties and the comparably limited radiation.<sup>42</sup> Nuclear States have clung to this conclusion as justification for retaining their nuclear arsenals. These States emphasise that while scenarios exist where the use of nuclear force under international law is permissible they reserve the right to use nuclear weapons in such scenarios.

Plainly, in the absence of a binding prohibition to the contrary, nuclear weapons could lawfully be used, so long as their use falls within the ambit of the constraints outlined above.

#### IV THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

Just as reports of the 'End of History' after the fall of the Soviet Union were greatly exaggerated, so too were any thoughts that the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* would spur significant action against nuclear weapons premature. It took more than twenty years – until 7 July 2017 – for the international community to take its next step towards banning nuclear weapons: the passage by the UN General Assembly of the TPNW.<sup>43</sup> The TPNW in art 1 seeks to put in place a comprehensive prohibition on the development, possession and use (including threatened use) of nuclear weapons. The TPNW further prohibits signatories from assisting a State from breaching its terms or allowing another state to place nuclear weapons within a signatories territory.<sup>44</sup>

Tellingly no State that currently possesses nuclear weapons participated in the development of the TPNW. The US Department of State in response to the TPNW's adoption proclaimed:

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<sup>42</sup> Ibid 320-321.

<sup>43</sup> 122 countries of the 124 presented voted in favour of its adoption. The Netherlands voted against and Singapore abstained.

<sup>44</sup> TPNW arts 1(e), 1(g).

The proposed treaty – which ignores the current security challenges that make nuclear deterrence necessary – will not result in the elimination of a single nuclear weapon, nor will it enhance the security of any state.<sup>45</sup>

Despite the dismissive tone of the US Department of State the TPNW has the potential to develop the law applicable to the possession and use of nuclear weapons.

### *A Evidence of Customary International Law?*

An essential limitation on the TPNW's effect is its status as a treaty – the principles of sovereignty and consent limit its effectiveness to States that are party to it.<sup>46</sup> However, as with other significant treaties, the TPNW's provisions *may* have broader application if they can be found to evidence rules of customary international law.<sup>47</sup> As noted in the *North Sea Continental Shelf* cases, there are three routes through which a treaty provision can be found to evidence customary international law: it may declare a pre-existing custom; it may crystallise a custom; or it may subsequently be followed such that it creates custom.<sup>48</sup> This raises the question: if the TPNW's provisions do evidence custom, how do they do it?

As the TPNW is merely weeks old and is yet to even be open for signature, much less come into force, its provisions cannot fall into the third of the *North Sea Continental Shelf* cases' categories. Nor can it be said that the TPNW declares a pre-existing norm: the *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons* made it clear that no such custom had yet evolved.<sup>49</sup> As there has been no concerted international action in the twenty years since that opinion, it is hard to conclude that the TPNW declares a pre-existing custom. Consequently, if the TPNW's provisions are to constitute custom, it must be that they crystallise it.

After ascertaining which of the TPNW's provisions *might* constitute custom, we will turn to addressing *whether* they do so. As a preliminary matter, it has been generally held that custom has two elements: 'State practice', which is constituted of the general and/or universal acceptance of a uniform practice for a considerable time period;<sup>50</sup>

<sup>45</sup> J Zarocostas, 'The UN Adopts Treaty to Ban the Use of Nuclear Weapons' (2017) 390(10092) *The Lancet* 349, 349.

<sup>46</sup> D Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 7th ed, 2010) 34-25.

<sup>47</sup> G Triggs, *International Law: Contemporary Principles and Practices* (Lexis Nexis, 2nd ed, 2011) 26.

<sup>48</sup> *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark & The Netherlands)* [1969] ICJ Rep 3; Harris, above n 46, 27-28.

<sup>49</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 247

<sup>50</sup> *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116.

and *opino juris*, which is that States, in acting in that way, were doing so because they considered themselves bound by law.

### 1 *Which Provisions Might Constitute Custom?*

Before assessing whether the TPNW's provisions constitute custom, one must first ascertain which of its provisions are likely candidates for elevation to custom. The most important, and most likely to constitute custom, is contained in Article 1 of the TPNW. The other provisions, although not insignificant, are novel mechanisms particular to the Treaty, and thus would not meet the requirements to constitute custom. Article 1 reads as follows:

#### **Article 1**

##### **Prohibitions**

1. Each State Party undertakes never under any circumstances to:
  - a. Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
  - b. Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
  - c. Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;
  - d. Use or threaten to use nuclear weapons or other nuclear explosive devices;
  - e. Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
  - f. Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
  - g. Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

Broadly, art 1 contains four classes of prohibition. That is, it contains a prohibition: on the development, testing and stockpiling of nuclear weapons (art 1(a)); the transfer or receipt of control of nuclear weapons or the stationing of them on a State's territory (arts 1(b), 1(c) and 1(g)); the use or threat of use of nuclear weapons (art 1(d)); and on assisting or seeking the assistance of another State in acting in a prohibited way.

This paper will focus on the effect of the TPNW in developing rules of custom relating to the prohibition of the development, stockpiling, threatening or using nuclear weapons.

## 2 *Prohibition on Developing, Testing or Stockpiling Nuclear Weapons*

The difficulty in ascertaining whether the majority of States have accepted that there was a prohibition in international law of the development, testing or stockpiling of nuclear weapons lies in the fact that most States had already signed onto the NPT. Thus, the question is whether they acted (or more accurately, refrained from acting) because they were bound by the NPT, or because they accepted a more general principle that the possession etc. of nuclear weapons was illegal under international law. For present purposes, the international community need not act unanimously; as noted by the ICJ in *Nicaragua*, it is not the case that State:

practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of States should, in general, be consistent with such rules... If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justification contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>51</sup>

As observed by Professor Triggs, this recognises that, to prove the rule, one must sometimes look to the exceptions and the way they are framed.<sup>52</sup>

Before progressing to the exceptions, it is important to state the rule. It would be easy to mistake this rule for one that purports to act against current nuclear weapons States. It does not. Rather, it prevents the development, or testing of *new* nuclear weapons, or the increase in the absolute numbers of a State's nuclear weapons. Thus, its implications are twofold: States that do not have nuclear weapons cannot acquire them by developing their own or stockpiling the, and States that do have nuclear weapons cannot test them.

A thorough testing of the exceptions to either component of this rule does indeed prove it.

The example used in the *Nicaragua* case of a State seeking to explain why its actions were a valid exception to the rule is not, in itself, applicable to the question of nuclear weapons. After all, each State that has developed nuclear weapons since the NPT came into force did so on the grounds that it was entitled to as a sovereign State. With respect to State practice, however, it is the actions of *other* States that is truly telling.

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<sup>51</sup> *The Republic of Nicaragua v The United States of America* [1986] ICJ Rep 14, [186].

<sup>52</sup> Triggs, above n 47, 33.

When the DPRK (North Korea) and Iran each sought to covertly develop and stockpile nuclear weapons, they have been met with concerted international action to block that eventuating. Although some of that can be explained by the general risk these States pose to international peace and security, that does not go the whole way to explaining the unanimous condemnation they received. Rather, the international community as a whole has acted as if the mere *possession* of nuclear weapons by new States is both an end to be avoided, and one warranting the most serious of consequences. Clearly, although the risk posed by nuclear weapons is undoubtedly great, the swift and unanimous responses point towards something greater: that this action is illegal under international law.

While international action against Iran may have been warranted by virtue of its status as a party to the NPT, North Korea withdrew from it in 2003. That it should still be incurring international condemnation and action for its nuclear weapons programme today indicates that the source of this condemnation is not the NPT itself, but rather a broader illegality under international law.

The second implication of this prohibition is that States that *do* have nuclear weapons must not test or increase their stocks of them. Barring the already aberrant North Korea and the mystery-shrouded Israel, the last nuclear weapons test was in May 1998, almost twenty years ago. Some of the credit for this undoubtedly goes to the end of the Cold War. However, that again is not enough to explain the total lack of nuclear testing, particularly given the meteoric advancements of all other forms of technology.

Although it never came into force, the *Comprehensive Test Ban Treaty (CTBT)*, which opened for signature in 1996, sheds some light on the reticence of nuclear weapons States to test their weapons. The CTBT has been signed by some 183 States and ratified by 166. Non-party States, including the United States decided not to ratify the CTBT on the grounds that it would unduly impinge on their sovereignty. Regardless of the merit in this, they have nevertheless refrained from testing nuclear weapons. At least partial credit for this must go to the apparent international consensus against nuclear testing. While it has not heretofore been sufficient to constitute custom, it is indicative of at least a highly homogenous State practice.

The NPT, which is rightfully the cornerstone of any potential prohibition on the possession of nuclear weapons has been in existence since 1968, and in force since 1970. Even more tellingly, outside North Korea, no State has been allowed to develop or test nuclear weapons since 1998. While there is no specific time limit for the development of custom, and longer periods are of course favoured, in this case the

stability of international action across this period is a factor in favour of this rule amounting to custom.

The final question is whether there is or will be *opinio juris* regarding the prohibition on developing, stockpiling or testing nuclear weapons once the TPNW comes into force. The answer is that States have acted as if a prohibition exists for different reasons. Some have acted because they were bound by treaty, some because of an ill-defined belief that the prohibition was effectively law, (even if it was not in actuality law), and some due to international power politics. The effect of the TPNW is to codify the prohibition and provide it with a firm footing. That is, whilst States may not have been acting in accordance with *opinio juris* before, the codifying effect of the prohibition in art 1(a) of the TPNW is such that they are likely to be into the future.

### 3 *Prohibition on the Use of Threat of Use of Nuclear Weapons*

Although there can be little doubt that a major goal of the TPNW was to prohibit the use or threat thereof of nuclear weapons, there is nevertheless a significant roadblock to this prohibition reaching the status of custom, namely the persistent statements made by nuclear States contrary to the development of that custom. This does not in and of itself preclude the development of a rule of customary law prohibiting the threat or use of nuclear weapons. Rather, any nascent custom will not bind a state that indicates its dissent from that custom while the law is in the process of development. Nor will that state be bound by the customary rule after it crystallises.<sup>53</sup> This is commonly known as the ‘persistent objector’ rule.

Nuclear weapons States have under taken several forms of action that may constitute evidence of persistent objection. The first is that nuclear States have consistently made statements in which they reserve their right to have recourse to nuclear weapons.<sup>54</sup> An example of this are the reservations made by France, Russia, the United States and the United Kingdom to the NPT whereby they reserved their right to use nuclear weapons to repel an attack carried out by a non-nuclear weapon state in concert with a nuclear weapon State.<sup>55</sup> Secondly, the foreign policy of States that possess nuclear weapons

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<sup>53</sup> American Law Institute, *Third Restatement of the Foreign Relations Law of the U.S.* (Westlaw, 1987) Vol I, 26; *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116.

<sup>54</sup> A Steinfeld, ‘Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons’ (1996) 62(1) *Brooklyn Law Review* 1635, 1673.

<sup>55</sup> Charge D’Affaires A.I. of the Permanent Mission of the United States of America to the United Nations, *Statement Issued on 5 April 1995 by the Honourable Warren Christopher, Secretary of State Regarding a Declaration by the President on Security Assurances for Non-Nuclear-Weapon States Parties to the Treaty on Non-Proliferation of Nuclear Weapons*, UN GAOR, 50<sup>th</sup> sess, Agenda Item 68, UN Doc A/50/153 (6 April 1995); Permanent Representative of France to the United Nations, *Statement Concerning Security*

has been premised on the use of nuclear weapons as a deterrent to external aggression, either arising from a second-strike policy, or a policy enabling pre-emptive nuclear strikes.<sup>56</sup> Finally, these States have consistently possessed and deployed nuclear weapons signalling objection to any developing customary prohibition.<sup>57</sup> It is thus fair to conclude that, although no nuclear weapon has been used against another State since 1945, each nuclear weapons State reserves the right to use them in the future, effectively making them persistent objectors to any rule against the use of nuclear weapons.

There may however be room for argument that a custom prohibiting the use or threat of use of nuclear weapons is developing but does not bind *present* nuclear weapons States. The practical effect of such custom would be that while not binding on States that currently possess nuclear weapons, it may well provide a legal restraint against prospective possessors – and users – of nuclear weapons.

Although one cannot fault the aspirations of proponents of such a customary rule, it is unfortunately wrong at law. Any customary rule against using or threatening to use nuclear weapons would only impact States that *actually possess* nuclear weapons. In the Dissenting Opinion of Judge Tanaka in the *North Sea Continental Shelf Cases*, it was noted that the actions of States that would not be immediately affected by a rule should be given little weight in determining whether the rule in fact exists.<sup>58</sup> Indeed, although its effect would undoubtedly be positive for the international community, it would effectively constitute a tyranny of the majority for a majority of non-nuclear weapons States to impose a rule upon all of nuclear weapons States, particularly when the latter group is unanimous in its opposition to the rule. Thus, it should only be with the participation or agreement of nuclear weapons States that any customary rule against the use or threat thereof of nuclear weapons can develop. Given the status of *all* nuclear weapons States and their allies as persistent objectors to such a customary rule arising, no customary rule can therefore exist.

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*Assurances to Non-Nuclear-Weapon States Made by the Permanent Representative of France to the Conference on Disarmament*, UN GAOR, 50<sup>th</sup> sess, Agenda Item 68, UN Doc A/50/154 (6 April 1995); Permanent Representative of the Russian Federation to the United Nations, *Statement By the Representative of the Ministry of Foreign Affairs of the Russian Federation*, UN GAOR, 50<sup>th</sup> sess, Agenda Item 68, UN Doc A/50/151 (6 April 1995); Permanent Representative of the UK & Northern Ireland to the United Nations, *Declaration of Security Assurances Made in the Plenary Session of the Conference on Disarmament*, UN GAOR, 50<sup>th</sup> sess, Agenda Item 68, UN Doc A/50/152 (6 April 1995).

<sup>56</sup> Steinfeld, above n 54, 1673.

<sup>57</sup> Ibid.

<sup>58</sup> *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark & The Netherlands)* [1969] ICJ Rep 3, [27].



### B *Could the TPNW Reflect Jus Cogens?*

*Jus cogens* are rules of international law that are universally recognised by States and from which no derogation is permitted.<sup>59</sup> Universal recognition includes circumstances where a very large majority accept the rule as non-derogable in the face of dissent from a small number of States.<sup>60</sup> Where a norm constitutes *jus cogens* it will be binding on all States in the international community, regardless of their previous dissent.<sup>61</sup> In that regard, if the prohibition on the use of nuclear weapons developed into *jus cogens* any argument of persistent objection by nuclear States would become ineffective.<sup>62</sup>

It is however difficult to see how art 1 of the TPNW could be rightly characterised as reflective of *jus cogens* given that the nuclear States and their allies ardently dismiss the Treaty's applicability and maintain their right to recourse to nuclear arms. In such circumstances it is unlikely that in the absence of the most powerful States in the international system a norm that is *universally recognised* has developed.

This is not to say that the TPNW may not play a role in the emergence of *jus cogens* prohibiting the use or possession of nuclear weapons. If in the future nuclear disarmament progresses to a point where the major nuclear powers adopt the TPNW a forceful case for an emerging *jus cogens* could be made. Unfortunately the chance of such a scenario coming to pass in the foreseeable future would appear slight. In the absence of any political commitment by the nuclear powers renouncing nuclear weapons, the development a *jus cogens* prohibiting their use or possession is unlikely to occur.

## V CONCLUSION

Despite the recognition that nuclear war has the potential to inflict unprecedented levels of suffering on humanity, the nuclear powers and their allies staunchly maintain that international law allows for the possession and use of nuclear weapons in a limited set of circumstances. While international law currently places significant constraints on the possession and use of nuclear weapons it does not provide an outright prohibition.

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<sup>59</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 53, 64.

<sup>60</sup> American Law Institute, above n 53, 28.

<sup>61</sup> G Danilenko, *Law Making in the International Community* (Dordrecht, 1993) 219.

<sup>62</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* [1971] ICJ Rep 16, 47.

The lofty aim of the TPNW to finally eliminate the nuclear sword of Damocles is unlikely to come to pass in the absence of the consent from the major nuclear powers. Nor is it likely that any customary prohibition on the threat or use of nuclear weapons will develop without the support of the major nuclear powers. Despite this, the recent adoption of the TPNW by the UN General Assembly has the capacity to crystallise nascent custom that has been steadily developing since the inception of the NPT. This custom, if crystallised, will act to make the acquisition of nuclear weapons by non-nuclear States unlawful, regardless of their membership of any non-proliferation regime.

## Book Review: *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law*<sup>1</sup>

Fauve B Kurnadi\*

[I]n an age when we hear so much of progress and civilization, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?

— Henry Dunant, *A Memory of Solferino*<sup>2</sup>

*Humanizing the Laws of War*, edited by Professors Robert Geiß and Andreas Zimmermann and German Red Cross Legal Adviser Stefanie Haumer, is a thoughtful examination of the unique influence of the International Committee of the Red Cross (ICRC) – and the International Red Cross and Red Crescent Movement (Movement) more broadly – in the development of International Humanitarian Law (IHL) over the past 150 years. Through a Red Cross tinted lens, this book offers a detailed examination of the creation, development and interpretation of IHL throughout this period in time, and critically analyses the ICRC's various roles, approaches, achievements, controversies and failures in its contributions to these developments. Each section has been carefully selected and more or less organised chronologically – both important and necessary features in a rich 150 year history – and has been written by international experts, some currently working within the Movement and all specialists in the field of IHL.

After an introduction to the book and, usefully, to the Movement – which comprises three components: the ICRC, the International Federation of Red Cross and Red Crescent Societies (IFRC) and 190 National Red Cross and Red Crescent Societies – the substantive text is arranged into four parts. Part I, consisting of Chapters 1 and 2, explores the impact of the ICRC on the conceptualisation and content of core IHL treaties, particularly the Geneva Conventions of 1949 and their Additional Protocols.

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<sup>1</sup> R Geiß, A Zimmermann and S Haumer (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law* (Cambridge University Press, 2017) (*Humanizing the Laws of War*).

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<sup>2</sup> H Dunant, *A Memory of Solferino* (ICRC, 1959) 127.

Part II, which includes Chapters 3 and 4, examines the role of the ICRC in the development of IHL beyond these treaty regimes – notably through customary norm clarification and interpretive guidance. Part III, containing Chapters 5 and 6, considers the ICRC's influence on related areas of international law, including in limiting and prohibiting certain weapons and in international criminal law. Finally, Part IV comprises the editors' concluding remarks in Chapter 7, in which the six preceding sections are drawn together. The authors also take this opportunity to reiterate the unique status of the ICRC in the creation and ongoing clarification of IHL and highlight several lessons learnt for contemporary and future challenges faced by the Movement.

It is apparent throughout the introduction that the editors' professional backgrounds and current expertise give them a nuanced understanding of the Movement. Despite the text's primary focus on the work of the ICRC, the editors make regular and necessary references to all components of the Movement. By reminding the reader to assess the work of the ICRC 'against the background of it being embedded in the overall Movement',<sup>3</sup> they accentuate the equally important and influential role that National Societies have made in the development of IHL. While at times the book can be repetitive in its frequent acclamation of the ICRC's impact and influence over the decades, that is, after all, the overarching objective of the book.

## I INFLUENCE ON THE DEVELOPMENT OF CORE IHL TREATIES

Long before negotiations on the drafting of the Geneva Conventions of 1949 had commenced, the ICRC had been playing a critical role in the legislative process. In Chapter 1, Robert Heinsch offers a critical analysis of the role of the ICRC not just in the lead up to the 1949 Diplomatic Conference but also throughout the negotiations, and in interpreting the Conventions following their adoption. Heinsch outlines, for the first of several times in this book, the ICRC's traditional approach to the development of IHL – a method that balances the need to address humanitarian challenges and lay the foundations for new developments in IHL, with the distinct needs and interests of the Member States of the Geneva Conventions. He offers examples of the ICRC's influential contributions, which notably include the addition of Common Article 2 and Common Article 3 to the Geneva Conventions, which refined the scope of application of IHL and introduced the rules and concept for non-international armed conflicts respectively; the development of much needed provisions for the protection of civilians; and the 'grave breaches regime', which

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<sup>3</sup> *Humanizing the Laws of War*, 17.

allowed for the criminal prosecution of the most serious violations of IHL. Heinsch also makes observations about the ICRC's influence after 1949. In particular, he cites the impact of the Commentaries to the Geneva Conventions, which he proclaims to be 'one of the most important tools for the application of the Geneva Conventions in practice as well as in academia',<sup>4</sup> and foreshadows the importance of the ICRC's 2005 Customary IHL Study – a momentous development in the advancement of modern IHL.

The ICRC continued to fulfil this traditional role of preparing draft treaties and developing IHL in the negotiations leading up to the adoption of the two Additional Protocols of 1977, as discussed by Michael Bothe in Chapter 2. Bothe offers an insightful overview of the ICRC's role throughout this legislative process and highlights some of the areas in which its expert input and participation had a tangible impact on the development of these treaties. As an example, he references the contribution of Jean Pictet, then Vice-President of the ICRC and head of the delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, who instigated an appeal to uphold the principles of IHL in order to strengthen views on the need to protect air crews in distress. Bothe acknowledges the positive and substantive influence of the Movement in this and other respects, but also, importantly, shines a light on four specific problems where the ICRC had underestimated or failed in its approach. One example that Bothe offers up is the failure to include environmental protections in the draft Protocols, though he does note that the ICRC has since rectified this oversight and has become a staunch advocate for environmental protections in warfare.

## II THE DEVELOPMENT OF IHL BEYOND TREATY REGIMES

In Part 2, the emphasis shifts away from the ICRC's role in the development of treaty law, to focus instead on the significant impact it had on the development of customary international law and norm interpretation. In Chapter 3, Jean-Marie Henckaerts, to whom the success of the Customary IHL Study<sup>5</sup> can be partially attributed, expertly navigates the reader through the history of the 2005 study, illustrating the versatile role of the ICRC in the development of IHL. The study, led by the ICRC but done so in consultation with governmental and academic experts, was a major international project that spanned nearly 10 years and comprised two significant volumes of

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<sup>4</sup> Ibid 52.

<sup>5</sup> J Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law*, 2 vols (Cambridge University Press, 2005).

customary rules and practice. Throughout the chapter, Henckaerts reflects on the specific mandate given to the ICRC to conduct the study as well as the contemporary relevance, functions and application of Customary IHL. He acknowledges the enormous scope of the study, the considerable resources invested by the ICRC, and the credibility of its findings, but at the same time Henckaerts does not shy away from the study's controversies, pointing out some of critiques received from States and scholars, including questions about the ICRC's methodology and its ability to consistently follow this methodology. Henckaerts also very willingly concedes that the study is non-exhaustive and incomplete in nature. It filled certain gaps in IHL, including narrowing the divide between non-international armed conflict and international armed conflict, but, as he elucidates, the study continues to be revised and updated by the ICRC, in a partnership with British Red Cross that at the time of writing is celebrating its tenth anniversary.

Expert contributions from the ICRC have not always been so well-received and, in demonstration of this, Robert Cryer's examination of the Interpretive Guidance on the Notion of Direct Participation in Hostilities (Guidance)<sup>6</sup> in Chapter 4 is a pertinent inclusion at this stage of the book. Throughout the chapter, Cryer explores how the Guidance has elicited controversy, criticism and significant debate. He offers various examples of where the Guidance has been challenged, including its assessment of the rules of State responsibility, questions around state membership to armed forces, and the concept of the 'continuous combat function', which Cryer explains may go beyond what IHL permits in terms of targetability. However, this is not to say the Guidance failed entirely in its contribution to international norm development. Cryer still argues that this study has filled somewhat of a lacuna on detailed DPH commentary. He provides the reader with the relevant arguments in favour of and against the Guidance, but does so through a lens of understanding that, 'although the Guidance is not unimpeachable, it is far better than the alternative. Free interpretation all too often becomes a free-for-all, and in armed conflict, that is not a good thing'.<sup>7</sup>

### III INFLUENCE ON RELATED AREAS ON INTERNATIONAL LAW

Appropriately, in Part III, the book moves on to examine the ICRC's influence on other related areas of IHL. Authors, Kathleen Lawand and Isabel Robinson, are no strangers to the ICRC's approach to limiting and prohibiting the use of certain

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<sup>6</sup> N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009).

<sup>7</sup> *Humanizing the Laws of War*, 136.

weapons, having been involved in some of these processes themselves. Over the decades, the ICRC has been cautious but influential in the development of IHL in this area. It has achieved this by balancing a number of concerns, which Lawand and Robinson skilfully describe throughout the chapter, while marking off the milestone achievements – prohibitions on chemical and biological weapons, weapons that ‘keep on killing’,<sup>8</sup> blinding laser weapons, in which the movement adopted a more unique, preventative – rather than reactive – strategy, and the development of the Arms Trade Treaty. Notably, this chapter offers the reader a comprehensive and stimulating overview of the ICRC’s move into a non-traditional domain – one of active engagement on matters concerning the acceptability of the means and methods of warfare. Refreshingly, Lawand and Robinson shine a light on the significant and nuanced auxiliary function of the Movement, which allows it to trigger political and public will while remaining neutral, impartial and devoid of political motive.

In Chapter 6, Carsten Stahn almost romantically introduces the reader to the multidimensional relationship between IHL and international criminal law, discussing their points of convergence and divergence as if he were describing a symbiotic relationship, which is not an inaccurate portrayal. Stahn elucidates this connection by demonstrating how official positions and studies of the ICRC have shaped and influenced judicial interpretation, while findings of the international criminal courts and tribunals (**ICCTs**) have, in turn, shaped and influenced the ICRC. One key point of convergence that Stahn explores is the ICRC’s and ICCTs’ mutual commitment to prevention and compliance. Stahn characterises this commitment as a crucial objective that not only underpins the aim and purpose of the ICCTs but which is also explicit in the *modus operandi* of the Movement and its mission to prevent suffering through the promotion and strengthening of IHL. While alluding to the appealing notion that international criminal law and IHL are ‘complementary projects that strengthen and support each other’,<sup>9</sup> Stahn gently steers the reader to recognise the dangers of ignoring the frictions and contradictions between them. In particular, he stresses the need to implement mutual checks and balances between these bodies of law as they both continue to mature and depend on accurate legal clarification.

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<sup>8</sup> Ibid 151.

<sup>9</sup> Ibid 209.

#### IV A UNIQUE ACTOR IN THE FIELD OF IHL CREATION AND DEVELOPMENT

To conclude the book, editors Geiß and Zimmermann in Chapter 7 offer a detailed and thoughtful analysis of the ICRC's evolution from a private association concerned with philanthropy to an influential and significant stakeholder in the development of IHL.<sup>10</sup> Today, the Movement is the largest humanitarian network in the world, comprising 80 million people across three distinct components, and Geiß and Zimmermann distinctly acknowledge the significant influence, versatility and respect such an institution would need to retain in order to survive this transformation and maintain relevance in an evolving field of law. Throughout the chapter, the editors once again examine the ICRC's multifaceted methods, strategies and approaches by delving into its historical contributions – from the adoption of the very first Geneva Convention, and the subsequent development of IHL treaty law, to the influential Customary IHL study and the reciprocal relationship with international criminal law.

#### V CONCLUDING REMARKS

*Humanizing the Laws of War* is an informed, balanced and valuable contribution to the understanding of how International Red Cross and Red Crescent Movement has influenced and advanced the development, clarification and codification of IHL since the ICRC's conception over 150 years ago. While the book does not shy away from the ICRC's shortcomings or its missed opportunities, criticisms and controversies throughout history, it does leave you with the distinct impression that the Movement has been a, if not *the*, significant driving force of progressive developments in IHL. I commend this text both to experts in the field of international law and to those who are keen followers of the work of the Movement, as it raises many valid and interesting questions about the historically symbiotic relationship between IHL and the ICRC. I echo the sentiment of Dr Seiters, President of the German Red Cross and author of the book's Foreword, and hope that despite any past and future challenges the Movement will continue to play a significant part in interpreting and developing IHL, so as to provide more effective protection and assistance to victims of conflict in years to come.

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<sup>10</sup> Ibid 217.